

RECENT DEVELOPMENTS UNDER THE INDIANA CONSTITUTION

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INTRODUCTION

The last year was marked by a sharp increase in the number of reported state court decisions construing provisions of the Indiana Constitution. The Indiana Supreme Court appears earnest about creating independent Indiana constitutional doctrine. Cases involving free speech, riverboat gambling, curbside trash, corporate reputations and equal privileges and immunities have all come before our appellate courts and received unique state constitutional analysis. While at times individual rights have been vindicated, the emerging doctrine is generally restrictive of individual liberty. With few exceptions, Indiana courts have granted considerable deference to the other two branches of state government, aligning with the state and against the individual. This Survey collects and comments on those decisions.

I. FREE SPEECH

Perhaps the most significant state constitutional decision in the past year is *Price v. State*.¹ In *Price* the individual prevailed, but the test the court adopted appears to enhance the government's ability to regulate speech. Nevertheless, *Price* represents a major and original shift in the supreme court's free speech jurisprudence, and a sincere attempt to breathe new life into the Indiana Constitution.²

The facts in *Price* are as follows: The police were called to a raucous New Year's Eve party in Indianapolis and attempted to break up a crowd in the street. They confronted and arrested one particularly unruly party-goer. Another member of the crowd, Colleen Price, loudly objected to the arrest, and an officer threatened to arrest her if she did not quiet down. Ms. Price responded "f--- you. I haven't done anything." The police then arrested Price, charging her with public intoxication,³ disorderly conduct,⁴ and interfering with a law enforcement officer by force.⁵ After a bench trial, she was convicted of disorderly conduct and public intoxication, but acquitted on the interfering count.⁶ Price appealed the disorderly conduct charges, but the trial court and the court of appeals rejected her constitutional challenge which was premised upon Indiana's free speech guarantee.⁷ Both lower courts analyzed the issue as if the challenge had been based upon the First Amendment to the United States Constitution. The Indiana Supreme

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1. 622 N.E.2d 954 (Ind. 1993).

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

3. See IND. CODE § 7.1-5-1-3 (1993).

4. See *id.* § 35-45-1-3(2).

5. See *id.* § 35-44-3-3(a)(1).

6. *Price*, 622 N.E.2d at 956-57.

7. See *Price v. State*, 600 N.E.2d 103 (Ind. Ct. App. 1992).

Court granted transfer and reversed the disorderly conduct conviction based on Article I, Section 9 of the Indiana Constitution.⁸

The court observed that it had not had many opportunities "to explicate the scope of Article I, [Section] 9,"⁹ despite the clause's 142 years of existence. The court then used the historical framework for analysis that it had previously set forth in *State Election Board v. Bayh*: "Interpretation of the Indiana Constitution is controlled by the text itself, illuminated by history and by the purpose and structure of our constitution and the case law surrounding it."¹⁰

Although the provision was never discussed during Indiana's Constitutional Convention of 1850-51, the court found "ample indicia [in Section] 9" to illuminate its meaning.¹¹ The court relied upon the text of the section in rejecting the State's argument that Price's speech was outside the protection of Section 9. The court stated that the provision protects the right to speak "on any subject whatever."¹² The relevant inquiry was whether the speech in question constituted an "abuse" of the right to speak under Section 9.¹³ This approach departs from federal jurisprudence and appears to provide greater protection in Indiana for some forms of speech.¹⁴

However, this promising development was offset by two disturbing pronouncements. First, the court in dictum said that violating "rational" statutes generally constitutes "abuse."¹⁵ Second, the court rejected the use of overbreadth analysis under Indiana law.¹⁶ These two developments are discussed in reverse order.

The court's perfunctory rejection of Price's per se challenge to the disorderly conduct statute premised upon its overbreadth was an unfortunate self-imposed limit on the court's power to protect individual rights.¹⁷ Price's facial challenge contended that the statute is substantially overbroad and that, when applied as in this case, the statute is used to curtail protected speech. Price argued that the statutory phrase "unreasonable noise" gives too

8. "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible." IND. CONST. art. I, § 9.

9. *Price*, 622 N.E.2d at 957.

10. *Id.* (citing *State Election Bd. v. Bayh*, 521 N.E.2d 1313, 1316 (Ind. 1988)).

11. *Id.*

12. *Id.*

13. *Id.* at 959.

14. This textual approach rejects a strand of First Amendment jurisprudence that sets some forms of speech, such as obscenity, fighting words, and speech likely to lead to imminent lawless activity, outside the protection of the First Amendment. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (imminent lawless activity advocacy); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words).

15. *Price*, 622 N.E.2d at 960.

16. *Id.* at 958.

17. The United States Supreme Court's overbreadth doctrine allows courts to invalidate laws directed toward unprotected speech but that sweep too broadly against protected speech. The doctrine is designed to remove the deterrent effect such laws have on free speech and render unnecessary a case-by-case narrowing of the offensive legislation. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940); *see generally* Note, *The Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

much discretion to law enforcement officers to arrest a person if the officer personally takes offense to the content of the person's speech.

In rejecting this claim, the court noted that federal overbreadth analysis is rooted in the proposition that expression occupies a "preferred" position within the Federal Bill of Rights, a status not enjoyed under the Indiana Constitution.¹⁸ Thus, Indiana courts "should focus on the actual operation of the statute at issue and refrain from speculating about hypothetical applications. . . . Unless the court concludes that the statute is incapable of constitutional application, [the court] should limit itself to vindicating the rights of the party before it."¹⁹

The court's rejection of the overbreadth doctrine can, and should, be limited to the facts of this case. Under federal constitutional jurisprudence, for the doctrine to apply, the "overbreadth . . . must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."²⁰ When an Indiana litigant makes that showing, our courts should be able to declare the statute unconstitutional and enjoin its enforcement. While the facts of Ms. Price's arrest fit well with this theory, she did not present any evidence that other people have suffered similar treatment under the disorderly conduct statute. The court should revisit the overbreadth issue in a future case that presents a more developed factual record indicating that the challenged statute is frequently used to abridge speech. The court's use of overbreadth analysis in other contexts supports its continued application in speech cases.²¹

Even more troublesome than its rejection of overbreadth analysis, the court suggested a rational basis review standard for most types of statutory restrictions on speech. The court noted: "Accordingly, while violating a rational statute will generally constitute abuse under [Section] 9, the State may not punish expression when doing so would impose a material burden upon a core constitutional value."²²

This test appears heavily weighted in favor of the state. The court recognized that the state's police power is broad and has acknowledged that this formulation makes the speech right appear illusory.²³ It also recognized that in other contexts most statutes prove rational when challenged.²⁴ By contrast, the First Amendment subjects most statutorily-based restrictions on speech to strict scrutiny.²⁵ The *Price* decision may thus leave speech

18. *Price*, 622 N.E.2d at 958 (citing *Thornhill*, 310 U.S. at 97).

19. *Id.*

20. *Broadick v. Oklahoma*, 413 U.S. 601, 615 (1973).

21. The court used an overbreadth analysis sub silentio in answering a certified question from the U.S. District Court for the Northern District of Indiana in *In Re Zumbrun*, 626 N.E.2d 452 (Ind. 1993). See *infra* notes 179-85 and accompanying text.

22. *Price*, 622 N.E.2d at 959.

