EMERGING FEDERAL RELIANCE—CONTINUED STATE CONSTITUTIONAL MINIMALISM: INDIANA STATE CONSTITUTIONAL LAW SUMMARIES—2016-2017

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During the survey period,[1] Indiana's appellate courts continued to decline opportunities to expound further on the animating principles of Indiana's Constitution. In a significant case addressing equal privileges and immunities, the Indiana Supreme Court avoided substantive analysis of when a state agency may treat one business differently than other businesses. The appellate courts' analysis of Indiana constitutional principles in government search cases was sparse. And in a decision addressing whether the General Assembly may enact ex post facto laws, the supreme court decided that a violation only applied to the party before the court.[2]

The areas substantively addressed by Indiana's appellate courts also decreased to the lowest number in the last five years.[3] Substantive decisions in the areas of government searches, ex post facto laws, and double jeopardy continue to issue regularly, but litigants saw little success in other areas addressing privileges and immunities, special laws, right to a remedy, and the right to a jury.

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1. The authors thank James R. Strickland, 2018 graduate from Indiana University Robert H. McKinney School of Law, for his invaluable assistance in gathering the materials for this Article.

2. Kirby v. State, 83 N.E.3d 1237, 1246 (Ind. Ct. App. 2017).

3. Eighteen topics were addressed in 2014, Jon Laramore & Daniel E. Pulliam, *Indiana Constitutional Developments: Small Steps*, 47 IND. L. REV. 1015, 1042 (2014); ten were addressed in 2015, Jon Laramore & Daniel E. Pulliam, *Developments in Indiana Constitutional Law: A New Equal Privileges Wrinkle*, 48 IND. L. REV. 1223, 1240 (2015); fourteen were addressed in 2016, Scott Chinn & Daniel E. Pulliam, *Minimalist Developments in Indiana Constitutional Law—Equal Privileges Progresses Slowly*, 49 IND. L. REV. 1003, 2021 (2016); and twelve topics covered in 2017, Scott Chinn & Daniel E. Pulliam, *Emerging Federal Reliance—Continued State Constitutional Minimalism: Indiana State Constitutional Law Summaries—2015-2016*, 50 IND. L. REV. 1215, 1238 (2017)

I. PRIVILEGES AND IMMUNITIES

In *Indiana Alcohol & Tobacco Commission v. Spirited Sales, LLC*,[4] the Indiana Supreme Court held that a state government agency's decision to confer preferential treatment by recognizing corporate separateness for some companies, but not for others, did not violate the Equal Privileges and Immunities Clause.[5] Indiana law prohibits beer wholesalers from having an interest in a liquor wholesaler's permit.[6] At issue was whether a limited liability company could receive a liquor permit after the agency found that the company's relationship with another company holding a beer wholesaler's permit justified a finding that they operated as the same company.[7] The trial court found that the agency had recognized corporate separateness in granting permits to businesses whose owners held interests prohibited by Indiana law.[8]

Without analysis though, the court found that the other entities that received the preferential treatment from the Indiana Alcohol and Tobacco Commission were not similarly situated.[9] Spirited Sales, LLC, the petitioner before the agency, was "a distinct type of business," with "separate licensing requirements," and a provider of "different services" than the other entities the trial court found received permits based on the corporate separateness doctrine.[10] These distinctions, unexplained in the opinion, convinced the supreme court that the state agency did not violate the Equal Privileges and Immunities by ignoring corporate separateness in this case but not in others.[11]

In *KS&E Sports v. Runnels*,[12] the Indiana Supreme Court held that the Indiana law barring negligence claims against firearms sellers for damages stemming from criminal or unlawful use of a firearm does not violate the open courts clause or the Equal Privileges and Immunities clause of the Indiana Constitution.[13] A convicted felon obtained a firearm through a straw purchase, which he then used to shoot a police officer during a traffic stop.[14] The police officer sued the seller of the firearm for negligent, reckless, and unlawful sale of the handgun used in the shooting.[15] The court held that under article I, section 12, the police officer was not entirely barred from the courts.[16] Under the Open Courts clause, the

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4. 79 N.E.3d 371, 382 (Ind. 2017). This Article's co-author, Scott Chinn, was one of the counsel of record for Spirited Sales, LLC.

5. *Id.*

6. *Id.* at 374.

7. *Id.* at 376.

8. *Id.* at 375.

9. *Id.* at 382.

10. *Id.*

11. *Id.*

12. 72 N.E.3d 892 (Ind. 2017).

13. *Id.* at 907.

14. *Id.* at 896-97.

15. *Id.* at 897.

16. *Id.* at 906.

General Assembly is able to limit access to the court—it just may not do so arbitrarily or unreasonably.[17] Under the wide latitude accorded the legislature, and the presumption of constitutionality accorded state statutes, the court held that the police officer could still seek equitable relief.[18] By barring damages, the General Assembly acted within its broad discretion and did not act irrationally or illegitimately.[19]

In holding that the law did not violate the Equal Privileges and Immunities Clause, the court found that the police officer failed to negate all conceivable bases for treating gun sellers more favorably than other sellers of weapons, such as knives.[20] Although the court did not know why the General Assembly passed the law, it speculated that it might have been because such lawsuits threatened the availability of firearms to law-abiding citizens wishing to exercise their Second Amendment rights.[21] Such a rationale would provide the reasonable basis needed to justify the legislature's decision to treat gun sellers more favorably.[22]

II. EX POST FACTO CLAUSE

Like previous survey periods, Indiana courts' application of the Ex Post Facto Clause of article I, section 24 of the Indiana Constitution focused on Indiana's Sex Offender Registration Act, or "SORNA."[23] Although most of these challenges fail, one attempt by the General Assembly to further restrict the freedom of individuals to which SORNA applied failed the constitutional test for ex post facto laws.[24]

In *Kirby v. State*, the Indiana Court of Appeals held that a 2015 law that made it a felony for a registered sex offender to enter school property was unconstitutional as applied to Kirby because it amounted to retroactive punishment in violation of the Ex Post Facto Clause in article, I, section 24.[25] Kirby pled guilty to a lesser-included offense felony child solicitation in 2010 after being charged with soliciting a child between the ages of fourteen and sixteen while being at least twenty-one years of age.[26] The court sentenced him to an eighteen month term of suspended probation and required him to register as an adult sex offender with the exception that he could visit his son's school.[27] In 2015, the General Assembly made it a felony for those with Kirby's offense

