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# EQUALITY AS A FUNDAMENTAL VALUE IN THE INDIANA CONSTITUTION

Michael John DeBoer\*

*Whatever the objections of the common law of England, there is a law higher in this country, and better suited to the rights and liberties of American citizens, – that law which accords to every citizen the natural right to gain a livelihood by intelligence, honesty, and industry in the arts, the sciences, the professions, or other vocations. . . .*

. . . .

*As was said by the supreme court of the United States . . . : “The theory upon which our political institutions rest is that all men have certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law.”*

*Before the law this right to a choice of avocations cannot be said to be denied, or intended to be abridged, on account of sex. Certainly the framers of our constitution intended no such result, and surely the legislature entertained no such purpose. Instead of such results having been intended in this state, we find the constitution declaring that such rights are inalienable.*

*Bearing in mind these inalienable rights, it is not possible for us to believe that the constitution was adopted, and the legislation enacted, in reliance upon any supposed rule of the common law which would exclude women from the enjoyment of any of such rights. We cannot believe that the law of this state was intended, by fixing the qualification for legitimate avocations of one class of citizens, to entirely exclude another class.*

– Justice Hackney, *In re Leach* (1893)<sup>1</sup>

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*Our law is no respecter of persons. The rights of just and upright citizens are not more sacred in the eyes of the law than the rights of the poorest and meanest citizens of the state. The safeguards erected by the Constitution are intended to protect the rights of all citizens alike. They protect the rights of the guilty as well as those of the innocent. The court cannot give its sanction to the conviction of any person accused of crime where the proceedings on which the judgment is based show the denial of a right to which the defendant was entitled under the Constitution. Such judicial sanction, in any case, would destroy the efficacy of the constitutional safeguards to protect the rights of all citizens of the state.*

– Justice Lairy, *Batchelor v. State* (1919)<sup>2</sup>

## I. INTRODUCTION

Undergirding the framework of state and federal constitutions are certain values, principles, and judgments so basic to the systems of law and government thereby constituted and the societies thereupon established that they may well be called fundamental. Among these are government by the people, individual freedom and liberty, the due process or course of law, justice and fairness, the dignity of every individual, and the essential equality of all human beings before the law.<sup>3</sup> Together, these values, principles, and judgments have a constitutive function in American systems of law and government.

Although these values, principles, and judgments have a long history that antedates state and federal constitutions, they have been recognized, indeed memorialized, in these documents. And today, decades and even centuries later, in contexts very different from those existing at the time of drafting, courts are looking to these age-old values, principles, and judgments to define the limits of governmental

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<sup>1</sup> In re Leach, 134 Ind. 665, 669, 34 N.E. 641, 642 (1893) (quoting *Cumming v. Missouri*, 71 U.S. (4 Wall.) 277, 321 (1866)); see IND. CONST. art. I, § 1 (recognizing the right of women in Indiana to practice law).

<sup>2</sup> *Batchelor v. State*, 189 Ind. 69, 84, 125 N.E. 773, 778 (1920).

<sup>3</sup> Indeed, the legitimacy, stability, and integrity of systems of law and government are measured according to how these basic values, ideals, and judgments are recognized and preserved.

power, to safeguard the basic rights of every individual, and to guide the resolution of disputes.<sup>4</sup>

Although these values, principles, and judgments might be studied in relation to each other and throughout the legal and governmental systems in the United States of America, this Article separately examines equality as a fundamental value in the system of law and government established by the 1851 Constitution of the State of Indiana.<sup>5</sup> This Article

<sup>4</sup> Half a century ago, the Indiana Supreme Court recognized this reality:

The preserving of the constitutional framework of our government against encroachment by one branch upon another is one of the prime responsibilities of our courts. Within and dependent upon this structure of constitutional government, our people are blessed by a galaxy of rights, privileges and immunities guaranteed to us by constitutional declaration. These have been amplified by a labyrinth of executive rules and regulations, legislative enactments and judicial declarations which our courts are, by inherent authority and constitutional mandate, required to preserve, construe, apply and enforce. . . .