23. *Id.* at 959.

24. *Indiana Dep't of Env'tl. Mgmt. v. Chemical Waste Mgmt., Inc.*, 643 N.E.2d 331 (Ind. 1994); see *infra* notes 158-78. But see *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (using rational basis review to invalidate a zoning ordinance requiring a special use permit for a proposed group home for the mentally retarded); *Plyer v. Doe*, 457 U.S. 202 (1982) (striking as irrational a Texas statute denying public education to children of illegal immigrants).

25. See, e.g., *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

with substantially less protection under Section 9. Under *Price*, it appears speech may be regulated by statute for any "rational" reason, so long as a "core constitutional value" is not "materially burdened," and the court's decision is unclear about which values are core.

Despite seemingly broad power ceded to the state to regulate speech, the court held out "core" values as a source of protection.²⁶

[I]n Indiana the police power is limited by the existence of certain preserves of human endeavor, typically denominated as interests not "within the realm of the police power," . . . upon which the State must tread lightly, if at all. Put another way, there is within each provision of our Bill of Rights 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.²⁷

What are the core constitutional values protected by Section 9? The court did not provide an exhaustive list in *Price*. It did, however, identify political speech as one of the "cluster" of values at the core of the provision, and defined that term broadly to include "mouthing-off" to a police officer.²⁸ It concluded that in 1851 when the framers removed the provision in the 1816 constitution that specifically protected the right to "examine the proceedings of the legislature, or any branch of government,"²⁹ they must have done so because the right to question governmental authority was so well-established that it needed no specific authorization in the constitution; only a general one was needed, such as the new version of Section 9.³⁰

Hopefully the analysis in *Price* will not prove an impediment to the discovery of additional broadly defined core values protected by Section 9 and other sections of the Indiana Bill of Rights. The term "cluster" is plural, not singular, and history suggests that the framers intended most forms of speech to receive plenary constitutional protection.³¹

The court relied upon the framers' natural rights philosophy to determine whether *Price*'s political speech constituted "abuse" under Section 9. The framers "perceived no dichotomy between individual rights and communal needs,"³² and thus erected a system wherein "government power [is] intended to support individual freedom."³³ Accordingly, the court concluded, the term "abuse" should be defined "to correlate the enjoyment of individual rights and the exercise of state power such that the latter facilitates the

26. *Price*, 622 N.E.2d at 960.

27. *Id.* (quoting *Milharcic v. Metropolitan Bd. of Zoning Appeals*, 489 N.E.2d 634, 637 (Ind. Ct. App. 1986)). Justice Shepard's "material burden" test resembles Justice O'Connor's "undue burden" test adopted by the United States Supreme Court to judge abortion regulations. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 520 (1989) (rejecting the trimester formulation of *Roe v. Wade*, 410 U.S. 113 (1973), and subjecting all abortion restrictions to an undue burden analysis).

28. *Price*, 622 N.E.2d at 963.

29. IND. CONST. art. I § 9, cl. 1 (amended 1851).

30. *Price*, 622 N.E.2d at 962-63.

31. *Cf. Price*, 622 N.E.2d at 962-63 ("Public discourse could hardly be called an abuse which impairs the sovereign when, in fact, a hale state government requires that discourse be unfettered and forthcoming.").

32. *Id.* at 959.

33. *Id.* at 958.

former.”³⁴ “Abuse,” then, is “that expression which injures the retained rights of individuals or undermines the State’s effort to facilitate their enjoyment.”³⁵ For political speech to constitute “abuse,” it must amount to more than a public nuisance; instead, it must inflict upon “determinant parties harm analogous to that which would sustain tort liability against the speaker.”³⁶ Because Price’s speech did not injure anyone in a tortious sense, it did not constitute abuse.

Although *Price* sets forth a unique state constitutional doctrine, it retains the primary historical approach to constitutional interpretation found in *Bayh v. Sonnenburg*,³⁷ and adopts a balancing test that seems heavily weighted in favor of the state. Colleen Price’s conviction was overturned, but the state’s power to punish speech under the Indiana Constitution appears to have been enhanced.³⁸ With time and additional cases, the court’s newly stated doctrine of core values may evolve and afford greater protection for speech than currently appears possible under the above formulation.

Whether *Price* will have continuing relevance, however, is unclear. *Price* was a three-two decision that was still pending rehearing at the end of 1994.³⁹ Moreover, in the year since its publication, no court, not even a single justice, has articulated another “cluster of essential values” within any other provision of the Indiana Bill of Rights. The court also has ignored the material burden test. Whether *Price* represents the watershed in state constitutional law, as suggested by some commentators, remains to be seen.⁴⁰

The Indiana Court of Appeals has experienced difficulty navigating in the wake of *Price*. In *Radford v. State*,⁴¹ the defendant, a hospital employee, who had been fired earlier that day, was allegedly removing hospital property when she was stopped in a corridor and questioned by a police officer. She complained, loudly, that the officer was “hassling” her and refused to cooperate. Judges Shields and Friedlander concluded that Radford’s speech, “like that of Price, protested the legality and appropriateness of police conduct.”⁴² It was therefore political speech and, given the facts, at most constituted a public nuisance but did not inflict harm upon any determinant party sufficient to sustain tort liability.⁴³ Radford’s conviction was reversed. Judge Staton, in dissent, argued that

34. *Id.*

35. *Id.*

36. *Id.* at 964. The court noted that “public nuisance” speech does not require an actual breach of the peace or threat to any individual, but “private nuisance” speech requires a showing of tortious harm to an individual. After *Price*, only the latter is sufficient to constitute abuse. *Id.* at 963-64.

37. 573 N.E.2d 398 (Ind. 1991).

38. The United States Constitution still provides a floor for the protection of speech rights below which the State may not fall.

39. Justice Krahulik, a member of the three-member majority in *Price*, has left the court, as has Justice Givan, who joined Justice Dickson in dissent.

40. See Patrick Baude, *Has The Indiana Constitution Found Its Epic?*, 69 IND. L.J. 849 (1994). Professor Baude praises the court’s opinion as providing a unique vision and meaning to the Indiana Constitution. For a comparison of *Price* to federal free speech jurisprudence, see Daniel O. Conkle, *The Indiana Supreme Court’s Emerging Free Speech Doctrine*, 69 IND. L.J. 857 (1994).

41. 627 N.E.2d 1331 (Ind. Ct. App. 1994) [hereinafter “*Radford I*”].

42. *Id.* at 1332.

43. *Id.* at 1333.

the majority overlooked the importance of the forum—a hospital.⁴⁴ He considered Radford's speech nonpolitical in nature because it was motivated by an effort to avoid detection of personal wrongdoing.⁴⁵ Because the speech was nonpolitical and the statute rational, Judge Staton would have upheld the conviction.

Judge Staton prevailed nine months later. The State petitioned for rehearing. Judge Shields had left the court and was replaced on the panel by Judge Barteau. Judge Staton's dissent became the majority opinion, with Judge Barteau concurring.⁴⁶ Judge Friedlander dissented for the reasons set forth in Judge Shield's previous majority opinion. The supreme court denied transfer in the case.