17. *Id.* at 905.
18. *Id.* at 906.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 907.
23. *See* Kirby v. State, 83 N.E.3d 1237 (Ind. Ct. App. 2017).
24. *Id.* at 1246.
25. *Id.* at 1240.
26. *Id.*
27. *Id.* at 1240-41.

record to enter school property.[28]

As applied to Kirby, the court of appeals held that the law amounted to unconstitutional retroactive punishment under the "intent-effects" test established in *Wallace v. State*.[29] As in prior cases, the court assumed the statute intended to create a civil, regulatory, non-punitive scheme.[30] Given that assumption, the court examined the statute's effect and whether it was punitive.[31] First, the statute created an affirmative disability that was neither minor nor indirect.[32] The sanction of barring him from school grounds was traditionally considered punishment.[33] It also applied to crimes that required a showing of *mens rea* by requiring knowledge or intent.[34] The statute further served the traditional aims of punishment by deterring others from committing the crime.[35] There was no question that the statute exposed Kirby to further criminal liability and was excessive in relation to the State's purpose because the trial court would not have granted Kirby the exception had it believed he posed a danger to society.[36] And he had, without incident, entered his son's school property for five years.[37] "To suddenly deprive Kirby of the opportunity to attend his son's activities for no reason other than his prior conviction is excessive."[38]

The only factor that went against the statute having punitive effects was the non-punitive interests that it advanced such as public safety and protecting children.[39] But the statute otherwise had punitive effects and therefore it violated the Ex Post Facto Clause of the Indiana Constitution.[40]

The court did not address whether the law could survive a facial challenge to the Ex Post Facto clause. Although the court purports to apply this section only to Kirby, and despite Indiana's strong presumption against deciding constitutional challenges to statutes facially,[41] the text of the provision—"No ex post facto law . . . shall ever be passed"[42]—does not appear to anticipate as-applied challenges.

Challenges under the Expo Post Facto Clause otherwise failed in the court of

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28. *Id.* at 1241.

29. *Id.* at 1246 (using the factors from Wallace v. State, 905 N.E.2d 371, 378 (Ind. 2009)).

30. *Id.* at 1243 (citing McVey v. State, 56 N.E.3d 674, 680 (Ind. Ct. App. 2016)).

31. *Id.*

32. *Id.*

33. *Id.* at 1244.

34. *Id.*

35. *Id.*

36. *Id.* at 1245.

37. *Id.*

38. *Id.* at 1246.

39. *Id.* at 1245.

40. *Id.* at 1246.

41. Baldwin v. Reagan, 715 N.E.2d 332, 337 (Ind. 1999) ("When a party claims that a statute is unconstitutional on its face, the claimant assumes the burden of demonstrating that there are no set of circumstances under which the statute can be constitutionally applied.").

42. IND. CONST. art. 1, § 24.

appeals. In *State v. Summers*,[43] the court of appeals held that a tolling provision in the Sex Offender Registration Act did not violate the Ex Post Facto Clause.[44] Summers had been ordered to register as a sex offender in Illinois for ten years when he moved to Indiana before the General Assembly amended its law to require registration of anyone required to register elsewhere.[45] Illinois law provides for tolling of the ten-year registration requirement for any time the individual is incarcerated for an unrelated conviction.[46] After the amendment, Summers was convicted of two counts of armed robbery in Indiana.[47]

After his release, Summers was told to register as a sex offender under an Indiana law that tolls a registration period during a time of incarceration—a law that was passed two years before Summers' convictions.[48] But he failed to do so and was charged with felony failure to register.[49] Summers moved to dismiss the charges on the basis that the tolling provision violated the Ex Post Facto Clause because it was enacted after he committed the Illinois offense requiring registration.[50] The trial court agreed, but the court of appeals reversed.[51] First, "by moving across state lines, Summers merely maintained his sex-offender status" under the Indiana Supreme Court ruling in *Tyson v. State*.[52] Second, the court reasoned that, "although Indiana adopted its tolling provision several years after Summers was adjudicated a juvenile delinquent in Illinois, Summers was already under a tolling requirement in Illinois."[53] Therefore, the court found "no punitive burden to maintaining both of these requirements across state lines."[54]

III. NO SPECIAL LAWS (ARTICLE 4, § 22)

In *Spencer County Assessor & Grass Township Assessor v. AK Steel Corp.*,[55] the Tax Court of Indiana held that a property tax assessment based on a state law that required a blast furnace to operate "in Indiana" did not violate the prohibition against special laws in article 4, section 22.[56] The Indiana law[57] provides steel mills with the option of valuing personal property of a certain manner if it produces steel by processing iron ore and other raw materials in a blast furnace

43. 62 N.E.3d 451 (Ind. Ct. App. 2016).
44. *Id.* at 455.
45. *Id.* at 452.
46. *Id.*
47. *Id.*
48. *Id.* at 452-53.
49. *Id.* at 453.
50. *Id.*
51. *Id.*
52. *Id.* at 455 (citing Tyson v. State, 51 N.E.3d 88, 96 (Ind. 2016)).
53. *Id.*
54. *Id.*
55. 61 N.E.3d 406 (Ind. T.C. 2016).
56. *Id.* at 421.
57. IND. CODE § 6-1.1-3-23 (2017).

in Indiana.[58] AK Steel produces carbon steel throughout the Midwest, including two blast furnaces in Ohio and Kentucky but none in Indiana.[59] AK Steel operates a finishing facility in Rockport, Indiana but because that does not include a blast furnace, the Board of Tax Review affirmed a county property tax assessment rejecting AK Steel's valuation.[60]