In *Stites v. State*,⁴⁷ the court of appeals upheld a disorderly conduct conviction based upon the defendant's loud argument with her ex-boyfriend after police had arrived and told her to be quiet. In rejecting a *Price* defense, Judge Staton, again writing for the court, noted that "[t]he mere presence of a police officer does not convert a defendant's speech into political expression."⁴⁸

In contrast, in *Whittington v. State*,⁴⁹ Judge Staton reversed a conviction for disorderly conduct where the speech in question was a loud argument between two men that occurred in the defendant's own home and where no evidence showed that it was "detectable by anyone outside of his residence or that it 'intolerably impaired' another person's privacy or use of his land."⁵⁰

The opinions in *Whittington* and *Radford II* are difficult to reconcile with each other and with *Price*. The speech in *Whittington* did not protest government action and, therefore, was not "political" in the *Price* sense. In *Radford II*, no particular individual was identified whose privacy interest was invaded, and Radford's speech, regardless of its motivation, protested police action and, therefore, fell squarely within *Price*. Finally, as noted in Judge Hoffman's dissent in *Whittington*, other members of defendant's household were subjected to the defendant's tirade, including his pregnant girlfriend who complained to police that the defendant had hit her in the abdomen.⁵¹ If *Price* survives, it will take some time for its teachings to become apparent.

44. *Id.* at 1334 (Staton, J., dissenting).

45. Whether Radford was actually doing anything illegal is unclear from the opinion. The only issue on appeal was her conviction for disorderly conduct based upon her speech. Judge Staton's distinction about the protections afforded by § 9 based upon the speaker's motivation resembles the private/public concern dichotomy under the Supreme Court's First Amendment jurisprudence for public employee speech. *See Connick v. Myers*, 461 U.S. 138 (1983).

46. 640 N.E.2d 90 (Ind. Ct. App. 1994) [hereinafter "*Radford II*"].

47. 627 N.E.2d 1343 (Ind. Ct. App. 1994).

48. *Id.* at 1345.

49. 634 N.E.2d 526 (Ind. Ct. App. 1994).

50. *Id.* at 527.

51. *Id.* at 528 (Hoffman, J., dissenting).

II. SEARCH AND SEIZURE

In *Moran v. State*,⁵² the court approved warrantless searches of curbside garbage, rejecting federal search and seizure jurisprudence, and adopting a uniquely Hoosier view of the rights of privacy under Article I, Section 11 of the Indiana Constitution.⁵³ The court reviewed the origins of Section 11 and observed that a similar provision appeared in the constitutions of various American states, including Virginia's 1776 constitution, shortly after the Declaration of Independence.⁵⁴ It appeared in the Federal Bill of Rights in 1791 as the Fourth Amendment and was replicated without change in the original 1816 Indiana Constitution. The court noted that the original purpose of the provision was to prevent abuses of police power like those in which the British engaged against the colonists.⁵⁵ The court concluded that the "primary and overarching mandate" of the provision was to ensure that the government acted reasonably.⁵⁶ In departing from federal jurisprudence, the court specifically rejected the familiar two-part *Katz* test under the Fourth Amendment.⁵⁷ This test asks first whether the individual actually possessed an expectation of privacy, and, second, whether society recognizes that expectation as reasonable.⁵⁸

The *Moran* court held that the purpose of Section 11 "is to protect from unreasonable police activity those areas of life that Hoosiers regard as private," and stated that the Section should receive a "liberal construction," to guarantee against unreasonable search and seizures.⁵⁹ The court relied upon Indiana cases decided prior to the application of the Fourth Amendment to the states to define the word "search" as "prying into hidden places for that which is concealed."⁶⁰

While recognizing that "Hoosiers are not entirely comfortable with the idea of police officers casually rummaging through trash left at curbside,"⁶¹ the court nonetheless upheld the search. The court's reasoning is curious:

52. 644 N.E.2d 536 (Ind. 1994).

53. IND. CONST. art. I, § 11 provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

The United States Supreme Court approved warrantless searches of curbside garbage under the Fourth Amendment in *California v. Greenwood*, 486 U.S. 35 (1988).

54. *Moran*, 644 N.E.2d at 539 (citing RICHARD L. PERRY, *SOURCES OF OUR LIBERTIES* (1959)).

55. *Id.*

56. *Id.*

57. *Id.* at 540 (citing *Katz v. United States*, 389 U.S. 347 (1967)).

58. *Id.*

59. *Id.*

60. *Id.* (quoting *Lindsey v. State*, 204 N.E.2d 357, 362 (1965) (quoting *McCoy v. State*, 170 N.E.2d 43, 48 (1960))). The court noted that if one considers "concealed" to be an objective inquiry and "hidden" to be subjective, then this standard might be understood as a precursor to *Katz*. *Id.* at 541 n.3.

61. *Id.* at 541.

We do not lightly entertain intrusions on those things that we regard as private, i.e. concealed and hidden. However, at the same time the inhabitants of this state have always valued neighborliness, hospitality, and concern for others, even those who may be strangers. Here, an open front walk leading to the front porch of a house is accurately judged by the passerby to be an open invitation to seek temporary shelter in the event of a sudden downpour. Stepping on that part of a yard next to the street or sidewalk to seek shade from a tree or to pick edible yet valueless plants growing in the lawn has been regarded proper conduct. It is permissible for children at play on the street or in the alley to examine the contents of garbage cans to find interesting items, so long as they do not make a mess. It is not infrequent that valuable items are placed in the trash in hopes that someone passing by will see them there and will take them and make good use of them. It has often been said that if you do not want others to know what you drink, don't put empties in the trash.⁶²

It seems that "Hoosier Hospitality" has the effect of diminishing the rights Indiana citizens might otherwise enjoy against police intrusions.

Justice Dickson concurred in the majority's rejection of federal jurisprudence but dissented with respect to the application of the "hidden and concealed" standard to this case.⁶³ Justice Dickson "remain[ed] convinced that Indiana citizens should be able to dispose of their trash without relinquishing their privacy."⁶⁴ He observed that one's garbage can reveal intimate, personal details of a person's religious beliefs, finances, political interests, medical and legal matters, personal relationships and numerous other confidential matters.⁶⁵ The fact that people rely upon governmental or commercial trash collection systems did not seem to Justice Dickson to diminish their reasonable expectations of privacy in those effects. He noted that if the police had probable cause to believe that the contents of curbside trash would reveal evidence of criminal wrongdoing, they could and should seek search warrants to search and seize it.⁶⁶

In *Taylor v. State*,⁶⁷ a fairly routine search and seizure case, Judge Kirsch restated basic premises of state constitutional law. First, "Indiana courts have the responsibility

62. *Id.* (footnotes omitted).

63. 644 N.E.2d at 543 (Dickson, J., dissenting).

64. *Id.*

65. *Id.*

66. Perhaps because Chief Justice Shepard recused himself from the case, the *Moran* court missed the opportunity to anchor its result in *Price*. It did not define the cluster of rights at the core of § 11 and did not question whether those rights were materially burdened. The court could have let the struggle between the refined gentile southern planter class and the rough frontiersman class, as related by Chief Justice Shepard in *Price*, 622 N.E.2d at 61-62, inform the constitutional analysis. Because this struggle was "won" by the individualistic frontiersmen, the court could have concluded that Hoosiers are more independent, libertarian, and suspicious of governmental action than the average American. This conclusion would have provided a principled basis for a broader privacy right emanating from § 11 than that contained in the Fourth Amendment. The court could have both rejected *Greenwood* and reaffirmed the unique vision of the Indiana Constitution in *Price*.

67. 639 N.E.2d 1052 (Ind. Ct. App. 1994).

of independent [state] constitution analysis. . . . [O]ur courts should decide such issues independently of federal law, and should neither defer nor grant precedential status to federal decisions interpreting analogous federal constitutional provisions."⁶⁸ If Indiana courts apply federal constitutional interpretations to state constitutional provisions, the decisions become Indiana law and remain unchanged by subsequent federal decisions altering federal interpretations.⁶⁹ The state constitutional provisions should be analyzed first. Only if the state constitution does not provide the protection should the court consider whether the act is protected by provisions of the federal constitution.⁷⁰

The *Taylor* court used these principles to reject a claim that an investigatory stop of a vehicle constituted an unreasonable seizure in violation of the Indiana Constitution, Article I, Section 11. In Section 11 cases, the court balances the individual's rights to liberty, privacy, and free movement against society's right to protect itself.⁷¹ Indiana courts permit brief investigatory stops based upon "reasonable suspicion of criminal activity."⁷² Such suspicion was present when a police officer observed Taylor in a vehicle parked in an unusual location with the vent window broken in a manner that indicated illegal entry. When the officer approached, the van sped off. The officer then turned on his red lights and pulled the van over. Because his suspicions were reasonable, the officer was justified in briefly detaining Taylor and conducting an investigation of possible criminal activity. His subsequent radio check disclosed that the van had been stolen. Accordingly, the defendant's arrest and conviction for auto theft did not violate the Indiana Constitution. Because this interpretation of the Indiana Constitution is consistent with federal interpretations of the Fourth Amendment, the court also rejected the defendant's federal claim.⁷³

III. CRIMINAL PROCEDURE

In *State v. Owings*,⁷⁴ the Indiana Supreme Court accepted transfer and affirmed the decision of the court of appeals which found no violation of the Article I Section 13⁷⁵ requirement of a face-to-face confrontation of witnesses. In *Owings*' trial, the prosecutor used the deposition of a witness that was taken in the absence of the defendant. The witness died prior to trial, and the defendant sought to exclude the deposition complaining that she had been unable to attend the deposition. The defendant's lawyer attended the

68. *Id.* at 1053.

69. *Id.*

70. *Id.*

71. *Id.* at 1054.

72. *Id.*

73. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1 (1968); *Alabama v. White*, 496 U.S. 325 (1990)).

74. 622 N.E.2d 948 (Ind. 1993), *aff'g* *State v. Owings*, 600 N.E.2d 568 (Ind. Ct. App. 1992).

75. IND. CONST. art. I, § 13 provides:

In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.

deposition, but the defendant, an alleged trafficker with a prisoner at the Indiana Youth Center, was excluded from the Youth Center, where the deposition was taken.

Justice Krahulik, writing for the majority, reviewed the distinctions between the Confrontation Clause in the Sixth Amendment and the state constitution's unique language, which provides the defendant with the right to meet the witness "face-to-face."⁷⁶ Nevertheless, the court held that, like other constitutional rights, this one can be waived by word or deed.⁷⁷ Owings waived that right because she had neither made a specific request to be allowed to enter the Youth Center for the purpose of the deposition, nor attempted to have the deposition taken elsewhere.⁷⁸

In his dissent, Justice DeBruler emphasized that the record did not disclose that the right was personally waived. Before a right could be waived, he would require: "(1) an intelligent personal decision to forgo the right, (2) without coercion and (3) with a full awareness of that right."⁷⁹ Justice DeBruler admonished that "[w]hen there is judicial, legislative, and executive respect for and observance of all of the enumerated individual rights granted by this provision, the promised security will be manifest."⁸⁰

In *Campbell v. State*,⁸¹ the supreme court held that the exclusion of a defendant's own alibi testimony, because of noncompliance with the twenty-day notice requirements of Indiana Code section 35-36-4-1, violates Article I, Section 13 of the Indiana Constitution. That provision provides, in pertinent part: "In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel . . ."⁸² Justice DeBruler noted that Section 13 "places a unique value upon the desire of an individual accused of a crime to speak out personally in the courtroom and state what in his mind constitutes a predicate for his innocence of the charges."⁸³ The court noted that if the State were surprised by the alibi, it could seek a continuance.⁸⁴ The United States Supreme Court reached a different conclusion under the compulsory process clause of the Sixth Amendment in *Taylor v. Illinois*.⁸⁵

Justice Givan dissented in *Campbell*. He believed that a person charged with a crime knows of any alibi he or she might have at the beginning of the case, and that the twenty-

76. *Owings*, 622 N.E.2d at 950-51 (citing *Brady v. State*, 575 N.E.2d 981, 988 (Ind. 1991) ("The Indiana Constitution recognizes that there is something unique and important in requiring face-to-face meeting between the accused and the State's witnesses as they give their trial testimony.")).

77. *Id.* at 952.

78. *Id.* at 953. The court found that generally no right existed for the criminal defendant to be present at a deposition. *Id.* at 951. Nonetheless, an exception to this rule seems to exist if the deposition is to be used as substantive evidence by the state at trial. Criminal defense counsel should object to depositions that may be used later at trial if their clients are unable to attend. Prosecutors who take depositions without defendants present should seek to make a record that the defendant was aware of the deposition and given the opportunity to attend.

79. *Id.* at 953 (DeBruler, J., dissenting).

80. *Id.*

81. 622 N.E.2d 495 (Ind. 1993).

82. IND. CONST. art. I, § 13.

83. *Campbell*, 622 N.E.2d at 498.

84. *Id.*

85. 484 U.S. 400 (1988).

day requirement to provide the state with notice of that alibi does not implicate the defendant's rights.⁸⁶

In *Hadley v. State*,⁸⁷ the court of appeals held that while a misdemeanor defendant is entitled to a jury trial under the Indiana Constitution, a right not enjoyed under the U.S. Constitution,⁸⁸ that right can be waived where the defendant does not make an affirmative request for a jury trial. In contrast, a person charged with a felony has an automatic right to a jury trial unless he or she affirmatively waives that right.⁸⁹ Thus, a misdemeanor defendant's right to a jury trial is not self-executing. Rather, the defendant must affirmatively demand a jury trial pursuant to Indiana Criminal Rule 22, which requires him to do so in writing at least ten days prior to the first scheduled trial date.⁹⁰ Hadley had signed an advisement of rights form, which informed him that his right to a jury trial would be waived unless requested at least ten days prior to the first trial setting.⁹¹ The court of appeals held that Hadley waived his right by failing to make such a request.⁹² The court reached this holding despite the fact that the record was silent as to whether Hadley knew how to read or understood the form.⁹³

IV. CRIMINAL LAW

In two cases, *Helton v. State*⁹⁴ and *Jackson v. State*,⁹⁵ the court of appeals considered the constitutionality of Indiana's criminal gang statute.⁹⁶ In each case the defendants mounted free speech, association and equal protection challenges to the statute under both the federal and state constitutions.⁹⁷ Both the first and fifth districts upheld the statute, and neither court applied an analysis of the state constitutional issues different from their federal counterparts.⁹⁸ Both courts followed the supreme court's admonition in *Price* not to engage in an overbreadth analysis under Article I, Section 9 of the state constitution.⁹⁹ They did, however, narrow the application of the statute to defendants who "actively participate" in a group that requires its members to commit felonies or batteries, who know of the group's criminal activities, and who have the specific intent to further the group's criminal conduct.¹⁰⁰ Both courts noted that the criminal gang statute does not

86. *Campbell*, 622 N.E.2d at 501 (Givan, J., dissenting).