Among other federal constitutional claims,[61] the tax court held that the "in Indiana" provision did not constitute a special law.[62] AK Steel argued that the provision only applied to AK Steel's property assessment as the only integrated steel producer in Indiana with blast furnaces outside Indiana.[63] Yet, the court held that under *Mun. City of South Bend v. Kimsey*,[64] that the statute was general as long as it applied to "all persons or places of a specified class throughout the state."[65] Here, although the law was passed to respond to issues in the region of the state in which AK Steel operated (northern Indiana), the General Assembly drafted the law to apply generally to a specified class throughout the state: "any person that has a blast furnace in Indiana—regardless of where in Indiana—" could obtain the tax assessment denied AK Steel.[66] By denying AK Steel this tax assessment because it did not operate a blast furnace in Indiana, the legislature's special class reasonably related to the legitimate purpose of eliminating contentious, protracted, and expensive adjudications of steel mill property tax claims involving blast furnaces.[67]

IV. RIGHT TO REMEDY (ARTICLE 1, § 12)

In *Price v. Indiana Department of Child Services*,[68] the court of appeals held that a state law imposing a maximum caseload requirement for Department of Child Services ("DCS") managers did not create a private cause of action.[69] The law[70] requires the department (using the term "shall") to limit managers' caseloads to twelve active cases or seventeen monitored children.[71] Mary Price, the plaintiff and Marion County DCS employee, maintained a caseload of about

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58. *AK Steel Corp.*, 64 N.E.3d at 409.

59. *Id.* at 410.

60. *Id.* at 414.

61. *Id.* at 416-19 (namely, federal Equal Protection, Commerce Clause, and Due Process claims).

62. *Id.* at 421.

63. *Id.*

64. 781 N.E.2d 683, 689 (Ind. 2003).

65. *AK Steel Corp.*, 61 N.E.3d at 421.

66. *Id.*

67. *Id.*

68. 63 N.E.3d 16 (Ind. Ct. App. 2016), *trans. granted*, 88 N.E.3d 1075 (Ind. 2017), *aff'd in part, vacated in part*, 80 N.E.3d 170 (Ind. 2017).

69. *Id.* at 22.

70. IND. CODE § 31-25-2-5 (2017).

71. *Price*, 63 N.E.3d at 20.

forty-three children and sought to enforce the state law mandate against DCS.[72]

The court held that the General Assembly "defined a wrong—an on-going services caseload greater than seventeen cases at any one time—but" failed to specify a remedy.[73] And a civil cause of action exists only where the duty imposed by the statute is accompanied by a private cause of action.[74] Otherwise, private parties may not enforce what constitutes general public rights.[75] Price argued that the caseload limitations only had ancillary public benefits and that she had a right to a limited caseload.[76] Yet the court held that the caseload requirement was intended to benefit the public in general "through consistent, efficient, and effective administration of DCS's services."[77] The main consideration was the protection of society's children and families.[78] Thus, Price lacked in ability to enforce the General Assembly's requirement of limiting caseloads.[79]

V. SEARCH AND SEIZURE

In *Zanders v. State*,[80] the Indiana Supreme Court held that obtaining historical cell-site location information without a search warrant did not violate the state constitutional prohibition against unreasonable searches and seizures.[81] The court notably rejected the third party doctrine for data turned over to third parties and applied traditional reasonableness principles under *Litchfield*.[82] Yet the court's analysis of the *Litchfield* factors was sparse given that it rested on the holding in the 2014 Indiana Court of Appeals decision in *McCowan v. State*,[83] and this particular search's reasonableness under the circumstances.[84] Put otherwise, in other circumstances undefined by the court, such warrantless searches may not be deemed reasonable under the Indiana Constitution.[85]

As for the circumstances, the police found photographs of items stolen from a liquor store by searching Facebook for the telephone number associated with the robbery.[86] The level of intrusion was low because such historical cell site data

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72. *Id.* at 20-21.

73. *Id.* at 28.

74. *Id.* at 22.

75. *Id.*

76. *Id.*

77. *Id.* at 23.

78. *Id.* at 22.

79. The court went on to hold that Price could obtain a mandate against DCS to enforce the General Assembly's requirements.

80. 73 N.E.3d 178 (Ind. 2017).

81. *Id.* at 179.

82. *Id.* at 186.

83. 10 N.E.3d 522, 533-35 (Ind. Ct. App. 2014).

84. *Zanders*, 73 N.E.3d at 186-87.

85. *Id.* at 188.

86. *Id.* at 180.

in this case only identified the towers that connected the defendant's calls.[87] And law enforcement needs, although not urgent, were high in searching for a potentially armed and dangerous robbery suspect.[88] The result may be different in another case where police obtain GPS data or triangulated cell tower data showing precise locations.[89]

Justice David, joined by Justice Rucker, dissented.[90] He did "not believe that most Hoosiers who use cell phones understand and appreciate that, by contracting with a third-party cell phone provider, they are giving up information that may be turned over to police in an effort to locate them without the requirement of a search warrant."[91] Law enforcement needs were not so urgent as to skip the warrant requirement.[92] Rather than completing and faxing a request for phone records, law enforcement could have readily obtained a search warrant.[93]

In *Brown v. State*,[94] the Indiana Court of Appeals held that officers' limited intrusion into Brown's home was justified by an immediate and urgent need to protect themselves and the public from someone the officers believed was armed and dangerous.[95] Although the holding in *Brown* is not surprising, the court's analysis provides a recent and useful guide for a traditional application of determining the reasonableness of a government search under Indiana's Constitution.