87. 636 N.E.2d 173 (Ind. Ct. App. 1994).

88. *See* *Blanton v. City of Las Vegas*, 489 U.S. 538 (1989) (no Sixth Amendment right to a jury trial if the possible penalty does not exceed incarceration of six months).

89. *Hadley*, 636 N.E.2d at 175.

90. *Id.*

91. *Id.*

92. *Id.* at 176.

93. *Id.* at 175.

94. 624 N.E.2d 499 (Ind. Ct. App. 1993).

95. 634 N.E.2d 532 (Ind. Ct. App. 1994).

96. IND. CODE § 35-45-9-1 (Supp. 1994).

97. *Helton*, 624 N.E.2d at 504; *Jackson*, 634 N.E.2d at 533.

98. *Helton*, 624 N.E.2d at 515; *Jackson*, 634 N.E.2d at 537.

99. *Helton*, 624 N.E.2d at 507; *Jackson*, 634 N.E.2d at 536.

100. *Helton*, 624 N.E.2d at 508; *Jackson*, 634 N.E.2d at 536.

prohibit the mere association of individuals, nor does it criminalize the status of gang membership.¹⁰¹ In *Helton*, the defendant's conviction was affirmed because evidence existed that he directly participated in battering initiates to the group.¹⁰² In *Jackson*, no evidence was presented that the defendant actually committed a battery or was involved in a crime.¹⁰³ There was evidence, however, that the *Jackson* gang required initiates to commit felony battery as a condition of membership.¹⁰⁴ The court upheld Jackson's conviction because of evidence that he knew about this requirement, was an active participant in the gang, and specifically intended to further and facilitate the substantive criminal conduct of the group.¹⁰⁵

In *Conner v. State*,¹⁰⁶ the supreme court used the unique proportionality requirement contained in Article I, Section 16 of the Indiana Constitution¹⁰⁷ to vacate a six-year sentence for distributing a substance represented to be marijuana. Conner had sold fake marijuana to an informant who turned it over to police. Conner was subsequently arrested and convicted of distributing a non-controlled substance, represented to be a controlled substance, a class C felony under Indiana law.¹⁰⁸ Conner received a six-year prison sentence for this offense. Had he instead sold the same amount of marijuana, he would have only been convicted of a class D felony with a possible maximum prison term of three years.¹⁰⁹ Thus, Conner's sentence was twice as long because he sold fake marijuana rather than the real thing.

The court noted that to subject a person dealing ten pounds of real marijuana to less criminal liability than one who sells one gram of fake marijuana makes little sense.¹¹⁰ The discrepancy offended the court's sense of justice.¹¹¹ The court affirmed the conviction but vacated the sentence and remanded the case instructing the trial court to resentence Conner for not more than three years.¹¹²

As in *Campbell*, the twenty-day alibi notice case, Justice Givan was the lone dissenter in *Conner*.¹¹³ He saw no constitutional violation in what appeared to him to be a legislative determination that selling fraudulent drugs should be penalized more severely than selling actual drugs.¹¹⁴ Justice Givan wrote that the court should have presumed the

101. *Helton*, 624 N.E.2d at 511; *Jackson*, 634 N.E.2d at 535.

102. *Helton*, 624 N.E.2d at 515.

103. *Jackson*, 634 N.E.2d at 534.

104. *Id.*

105. *Id.* at 537.

106. 626 N.E.2d 803 (Ind. 1993).

107. "Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense." IND. CONST. art. I, § 16.

108. IND. CODE § 35-48-4-4.6 (1993).

109. IND. CODE § 35-48-4-10(b)(1)(B) (1993) (dealing more than thirty grams of marijuana, a Class D felony); IND. CODE § 35-50-2-7 (1993) (maximum prison term for Class D felony, three years).

110. *Conner*, 626 N.E.2d at 806.

111. *Id.*

112. *Id.*

113. *Id.* (Givan, J., dissenting).

114. *Id.*

statute constitutional and subjected it to rational basis review.¹¹⁵ What is interesting about *Campbell* and *Conner*, and other criminal cases as opposed to civil cases, is that the court is less willing to defer to legislative choices. If in *Campbell* the twenty-day notice provision had been presumed constitutional, and if in *Conner* the increased penalty for the fraudulent sale of drugs had been presumed constitutional, and if the defendants had to negate every conceivable rational basis for the statutes, the statutes most likely would have been upheld. As demonstrated by the cases that follow, the Indiana Supreme Court is much more likely to engage in minimal rationality review in the civil law context.

V. EQUAL PRIVILEGES AND IMMUNITIES

In *Collins v. Day*,¹¹⁶ the court rewrote state equal protection law. In doing so, it rejected a long line of cases interpreting Article I, Section 23 coextensively with the equal protection clause of the Fourteenth Amendment to the United States Constitution.¹¹⁷

Plaintiff Eugene Collins was a farm worker who broke his leg while working on defendant Glen Day's farm. Collins applied for worker's compensation benefits, but Indiana's worker's compensation statute specifically exempts agricultural workers from coverage.¹¹⁸ Collins was denied coverage by the Worker's Compensation Board and the Indiana Court of Appeals. The court concluded that Section 23 was the same as the Equal Protection Clause of the Fourteenth Amendment¹¹⁹ and that the exemption of agricultural workers from the statute was an economic classification, subject to minimal rational basis review scrutiny, which it easily survived. Collins sought transfer arguing that Section 23 was independent of and distinguishable from the Fourteenth Amendment, and that Section 23 imposes greater restrictions on the state's ability to classify citizens based on economic status.

The Indiana Supreme Court acknowledged that its case law has taken varying positions regarding the relationship between Section 23 and the Fourteenth Amendment.¹²⁰ The court reviewed the constitutional debates of 1850-51 and determined that Section 23 was introduced to "prohibit state entanglement in private profit-seeking ventures and to avoid the creation of monopolies."¹²¹ From its early cases, the court distilled a two-part test for Section 23 violations. First, to be permissible, legislative classifications "must be

115. *Id.*

116. 644 N.E.2d 72 (Ind. 1994). The author represented the plaintiff in this case.

117. U.S. CONST. amend. XIV provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The corresponding section of the Indiana Constitution provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." IND. CONST. art. I, § 23.

118. See IND. CODE 22-3-2-9(a) (1993).

119. *Collins v. Day*, 604 N.E.2d 647 (Ind. Ct. App. 1992).

120. *Collins*, 644 N.E.2d at 74. Compare *Hammer v. State*, 89 N.E. 850, 852 (1909) (Section 23 "is the antithesis of the Fourteenth Amendment to the federal constitution.") with *Dortch v. Lugar*, 266 N.E.2d 25, 39 (1971) (Section 23 and the Fourteenth Amendment "concern the abridging of privileges and immunities of citizens and protect substantially identical rights.").

121. *Collins*, 644 N.E.2d at 76.

based upon distinctive, inherent characteristics which rationally distinguish the unequally treated class, and the disparate treatment accorded by the legislation must be reasonably related to such distinguishing characteristics."¹²² Second, "any privileged classification must be open to any and all persons who share the inherent characteristics which distinguish and justify the classification, with special treatment accorded to any particular classification extended equally to all such persons."¹²³

If the court's analysis had ended with the construction of this two-part standard, some progress would have been made in equality law in Indiana. Unfortunately, the court overlaid this test with its common theme that "courts must accord considerable deference" to the legislature, must presume every statute to be constitutional, and must require the challenger "to negative every conceivable basis which might have supported the classification."¹²⁴ Further, "the question of classification under Section 23 is primarily a legislative question," and only subject to judicial review "where the lines drawn appear arbitrary or manifestly unreasonable."¹²⁵ This form of rational basis review provides little protection against legislative grants of unequal privileges and immunities.

The court specifically rejected the idea of establishing varying degrees of scrutiny for different protected interests.¹²⁶ In other words, the Indiana Supreme Court foreclosed future application of strict scrutiny review of infringements of fundamental rights or classifications based on suspect classifications, such as those based upon race or religion. After *Collins*, Section 23 provides substantially less protection than its federal counterpart.

VI. SPECIAL OR LOCAL LEGISLATION

The Indiana Constitution contains several provisions that have no federal analogues. One such provision is the requirement that all laws shall be general and must have uniform application throughout the state.¹²⁷

In *Indiana Gaming Commission v. Moseley*,¹²⁸ the Indiana Supreme Court again demonstrated considerable deference to the legislature by rejecting state constitutional

122. *Id.* at 79.

123. *Id.*

124. *Id.* The court speculated that the legislature could have had several reasonable bases for its exclusion of agricultural workers, including

the prevalence of sole proprietorships and small employment units, including numerous family operations; the distinctive nature of farm work, its attendant risks, and the typical level of worker training and experience; the traditional informality of the agricultural employment relationship and the frequent ancillary employee benefit programs; and the peculiar difficulties employers experience in passing along the additional cost of worker's compensation insurance to the consumer.

Id. at 81.

125. *Id.* at 79 (citations omitted).

126. *Id.*

127. "In all cases enumerated in the preceding Section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State." IND. CONST. art. IV, § 23.

128. 643 N.E.2d 296 (Ind. 1994).

challenges to the Indiana General Assembly's decision to limit riverboat gambling to certain geographic areas in the state and to delegate to local referenda the question of whether riverboat casinos would be licensed at all. The Porter Superior Court declared the riverboat gambling statute unconstitutional under Article IV, Section 23 of the Indiana Constitution but rejected a challenge to it premised on Article I, Section 23¹²⁹ of the state constitution.¹³⁰

Four Portage residents sued, claiming that the riverboat gambling law was not general but rather special legislation in violation of Article IV, Section 23.¹³¹ Their claim was premised on the referenda scheme authorizing riverboat casinos in Lake County based only on city-wide referenda, but requiring county-wide referenda in Porter and other counties.¹³² The plaintiffs claimed this was special legislation favoring the residents of Lake County cities and disadvantaging the Portage residents in Porter County.¹³³ They argued that if Portage had been treated like Gary, it too would have been eligible for a riverboat license.¹³⁴

The court first noted that one of the primary purposes of the constitutional convention of 1850-51, and the genesis of Article IV, Section 23, was to prohibit the legislature from enacting special or local legislation.¹³⁵ The court candidly admitted that it had "struggled since 1851 to articulate a consistent basis for determining when a law is special, and when its subject could be addressed through a general law."¹³⁶ That struggle continues in this case.

The court reaffirmed its position that Article IV, Section 23 questions are justiciable.¹³⁷ But its "high degree of deference to the legislature on [Section] 23 questions"¹³⁸ make that justiciability fairly meaningless. In upholding the legislation the court made some highly questionable factual assumptions. First, it concluded that "[i]t is apparent that the legislature's decision to permit casino gambling only on riverboats has the effect of rendering most Indiana counties unable to participate."¹³⁹ Also, the court assumed that the legislature

identified the universe of Indiana counties suitable to host riverboat gambling. Limiting the locations of riverboats to the specified counties naturally flows

129. See *supra* notes 116-26 and accompanying text.

130. *Moseley*, 643 N.E.2d at 297.

131. *Id.* at 298.

132. *Id.*

133. *Id.*

134. Voters in Gary, East Chicago and Hammond in Lake County voted for gambling, as did voters in LaPorte County, where voting was conducted on a county-wide basis. Voters in Portage in Porter County voted for gambling, but Porter County as a whole voted against gambling. *Id.*

135. *Id.* at 299. Immediately prior to the 1850 constitutional convention the legislature spent up to 90% of its time dealing with individual cases and local legislation including everything from granting divorces to providing for local roads, streets and alleys. *Id.*

136. *Id.* at 300.

137. *Id.*

138. *Id.*

139. *Id.* at 301.

from [the] fact that not every county is home to a suitable body of water. It is inherent in the riverboat decision to [issue] permit[s] [only to] riverboats. We conclude that riverboat gambling is not subject to uniform law of general applicability.¹⁴⁰

The actual universe of suitable counties is substantially larger given that riverboat casinos would not necessarily have to undock from port and thus do not need to be restricted to navigable bodies of water. Many ports along the Wabash, White and other rivers and lakes in the state are just as suitable. The real factor in the legislature's decision to limit riverboat gambling to certain geographic areas was the political influence of key legislators, not the navigability of the bodies of water.

The court can be excused for ignoring this political reality because it was never at issue. The plaintiffs did not seek to strike down the legislation nor to expand its operation to cities other than Portage. They were entrepreneurs disappointed by the county-wide vote in Porter County who merely wanted the same city-only voting scheme allowed in Lake County to be applied in Portage so that they could obtain and benefit from a riverboat gambling license. The plaintiffs only argued that the counties selected by the legislature had to be treated alike.¹⁴¹ In this limited context, the Indiana Supreme Court held that the legislation was constitutional.¹⁴² A broader attack might have been more persuasive; yet given the state's enormous economic interest in sponsoring riverboat casinos, the result would probably have been the same.

The court's analysis of the limited question presented by the plaintiffs is contained in a few sentences in which it speculates on a possible rational basis for the legislature's distinction between Lake and other counties. The court noted:

In Lake County, the whole of the waterfront is covered by substantial cities whose residents have the greatest interest in how the shore is used. In all the other [selected] counties, however, the shore contains both incorporated and unincorporated territory. It thus seems sensible to stage a vote of all persons in the county.¹⁴³

The court's test of constitutionality appears to rest on whether the legislation is "sensible." Yet its actual analysis does not serve as a check upon legislative classifications or local or special legislation.

The court also rejected the plaintiff's Article I, Section 23 challenge but recognized that the provision's original purpose was to prohibit the legislature from granting monopolies or special privileges to private commercial enterprises.¹⁴⁴ While this purpose

140. *Id.*

141. *Id.*

142. *Id.* at 304.