Brown's confrontation with the officers started with a dispute with his new neighbors with whom he shared an alley.[96] Brown kept valuable renovation material in a freestanding garage and had stopped several break-in attempts in the past consistent with the neighborhood's reputation for crime and poverty.[97] As a new neighbor cleaned trash from her backyard, a verbal exchange turned into an intense argument with accusations of trespassing.[98] Brown's threat to blow the neighbors' "brains out" was met by a threat to call the police, which Brown did not take seriously because of law enforcement's failure to respond to the break-ins he experienced.[99]

During the dispute, Brown kept his hand on his pants pocket causing his new neighbors to suspect he had a gun.[100] Responding to a call from the new neighbors, the police interviewed the new neighbors and then approached

87. *Id.* at 187.
88. *Id.*
89. *Id.*
90. *Id.* at 189 (David, J., dissenting).
91. *Id.* at 190.
92. *Id.*
93. *Id.*
94. 62 N.E.3d 1232 (Ind. Ct. App. 2016).
95. *Id.* at 1237.
96. *Id.* at 1234.
97. *Id.* at 1233.
98. *Id.* at 1234.
99. *Id.*
100. *Id.*

Brown's door.[101] Brown came to the door, opened it, stepped outside while keeping a hand behind his back, and told the officers he had "nothing" behind his back.[102] Brown then said the ".357" was lying on the counter according to a recording from body camera worn by one of the officers.[103] The officers asked Brown to show his hands but when he failed to do so, the officers concluded he had criminally resisted law enforcement.[104] A scuffle ensued that resulted in multiple stun gun attempts to subdue Brown and caused non-life threatening injuries.[105] Brown was charged with felony battery on a public safety officer and disarming a public safety officer, and after a bench trial, was convicted of battery and acquitted of disarming.[106] At sentencing, the judge sentenced Brown to a misdemeanor one-year term suspended to probation.[107]

On appeal, Brown argued that under the totality of the circumstances, the search was unreasonable under the Indiana Constitution.[108] Under *Litchfield v. State*,[109] Indiana courts determine the reasonableness of a search under article 1, section 11 by looking at (1) the degree of concern, suspicion, or knowledge regarding the occurrence of a violence; (2) the degree of the search method's intrusion on the citizen's ordinary activities; and (3) the extent of law enforcement needs.[110]

The court concluded that the officers' intrusion into Brown's privacy was justified by the immediate and urgent need to protect themselves and the public from a man the officers reasonably believed was armed and dangerous.[111] Although Brown's conduct while standing on the porch did not rise to a crime, his threatened conduct to his new neighbors gave the officers concern for illegal behavior that if carried out, would be an unreasonable use of deadly force in defense of property.[112] This threat to commit a crime created a high degree of suspicion.[113] Although the use of the stun gun and arresting Brown in his home was quite intrusive, Brown freely and voluntarily answered the officers' knock at his door and willingly surrendered his privacy when he stood outside.[114] Although the officers could have escalated the situation in a fatal manner, they reasonably deployed less lethal force.[115]

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101. *Id.*
102. *Id.* at 1235.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 1235-36.
107. *Id.* at 1236.
108. *Id.* at 1237.
109. 824 N.E.2d 356, 361 (Ind. 2005).
110. *Brown*, 62 N.E.3d at 1237.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*

The court noted that the third factor was decisive and was not accorded sufficient weight by the trial court or Brown.[116] Officer safety is always a legitimate concern and it would have been entirely unreasonable for the officers to turn their backs on Brown—a man whom they believed to be armed, was noncompliant in response to their commands, and had threatened earlier "to commit a horrific act of violence on two innocent neighbors."[117] His refusal to submit to the officers by raising his hands created the emergency.[118] Holding otherwise would undermine community policing by requiring officers to turn their backs on an armed and potentially unstable man.[119]

By contrast, in *Watkins v. State*,[120] the Indiana Court of Appeals held that officer conduct in executing a search warrant violated state constitutional prohibitions against unreasonable searches and seizures.[121] A search warrant resting on a tip from a confidential informant that cocaine was in a home triggered a dozen-plus officer SWAT raid in a Lenco Bearcat with assault weapons.[122] One second after knocking on the door, the SWAT team rammed the door through and deployed a "flash bang" grenade in the same room as a nine-month old baby.[123] Other officers smashed in the kitchen window, threw another flash bang, and set off the smoke detectors.[124]

The court ordered the evidence from the search of the home, which included marijuana, a digital scale, baggies, cocaine, and a 0.40 caliber handgun, suppressed because the search violated article 1, section 11 of the Indiana Constitution.[125] The officers had a considerable degree of suspicion from a credible and reliable confidential informant but the degree of the intrusion—a "military-style assault"—went beyond what was reasonable.[126] The burn mark from the flash bang was very close to the crib with a baby and the officer failed to confirm who was in the room.[127] Law enforcement needs were also low.[128] The suspects in the house had no known criminal history and the officers were after what they believed were ten grams of cocaine and marijuana.[129]

The court rejected the State's request to adopt the inevitable discovery exception as a matter of Indiana constitutional law because the Indiana Supreme

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116. *Id.* at 1237-38.

117. *Id.* at 1238.

118. *Id.*

119. *Id.*

120. 67 N.E.3d 1092, 1092 (Ind. Ct. App.), *trans. granted, opinion vacated*, 86 N.E.3d 170, 170 (Ind.), *and vacated*, 85 N.E.3d 597, 597 (Ind. 2017).

121. *Id.* at 1102.

122. *Id.* at 1095.

123. *Id.*

124. *Id.* at 1096.

125. *Id.* at 1102.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

Court held in *Brown v. State*[130] that evidence found from unconstitutional searches must be suppressed—regardless of whether the evidence would have otherwise been discovered.[131]

Judge May dissented on the basis that the majority underestimated the needs of law enforcement.[132] Judge May did not believe police would ever knowingly use a flash bang near a child and that the use of a flash bang was to protect officers from weapons fire.[133] Once the search warrant was issued, the officers had "authority to intrude into" the defendant's "personal residence, drag him outside in handcuffs, and turn his residence upside down."[134]

In *Bell v. State*,[135] the court of appeals held that the absence of lighting on a bicycle, in violation of state law requiring a red light in the back and a white light in the front, justified the reasonableness of a stop of an individual who was "scanning and looking around."[136] The court distinguished the holding in *State v. Richardson*,[137] that observing an "unusual bulge" is not sufficient for reasonable suspicion on the basis that the bicyclist was nervous, scanning the area, and didn't answer the officer's question.[138] The individual was also sweating and his heart was beating fast.[139] Even though sweat and a fast heart rate are facts consistent with most active bicyclists, the court found that these facts justified the officer in asking about a "bulge" in the bicyclist's pocket.[140] This minimal outer clothes pat-down, that turned up a gun, was justified for officer and public safety.[141] Because the degree of suspicion was high, the intrusion was minimal, and law enforcement needs were high, the search did not violate article 1, section 11.[142]