143. *Id.* at 301. This speculative basis for the legislation was not even suggested by the State but rather was raised for the first time at oral argument by Justice DeBruler.

144. The court refused to consider whether Article I, Section 23 should be construed independently from the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. It noted that the issue was squarely presented by the *Collins* decision. *Moseley*, 643 N.E.2d at 303. See *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994), *supra* notes 116-26 and accompanying text.

is exactly what the riverboat gambling statute was created to achieve, this purpose of the statute was never discussed in the case. Again, the plaintiffs avoided the issue because they wanted to benefit from the statute, not strike it down. In this context, the court reasoned, the historical basis for Section 23 did not apply to a voting scheme by which local people directly determine the allocation of commercial licenses. By ipse dixit, the court concluded that such referenda do not bestow benefits or privileges nor impose burdens on those individuals affected by the results. The court did not explain its conclusion nor did it compare the prospective Portage casino licensee with his counterpart in Hammond or East Chicago.¹⁴⁵

Justice Givan was the sole dissenter. He considered the statute to be applied unequally, and refused to accept the majority's assumption that a casino's effect in Lake County would be confined to the cities along the lake front. Justice Givan noted that all residents and taxpayers in a county with a casino would be significantly affected in terms of increased traffic and greater expenditure of county funds for law enforcement. He found no justification in treating the taxpayers of Lake County any differently than taxpayers of other counties in which referenda were authorized.¹⁴⁶

VII. RIGHT TO A REMEDY

In *Shook Heavy and Environmental Construction Group v. City of Kokomo*,¹⁴⁷ the court held that an unsuccessful bidder does not have a cause of action pursuant to a state statute that requires municipalities to award contracts to the lowest responsible and responsive bidder.¹⁴⁸ It also refused to create such a cause of action under the common law or Article I, Section 12 of the Indiana Constitution.¹⁴⁹

The court first reviewed the statutory framework for public lawsuits challenging public bid procedures. The court held that the statutory causes of action, one limited to taxpayers or citizens of the municipality, the other limited to claims of fraud or collusion, were not applicable.¹⁵⁰ *Shook* was neither a citizen nor a taxpayer of Kokomo, and did not allege collusion or fraud. Because the legislature created these two specific causes of action, along with an administrative process for the appeal of certain municipal decisions, a process which specifically excluded challenges to public bidding procedures, the court concluded that the legislature intended that there be no other causes of action regarding such public bidding.¹⁵¹

145. The court, relying upon *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 68 (1978), also concluded that the voting scheme did not violate the Fourteenth Amendment. *Moseley*, 643 N.E.2d at 304.

146. *Moseley*, 643 N.E.2d at 305.

147. 632 N.E.2d 355 (Ind. 1994).

148. *Id.* at 357. See IND. CODE § 36-1-9-3 (1993).

149. "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." IND. CONST. art. I, § 12.

150. *Shook Heavy*, 632 N.E.2d at 358.

151. *Id.* at 359.

Similarly, the court found no common law right on behalf of an unsuccessful bidder to force a governmental entity to contract with it.¹⁵² It refused to accept Shook's arguments that such a right should be created to protect the sanctity of the competitive bidding process and to insure a level playing field to all potential contractors. Rather, the court, speaking through Justice Sullivan, noted that there were important public policy arguments in favor of denying such a cause of action to unsuccessful bidders.¹⁵³ The court noted the primary interest was the expeditious construction of public works projects. According to Justice Sullivan, "No where is time money more than in the construction field."¹⁵⁴

The court also rejected Shook's argument for a cause of action based upon Article I, Section 12 of the Indiana Constitution. This issue, though not briefed, was raised at oral argument and the court declined to give it extensive treatment.¹⁵⁵ Nevertheless it took the opportunity to engraft federal due process law onto Article I, Section 12, and provided that to maintain a cause of action for injury to property, a person must allege some injury to a "protected property interest."¹⁵⁶ The court followed federal law in concluding that property interests are not created by procedural rules, but instead must be "derived from statute, legal rule or mutually explicit understanding and stemming from a source independent of the Constitution such as state law."¹⁵⁷ Because no statutory or common law cause of action existed, the court determined that Shook had no entitlement to the contract, and therefore was not deprived of a constitutionally protected property interest by the city's failure to award it the bid.

In *Indiana Department of Environmental Mgmt. v. Chemical Waste Management, Inc.*,¹⁵⁸ the court upheld Indiana's "good character" law¹⁵⁹ against a variety of challenges brought by a hazardous waste disposal company. The statute essentially allows the Commissioner of the Indiana Department of Environmental Management (IDEM) to deny hazardous waste disposal permits to companies that have paid \$10,000 or more to settle civil, criminal or administrative complaints against them in other states that alleged a violation of an environmental law. The Marion Superior Court enjoined the Commissioner from applying the statute to Chemical Waste's application for a permit to construct a hazardous waste disposal site in Allen County. IDEM appealed. The Indiana Supreme Court held that the case was not ripe for review because the solid waste management board had not promulgated rules governing review of the Commissioner's denial of permit applications.¹⁶⁰ Nevertheless, the court noted, although Article III of the U.S. Constitution limits federal courts from issuing advisory opinions, no such

152. *Id.* at 359-60.

153. *Id.* at 359.

154. *Id.*

155. *Id.* at 360.

156. *Id.* at 361.

157. *Id.* (quoting *Rice v. Scott County Sch. Dist.*, 526 N.E.2d 1193, 1196-97 (Ind. Ct. App. 1988) (citing, *inter alia*: *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593, 602 (1972))).

158. 643 N.E.2d 331 (Ind. 1994).

159. See IND. CODE 13-7-10.2 (1993 & Supp. 1994).

160. *Chemical Waste*, 643 N.E.2d at 337.

constitutional restriction exists in Indiana. It therefore chose to provide the Commissioner guidance in applying the statute in the future.¹⁶¹

The court first rejected Chemical Waste's argument that the statute violates equal protection and privileges and immunities principles because it distinguishes between non-commercial and commercial waste disposal facilities.¹⁶² The court determined that the statute did not implicate fundamental rights or suspect classifications and therefore was subject to rational basis review rather than strict or middle level scrutiny under the Fourteenth Amendment.¹⁶³ The court recognized that statutes rarely survive strict scrutiny and rarely fail the rational basis test.¹⁶⁴ In upholding the distinction the court reasoned that "the General Assembly has decided to concentrate the State's energies on regulating commercial waste disposal facilities and it is not our job to second guess such decisions."¹⁶⁵

The court relied upon its recent decision in *Collins v. Day* to reject the Article I, Section 23 challenge to the statute.¹⁶⁶ It found that the disparate treatment accorded commercial waste facilities was reasonably related to inherent characteristics that distinguished them from non-commercial facilities and that the preferential treatment accorded non-commercial facilities was uniformly and equally available to all such facilities. It also found Chemical Waste did not "negate every conceivable basis upon which might have supported the classification."¹⁶⁷

The court also concluded that the statute was not impermissibly vague and did not deny due process by its lack of a hearing prior to a ruling on the permit application. Nor did the lack of promulgated rules, which had been assumed by the statute, implicate due process or equal protection concerns.¹⁶⁸ Similarly, the court found that the statute did not impair contractual obligations nor impose an ex post facto law.¹⁶⁹ Additionally, the court found that the statute does not interfere with freedom of expression or associational interests on its face and that a challenge to the statute as applied was not yet ripe.¹⁷⁰ The broad delegation of authority given by the legislature to IDEM and the limited standards to guide the agency's discretion did not constitute an impermissible delegation of authority since the statute provided the Commissioner with reasons for denying a permit and the discretion to grant permits if mitigating factors are present. While this framework was "far from perfect," it seemed to the court to be adequate.¹⁷¹

161. *Id.* The court noted that the Indiana Constitution does not contain a "cases and controversies" limitation on the court's jurisdiction as does Article III of the United States Constitution, but the state constitution's separation of power language in Article III, § 1 fulfills an analogous function. *Id.* at 336-37.