Judge Robb dissented.[143] Failure to have proper lighting on a bicycle was just an infraction.[144] That limited the stop's scope.[145] The behavior was that of most people stopped by law enforcement.[146] The stop should have concluded with a traffic citation because "[a] generalized suspicion that an individual presents a threat to an officer's safety is insufficient to authorize a pat-down search."[147]

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130. 653 N.E.2d 77, 80 (Ind. 1995).
131. *Watkins*, 67 N.E.3d at 1102.
132. *Id.* at 1103 (May, J., dissenting).
133. *Id.* at 1104.
134. *Id.*
135. 81 N.E.3d 233, 239 (Ind. Ct. App.), *trans. denied*, 94 N.E.3d 297 (Ind. 2017).
136. *Id.* at 238.
137. 927 N.E.2d 379, 384 (Ind. 2010).
138. *Bell*, 81 N.E.3d at 238.
139. *Id.*
140. *Id.* at 239.
141. *Id.* at 238-39.
142. *Id.* at 239.
143. *Id.* (Robb, J., dissenting).
144. *Id.*
145. *Id.*
146. *Id.* at 242.
147. *Id.* at 243 (quoting Patterson v. State, 958 N.E.2d 478, 486 (Ind. Ct. App. 2011)).

In *Porter v. State*,[148] the court of appeals held that a search of a motorist on the side of the road, based on the smell of marijuana emanating from the vehicle, was unreasonable under article 1, section 11.[149] The officer had an unquestionable basis for believing the motorist possessed marijuana.[150] But the degree of the subsequent intrusion went to the "sanctity of one's most private areas."[151] After searching the motorist's pockets and vehicle without success, the officer put her hand inside the front of the motorist's jeans but outside her underwear.[152] After feeling what the officer believed was a marijuana blunt, she put her hand inside the motorist's underwear and retrieved the blunt.[153] This activity took place without any privacy precautions in place on a public road or sanitary precautions such as plastic gloves.[154] The court compared it to a strip search that, although incident to a lawful misdemeanor arrest, was impermissible under the Indiana Constitution.[155]

The court also noted that the State presented no evidence of an immediate need for the search's timing to take place.[156] The officers could have taken her to a more private area and there were no concerns about officer safety or the destruction of evidence.[157] This decision to perform an intrusive search on a public road was unreasonable and violated the Indiana Constitution.[158]

In *K.C. v. State*,[159] the court of appeals held that the new crime exception to the exclusionary rule applied to the search of high school students after the student committed battery against the officer.[160] The officer was conducting a pat-down search of every student in a high school classroom to find an alleged stolen phone.[161] The student refused to be searched, but the officer moved the student's desk away and placed his hand on the student's shoulder.[162] The student threw his arm back in an aggressive manner and when the officer went to grab the student, the student balled his fist and swung it at the officer multiple times.[163] After the officer placed the student on a ledge, the student punched the officer in the ribs and with a limestone-based trophy.[164]

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148. 82 N.E.3d 898 (Ind. Ct. App. 2017).
149. *Id.* at 907-08.
150. *Id.* at 907.
151. *Id.*
152. *Id.* at 901.
153. *Id.*
154. *Id.* at 908.
155. *Id.* at 907 (citing Edwards v. State, 759 N.E.2d 626, 627 (Ind. 2001)).
156. *Id.* at 907-08.
157. *Id.* at 908.
158. *Id.*
159. 84 N.E.3d 646 (Ind. Ct. App. 2017).
160. *Id.* at 651.
161. *Id.* at 647.
162. *Id.* at 648.
163. *Id.*
164. *Id.*

Even though the court declined to address whether a classroom-wide pat-down search was permissible on the basis that there was no suspicion that the entire class was involved in the alleged phone theft, the student's violence against the officers created a new crime and thus the evidence found after that seizure was admissible.[165] The court's decision was supported by the recent *C.P. v. State* decision,[166] where the court found that the new-crime exception to the exclusionary rule applied to a search conducted after a child committed battery against a public safety official.[167]

In *Jacobs v. State*,[168] the court of appeals held that the seizure of an individual believed to be a juvenile for apparent truancy was not unreasonable under article I, section 11.[169] The officer had observed a group of what appeared to be school age juveniles gathered at a park in a high crime area with many individuals wearing clothing bearing gang colors.[170] The defendant and another apparent juvenile walked away any time law enforcement approached and refused initially to stop when ordered by the officer.[171] This flight could be circumstantial evidence of conscious guilt that they should have been in school rather than the park.[172]

The degree of intrusion was not minimal—the officer instructed the defendant to lie on the ground and handcuffed him.[173] Although the defendant's refusal to stop justified this high degree of intrusion, the court considered this factor in the defendant's favor.[174] Yet law enforcement needs were high given the area's recent reports of gunshots by gang members.[175] The defendant and those with him looked like gang members and appeared to be truant from school.[176] Thus, the court deemed the search reasonable.[177]

Judge Crone dissented.[178] The suspicion of any violation was low.[179] The defendant had every right to walk away from the officer and although he was in a high-crime area, the officers never saw the defendant break any laws or engage in any gang-related activity.[180] Rather than briefly detaining him, the officers

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165. *Id.* at 651.
166. 39 N.E.3d 1174 (Ind. Ct. App. 2015).
167. *Id.* at 1176.
168. 62 N.E.3d 1253 (Ind. Ct. App. 2016).
169. *Id.* at 1263-64.
170. *Id.* at 1256.
171. *Id.*
172. *Id.* at 1263.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 1264 (Crone, J., dissenting).
179. *Id.* at 1266.
180. *Id.* at 1266-67.

cuffed him on the ground.[181] And law enforcement needs were low: the defendant "appeared to be a truant juvenile who had walked away from two marked vehicles, which would be understandable for someone guilty of a status offense (which he was not) as well as prudent for any young African-American male who wished to avoid a confrontation with law enforcement."[182]

Months later, the Indiana Supreme Court reversed.[183] The officer lacked suspicion sufficiently linked to articulable criminal activity.[184] The intrusion was not minimal and law enforcement needs as to this defendant had nothing to do with the earlier concerns regarding gang activity, juveniles, and display of gang color.[185]

In three cases, *M.O. v. State*,[186] *Cruz-Salazar v. State*,[187] and *Pinner v. State*,[188] the Indiana Supreme Court expressly refused to analyze a defendant's claim under article 1, section 11 of the Indiana Constitution that a search was unreasonable. The court found in *M.O.* that although its interpretation of article 1, section 11 "somewhat" differs from the Fourth Amendment, it did not analyze the article 1, section 11 claim because of its "extensive Fourth Amendment analysis" in finding that the search violated the Fourth Amendment.[189] And, in *Anderson v. State*,[190] the court of appeals did not address an argument under the Indiana Constitution because it found the search unconstitutional under the Fourth Amendment.[191]

Refusing to decide a case under state constitutional grounds when the court decides the issue on federal constitution grounds is a form of constitutional minimalism.[192] Yet deciding cases on federal constitutional grounds, and avoiding the development of independent and adequate state constitutional grounds, may erode the development of state constitutional principles.[193]

VI. RIGHTS OF THE ACCUSED AND VICTIMS

In *Messersmith v. State*,[194] the court of appeals held that a trial judge's withdrawal of a plea agreement, after accepting it and entering judgment of

181. *Id.* at 1267.

182. *Id.*

183. Jacobs v. State, 76 N.E.3d 846, 852 (Ind. 2017).

184. *Id.*

185. *Id.*

186. 63 N.E.3d 329 (Ind. 2016).

187. 63 N.E.3d 1055 (Ind. 2016).

188. 74 N.E.3d 226 (Ind. 2017).

189. *M.O.*, 63 N.E.3d at 334.

190. 64 N.E.3d 903 (Ind. Ct. App. 2016).

191. *Id.* at 905 n.4.

192. *Id.*

193. Michigan v. Long, 463 U.S. 1032, 1041 (1983) (anticipating that state courts will develop state jurisprudence unimpeded by federal interference while preserving the integrity of federal law).

194. 70 N.E.3d 861 (Ind. Ct. App. 2017).

conviction, violated the defendant's due process rights.[195] The State charged the defendant with "Neglect of a Dependent Resulting in Bodily Injury" and "Battery on a Person Less than 14 Years Old" after it was alleged he forcibly pushed his four-year-old son against a trailer at a county fair.[196] The defendant accepted the State's offer—plead guilty to battery of a person less than fourteen—and the trial court entered judgment.[197] The following month, the State sought to withdraw the plea agreement because the State entered the agreement without first notifying the victim.[198] The trial court agreed and withdrew the plea agreement, and a jury convicted the defendant on both counts.[199]

On appeal, the State argued that withdrawing the plea agreement accounted for the victim's rights.[200] Article 1, section 13 of the Indiana Constitution states that the victims of crimes "shall have the right to be treated with fairness, dignity, and respect" and "to be informed of and present during public hearings."[201] But the court found that the provision's second clause—that those victims' rights are limited by the "constitutional rights of the accused"—required the victim's rights to yield in this case.[202]

Under the Fourteenth Amendment of the U.S. Constitution, states may not "deprive any person of life, liberty, or property, without due process of law."[203] This constitutional principle requires the government to uphold its side of plea agreements under longstanding U.S. Supreme Court precedent.[204] Although victims' rights are important, those rights must yield to a defendant's federal due process rights.[205]

In *State v. McKinney*,[206] the court of appeals held that a defendant's confrontation rights under article 1, section 13 were not violated where a victim was deposed outside the presence of the defendant.[207] The defendant was charged with molesting an eight-year-old child.[208] The State sought to have the child testify via closed circuit television during the jury trial and to exclude the defendant from the child's deposition.[209] The child was being treated for post-traumatic stress disorder, oppositional defiant disorder, and attention deficit

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195. *Id.* at 865.
196. *Id.* at 863.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.* at 863-64.
201. *Id.* at 864.
202. *Id.*
203. U.S. CONST. amend. XIV, § 1.
204. *Messersmith*, 70 N.E.3d at 864.
205. *Id.* at 864-65.
206. 82 N.E.3d 290 (Ind. Ct. App. 2017).
207. *Id.* at 296.
208. *Id.* at 292.
209. *Id.*

hyperactivity disorder in part because of the sexual abuse she suffered.[210] The trial court found that the defendant could be in the room—no closer than ten feet away from the child—during a deposition and that the testimony was to be before the jury in the presence of the defendant.[211] The State sought interlocutory appeal.[212]

The court of appeals held that the trial court abused its discretion in denying the State's motion to exclude the defendant from the child's deposition given the evidence presented to the court regarding the trauma the victim would suffer being in the defendant's presence.[213] Under article 1, section 13, crime victims "shall have the right to be treated with fairness, dignity, and respect" to the extent those rights do not infringe on the defendant's constitutional rights.[214] Taking a deposition to discover information did not have a direct consequence on the accused in the way a trial or a parole proceeding may have.[215] Given the lack of a right for the defendant to attend the deposition, the trial court's decision on the deposition went "against the logic and effect of the facts and the circumstances."[216]

As for closed circuit testimony, the court of appeals held that the Protected Person Statute[217] allowed the victim to be permitted to testify outside the courtroom due to the testimony of the doctors that testifying in the defendant's presence would cause the victim significant trauma.[218] The emotional harm the victim would suffer if she testified in the defendant's presence would limit her ability to effectively communicate in court.[219] Thus, the trial court's decision denying the motion to have the victim testify via closed circuit television was an abuse of discretion.[220]

VII. DOUBLE JEOPARDY

In *Thompson v. State*,[221] the court of appeals vacated a Level 6 felony domestic battery conviction because a second battery conviction violated state constitutional double jeopardy principles.[222] The defendant had struck his ex-wife during an argument, causing her to trip and fall over a curb, twist her ankle, and strike the defendant's elderly grandmother, causing her to fall and fracture her

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210. *Id.*
211. *Id.* at 293.
212. *Id.* at 294.
213. *Id.* at 296.
214. *Id.* (quoting IND. CONST. art. 1, § 13(b)).
215. *Id.* at 295.
216. *Id.* at 294.
217. IND. CODE § 35-37-4-6 (2017).
218. *McKinney*, 82 N.E.3d at 296-97.
219. *Id.* at 298-99.
220. *Id.* at 299.
221. 82 N.E.3d 376 (Ind. Ct. App. 2017), *trans. denied*, 95 N.E.3d 1294 (Ind. 2018).
222. *Id.* at 382-83.