162. *Id.* at 337 (citing IND. CODE § 13-7-10.2-1 (Burns Supp. 1993)).

163. *Id.* at 338.

164. *Id.* at 337.

165. *Id.* at 338.

166. *Id.* See *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994), *supra* notes 116-26 and accompanying text.

167. *Id.* (quoting *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585, 597 (1980)).

168. *Id.* at 339.

169. *Id.* at 339-40.

170. *Id.* at 340.

171. *Id.*

The court also rejected a challenge based upon Article I, Section 25 of the Indiana Constitution.¹⁷² The court noted that the statute authorized but did not require IDEM to deny permits based upon alleged environmental violations committed in other jurisdictions. It held that Article I, Section 25 controls only the Indiana General Assembly and not the Executive, and is concerned with how laws take effect. It considered the good character statute as analogous to habitual offender enhancement statutes which permit the courts to consider convictions of other jurisdictions that impose sentences in Indiana.¹⁷³

Because of the procedural posture, the court declined to decide whether reputation is a fundamental interest protected by Article I, Section 12.¹⁷⁴ The court observed that a natural person has a more significant interest in his reputation than a waste management company. Such a right seems fundamental based upon its explicit reference in our constitution, but its nature and scope awaits another day.¹⁷⁵

The court was concerned that the statute appeared to authorize IDEM to deny permits based solely on complaints in other jurisdictions. They found this portion of the statute in violation of Article I, Section 1 of the state constitution.¹⁷⁶ The court found that interfering with business or imposing unnecessary restrictions upon lawful occupations based on unsubstantiated allegations violates the fundamental rights contained in Article I, Section 1. The court thus construed the statute to avoid this unconstitutional result by precluding unsubstantiated complaints as grounds for the denial of permits.¹⁷⁷ The court imposed a requirement on the Commissioner to make specific findings that environmental violations had actually occurred prior to using the charges as a basis to justify the denial of a permit.¹⁷⁸

Perhaps the most important state constitutional principle emanating from *Chemical Waste* is the court's limitation of the state's police power based upon Article I, Section 1. The right to pursue an occupation remains vital in Indiana.

172. *Id.* at 341. Article I, § 25 provides: "No law shall be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." IND. CONST. art. I, § 25.

173. *Chemical Waste*, 643 N.E.2d at 341 (citing IND. CODE § 35-50-2-8 (Burns 1994)).

174. *Id.* at 337-38 (relying upon Article I, § 12 of the Indiana Constitution, which provides, in pertinent part: "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." IND. CONST. art. I, § 12 (emphasis added).)

175. For an excellent discussion of Article I, § 12, see Jerome L. Withered, *Indiana's Constitutional Right to a Remedy by Due Course of the Law*, 37 RES GESTAE, No. X, April 1994, at 456-64.

176. *Chemical Waste*, 643 N.E.2d at 341. Article I, § 1 provides: "WE DECLARE, that all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government." IND. CONST. art. I, § 1. This section essentially constitutionalizes the Declaration of Independence.

177. *Chemical Waste*, 643 N.E.2d at 341.

178. *Id.*

VIII. BANKRUPTCY

The same court that rejected the overbreadth doctrine in *Price*, used it sub silentio in answering a certified question from the United States District Court for the Northern District of Indiana. In *In Re Zumbrun*,¹⁷⁹ a debtor filed for Chapter 7 bankruptcy and listed as an asset an individual retirement account (IRA) valued at \$3600.00. Zumbrun contended that this IRA was protected under Indiana law, which then exempted “[a]n interest the judgment debtor has in a pension fund, a retirement fund, an annuity plan, an individual retirement account, or a similar fund, either private or public.”¹⁸⁰ The bankruptcy trustee contended that the exemption statute violated Article I, Section 22 of the Indiana Constitution, which requires the Indiana General Assembly to exempt from “a reasonable amount of property seizure or sale for the payment of any debt or liability.”¹⁸¹ The district court certified the question of whether the statute violated Article I, Section 22 by failing to impose a dollar limitation on the exempted individual retirement account.

Justice Shepard, writing for himself and Justices DeBruler and Givan, never questioned whether \$3600.00, the amount at issue in the case, was a “reasonable amount of property,” enabling the debtor “to enjoy the necessary comforts of life.”¹⁸² Instead, the court struck the statute as unconstitutional because it “exempted an unlimited amount of intangible assets from execution to pay legitimate debts, making it possible to closet virtually every liquid asset possessed by a debtor simply through placing the assets in some form of retirement instrument.”¹⁸³ This certainly has the appearance of an overbreadth analysis since the court failed “to limit itself to vindicating the rights of the [parties] before it,” and was instead “speculating about hypothetical applications.”¹⁸⁴

Justices Dickson and Sullivan dissented, complaining that a fair reading of Section 22 does not require the legislature to limit the amount of property exempt from a creditor’s claim, but rather mandates it to exempt *at least* a reasonable amount of property from collection.¹⁸⁵

CONCLUSION

There is a trend in Indiana, as elsewhere, for litigants to rely upon the state constitution as a source of independent rights. The Indiana Constitution is an expansive document that on its face provides broader protection for individual rights than does its federal counterpart. Indiana courts are serious about creating independent state

179. 626 N.E.2d 452 (Ind. 1993).

180. See IND. CODE ANN. § 34-2-28-1(a)(6) (West Supp. 1991). This statute was amended in 1993 to exempt only certain types and amounts of such funds. See 1993 Ind. Acts 4069.

181. Article I, Section 22 of the Indiana Constitution 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 hereafter contracted; and there shall be no imprisonment for debt, except in case of fraud.

182. IND. CONST. art. I, § 22.

183. *Zumbrun*, 626 N.E.2d at 455.

184. *Price v. State*, 622 N.E.2d 954, 958 (Ind. 1993). See *supra* notes 15-30 and accompanying text.

185. *Zumbrun*, 626 N.E.2d at 455 (Dickson, J., dissenting); *id.* at 456 (Sullivan, J., dissenting).

constitutional doctrine when fairly presented with a state constitutional argument. This past year saw a significant increase in the number of reported decisions applying state constitutional analysis. The developing doctrine is in significant flux as our state courts shake off the vestiges of federal constitutional jurisprudence and search for a unique vision of the Indiana Constitution. While it is too early to definitely characterize that vision, the doctrine being created generally reflects our current state judiciary, which is highly deferential to the legislative and executive branches, especially in civil matters. Only time and experience will reveal whether the rediscovery of the Indiana Constitution will substantially enhance the individual rights of Hoosiers.