tailbone and vertebra.[223] The two injuries were the basis of the two battery charges.[224] Yet under article 1, section 14 of the Indiana Constitution, the two injuries stemmed from a single "beating . . . upon one victim."[225] The defendant only shoved one person once.[226] The resulting injuries, even though inflicted upon two people, could not serve the basis of two battery convictions.[227]

In *Hunter v. State*,[228] the court of appeals held that convictions for dealing and possession of cocaine and maintaining a common nuisance constituted a double jeopardy violation.[229] Under *Richardson v. State*,[230] the court looked at whether either (A) the statutory elements of the offenses or (B) the actual evidence supporting the convictions establishes the same essential elements of both offenses.[231] The actual evidence used to obtain both convictions must have made it reasonably possible that the jury used the same facts to obtain both convictions.[232]

Under the actual evidence test, the court looked at the evidence presented at trial to determine whether separate and distinct facts supported each offense.[233] The evidence showed that the defendant drove his car to a confidential informant's house, which was within 1,000 feet of an elementary school, on three separate days and sold crack cocaine.[234] On a fourth day, the police stopped the defendant on the school property as he picked his child up from the school and found crack cocaine in his car.[235]

The court found that there was no separate conduct of maintaining a common nuisance.[236] "[T]here [was] more than a reasonable possibility that the jury used the same evidentiary facts to establish the essential elements of" dealing in cocaine, possessing cocaine, and maintaining the common nuisance.[237]

In *Jones v. State*,[238] the court of appeals held that convictions for felony attempted armed robbery and felony conspiracy to commit armed robbery violated double jeopardy principles where the defendant raised the defense of voluntary abandonment.[239] The court first held that the defense of abandonment

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223. *Id.* at 378-79.
224. *Id.* at 379.
225. *Id.* at 382 (quoting McGaughey v. State, 419 N.E.2d 184, 185 (Ind. Ct. App. 1981)).
226. *See id.* at 383 ("[Each battery conviction] relied on the same, single act of touching.").
227. *Id.*
228. 72 N.E.3d 928 (Ind. Ct. App.), *trans. denied*, 88 N.E.3d 1077 (Ind. 2017).
229. *Id.* at 935.
230. 717 N.E.2d 32 (Ind. 1999).
231. *Hunter*, 72 N.E.3d at 934.
232. *Id.*
233. *Id* at 934-35.
234. *Id.* at 935.
235. *Id.*
236. *Id.*
237. *Id.*
238. 75 N.E.3d 1095 (Ind. Ct. App.), *vacated*, 87 N.E.3d 450 (Ind. 2017).
239. *Id.* at 1098-99.

did not apply to the conviction for conspiracy to commit armed robbery.[240] The conspiracy is complete when the person, intending to commit a felony, forms an agreement with another to commit a felony and one member of the conspiracy commits an overt act in furtherance of that agreement.[241] Here, the commission of an overt act was proven by a security video recording showing the defendant and his companion outside a gas station at two a.m. wearing masks and hoodies and holding what appeared to be handguns.[242]

But the State did not overcome the defendant's abandonment defense beyond a reasonable doubt for the attempted armed robbery conviction.[243] Separately, using the same overt act used for the conspiracy conviction to convict on attempt violated double jeopardy.[244] A reasonable possibility existed that the jury used the same evidentiary fact—standing outside the gas station in masks and hoodies and carrying what appeared to be handguns—to find that the defendant committed an overt act in furtherance of an agreement and a substantial step toward the armed robbery.[245]

In *Lewis v. State*,[246] the Indiana Supreme Court held that it could not sentence a defendant for murder, murder in the perpetration of criminal deviate conduct, criminal deviate conduct, and resisting law enforcement.[247] Sentencing the defendant on all four charges violated double jeopardy because, although without factual analysis, the court found that a reasonable possibility existed that the jury may have utilized the same evidentiary facts to support the essential elements of multiple of these counts.[248]

In *Paquette v. State*,[249] the court of appeals disagreed with another panel decision in holding that the language of Indiana's resisting statute does not permit multiple convictions based on a single act of resisting.[250] "Because [the defendant] engaged in only one act of resisting, he [could] be convicted and sentenced on only one count of resisting law enforcement."[251] The defendant collided with two other vehicles while fleeing law enforcement, killing three people and seriously injuring another.[252] The trial court entered three convictions and three consecutive sentences for resisting.[253]

On appeal, the court found that the resisting statute permitted only a single

240. *Id.* at 1098.
241. *Id.*
242. *Id.* at 1098-99.
243. *Id.* at 1099.
244. *Id.*
245. *Id.*
246. 59 N.E.3d 967 (Ind. 2016).
247. *Id.* at 969.
248. *Id.*
249. 79 N.E.3d 932 (Ind. Ct. App.), *trans. granted*, 92 N.E.3d 1089 (Ind. 2017).
250. *Id.* at 933, 935-36 (citing IND. CODE § 35-44.1-3-1 (2017)).
251. *Id.* at 936.
252. *Id.* at 933.
253. *Id.*

conviction.[254] The harm of resisting is one incident regardless of the number of officers resisted or individuals harmed.[255] The court rejected the State's argument that multiple resisting counts are allowed under the statute where a single act of resisting leads to the injury or death of more than one person.[256] The court also rejected the holding in *Whaley v. State*[257] that the Indiana Constitution's prohibition against double jeopardy allowed for two resisting convictions where two officers were harmed in a single act of resisting.[258]

VIII. RIGHT OF THE JURY TO DETERMINE THE LAW AND THE FACTS IN CRIMINAL CASES

In *Tyms-Bey v. State*,[259] the court of appeals held that Indiana's recently enacted Religious Freedom Restoration Act ("RFRA") did not serve as a defense to criminal nonpayment of income taxes as a matter of law.[260] RFRA provides that government entities "may not substantially burden a person's exercise of religion" except where the government entity shows that the application of the burden to the person furthers a compelling governmental interest and is the least restrictive means of furthering that interest.[261]

The State conceded that RFRA applied to criminal proceedings, and the court agreed.[262] But the court decided the question on narrower grounds: The State's enforcement of its income tax laws was in furtherance of a compelling state interest and was the least restrictive means of furthering that compelling state interest.[263] Collection of taxes in a uniform and mandatory manner served the broad public interest.[264] A religious belief in conflict with the payment of taxes provided no basis for resisting taxation.[265] The imposition of criminal penalties on those who refuse to pay taxes did not substantially burden the taxpayer—the burden was the taxes.[266] The criminal penalties served as the enforcement method.[267] The State may choose its enforcement mechanism within the important

254. *Id.* at 933-34.

255. *Id.* at 935.

256. *Id.*

257. 843 N.E.2d 1 (Ind. Ct. App. 2006).

258. *Paquette*, 79 N.E.3d at 936 (citing *Whaley*, 843 N.E.2d at 14-15).

259. 69 N.E.3d 488 (Ind. Ct. App.), *trans. denied*, 88 N.E.3d 1076 (Ind. 2017).

260. *Id.* at 492.

261. *Id.* at 489 (quoting IND. CODE § 34-13-9-8 (2016)).

262. *Id.*

263. *Id.* at 490-91.

264. *See id.* at 490 (quoting United States v. Lee, 455 U.S. 252, 260 (1982)) (noting that "uniform and mandatory participation" in a tax system is necessary and that there is "a broad public interest in maintaining a sound tax system").

265. *Id.*

266. *Id.* at 491.

267. *Id.*

government interest of ensuring a uniform and mandatory tax system.[268]

Judge Najam dissented on the basis that the court's holding rendered the RFRA affirmative defense a nullity and, by deciding the RFRA affirmative defense as a matter of law, denied the defendant his article 1, section 19 right to a jury.[269]

IX. ARTICLE 7, SECTION 4/6 – JURISDICTION OF APPELLATE COURTS

In *Mathews v. State*,[270] the court of appeals held that allowing criminal defendants to seek recusal of judges solely under the Code of Judicial Conduct would "usurp the exclusive supervisory authority of our supreme court over judicial conduct."[271] The State charged the defendant with motor vehicle operation violations in 2003.[272] Nearly eight years later, the State charged him with felony intimidation and public intoxication.[273] The defendant asked for a change of judge because the defendant believed the judge would be biased against him because of his experiences involving that judge—namely the judge's representation of the defendant as a public defender in the 2003 violations.[274]

The court found the defendant's motion procedurally improper under the Indiana Rules of Criminal Procedure—it was unverified and filed seven months after the initial hearing.[275] The court also found that the defendant could not invoke the Code of Judicial Conduct to disqualify the judge.[276] The code's obligations are not freestanding rights of enforcement for private parties.[277]

Rather, the judge must enforce them against himself in the first instance, and in the last instance, the Indiana Supreme Court enforces them through disciplinary actions.[278] The defendant's argument would nullify the trial rules and allow a "new species of recusal motion" that could be brought at any time and under circumstances beyond those contemplated by the procedural rules.[279]

X. ARTICLE 7, SECTION 6 (SEPARATION OF POWERS)

In *Groth v. Pence*,[280] the court of appeals affirmed the trial court's decision

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268. *Id.* at 491-92.

269. *Id.* at 492 (Najam, J., dissenting); *see* IND. CONST. art. 1, § 19 (providing a right to a jury in criminal cases).

270. 64 N.E.3d 1250 (Ind. Ct. App. 2016), *trans. denied*, 83 N.E.3d 1218 (Ind. 2017).

271. *Id.* at 1254-55.

272. *Id.* at 1251.

273. *Id.*

274. *Id.* at 1251-52.

275. *Id.* at 1254.

276. *See id.* at 1255 ("[The Code of Judicial Conduct] obligations do not create freestanding rights of enforcement in private parties.").

277. *Id.*

278. *Id.*

279. *Id.*

280. 67 N.E.3d 1104 (Ind. Ct. App.), *trans. denied*, 86 N.E.3d 172 (Ind. 2017).

to allow former Governor and now-Vice President Mike Pence to withhold documents related to Indiana's joining of a Texas lawsuit to contest presidential executive orders related to immigration.[281] The private citizen's request for documents was deemed justiciable, despite the Indiana Supreme Court's decision in *Citizens Action Coalition v. Koch*,[282] because the question at issue was a court-created definition of work product.[283] Instead of the judicial branch examining the work product of the General Assembly as it did in *Citizens Action Coalition*, the court was examining the executive branch's assertion of work product.[284] Thus, the judicial branch did not have to abstain from the questions' merits.[285] But the court agreed with the Governor that the trial court's in camera review of the documents' contents—to assess the validity of the assertion of work product—did not violate due process.[286] The citizen could have sought the ability to view the sealed records under protective order, but he did not seek that and thus forfeited that right.[287] "He [could not] avoid his forfeiture of that opportunity by claiming a due process violation."[288] Substantively, the court of appeals held that a white paper was subject to the attorney-client privilege under the common interest doctrine and that redacted information from invoices from an Indianapolis law firm hired to represent the Governor in the Texas litigation was subject to work product protection.[289]

Chief Judge Vaidik concurred with the decision on all issues but whether the Governor met the burden of showing that the white paper was subject to disclosure under the public records law.[290] The common interest doctrine only applied if the parties came to an agreement, but the evidence showed that the State of Indiana had not agreed yet to join the Texas litigation.[291]

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281. *See id.* at 1109 (holding that the Governor did not violate the Access to Public Records Act).

282. 51 N.E.3d 236 (Ind. 2016).

283. *Pence,* 67 N.E.3d at 1116.

284. *Id.*

285. *Id.*

286. *See id.* at 1116-17 (stating that the citizen's due process rights were not violated and that the purpose of in camera review is to identify whether information should be disclosed).

287. *Id.* at 1117.

288. *Id.*

289. *Id.* at 1108, 1119, 1123.

290. *Id.* at 1123 (Vaidik, C.J., dissenting).

291. *Id.* at 1124.