. . . Our courts are the bulwark, the final authority which guarantees to every individual his right to breathe free, to prosper and be secure within the framework of a constitutional government. The arm which holds the scales of justice cannot be shackled or made impotent by either restraint, circumvention or denial by another branch of that government. . . .

. . . .

Courts are an integral part of the government, and entirely independent; deriving their powers directly from the Constitution, in so far as such powers are not inherent in the very nature of the judiciary. A court of general jurisdiction, whether named in the Constitution or established in pursuance of the provisions of the Constitution, cannot be directed, controlled, or impeded in its functions by any of the other departments of the government. The security of human rights and safety of free institutions require the absolute integrity and freedom of action of courts.

*Noble County Council v. State ex rel. Fifer*, 234 Ind. 172, 181-83, 125 N.E.2d 709, 713-15 (Ind. 1955) (quoting *Board of Com'rs of Elkhart County v. Albright*, 168 Ind. 564, 578, 81 N.E. 578, 582-83 (1907)).

<sup>5</sup> Equality may be described in a variety of ways—as a principle, an idea, a belief, an ideal, a right, a convention, and so on. The author will refer to equality as a value, indeed as a fundamental value. Although each of these descriptions contributes to a fuller understanding of equality, conceiving of equality as a value suggests that equality is an element that permeates our law and systems of government. Equality is a factor that is esteemed by the people in those systems, a standard that assists in judging the justness of the law and government conduct, and a quality that is aspirational, instructive, and transcendent. As a value, equality calls for continual reassessment and reformation and for consistency between what is believed and what is done. Remaining over time, it leads citizens and their governments to conceive of better societies and to work to create them. Furthermore, understanding equality as a value may help to explain how people can

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will argue that the framers of the Indiana Constitution understood equality to be a fundamental value and recognized it as such in the drafting of the document. In examining equality in the Indiana Constitution of 1851, this Article explores the framers' and the ratifiers' understanding of equality, their perspective on its role in law and government, the manner in which this value informed their work, and their attempt to safeguard equality both explicitly and implicitly in the constitution. This Article, however, looks beyond the text and context of the framers and ratifiers and considers several recent decisions by the Supreme Court of Indiana that have discussed equality or touched upon equality principles.<sup>6</sup>

In developing this theme, this study of equality in the Indiana Constitution will proceed in three steps. First, this Article will explore some of the currents that came together to shape the framers' and ratifiers' understanding of equality and ultimately the constitutional text they adopted. Second, this Article will study specific provisions within the Indiana Constitution that establish equality as a fundamental value and note some exceptions and inconsistencies inherent within the text. Third, this Article will consider several recent decisions by the Supreme Court of Indiana, observing the implications of these decisions for equality in Indiana.

## II. EQUALITY IN AMERICAN AND INDIANA HISTORY

The conceptions of equality held by the framers and ratifiers of the 1851 Indiana Constitution were influenced by the dominant currents in mid-nineteenth century America and Indiana as well as many of the same currents that flowed during the American Revolutionary era, that shaped the establishment of the new nation, the content of the United States Constitution, and the contours of American law, and that fueled the westward expansion of American boundaries and institutions.<sup>7</sup> A

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advance the value in one context, when they themselves are involved, yet compromise and act inconsistently in another context.

<sup>6</sup> This Article does not engage in contemporary debates regarding equality or the extent to which the government must play a role in equalizing society in economic terms and ensuring equality of opportunity and outcome. Rather, this Article focuses upon equality as it was understood by the framers, as set forth in the Indiana Constitution, and as interpreted by the courts.

<sup>7</sup> For general surveys of currents in American legal and political experience that shaped notions of equality, see J. BAER, *EQUALITY UNDER THE CONSTITUTION* 38-56 (1983); Patrick McKinley Brennan, *Arguing for Human Equality*, 18 J.L. & RELIGION 99 (2002); George P. Fletcher, *In God's Image: The Religious Imperative of Equality Under Law*, 99 COLUM. L. REV.

survey of these currents shows that Indiana in the late eighteenth and first half of the nineteenth centuries experienced a confluence of various equalitarian currents, ranging from the religious and philosophical to the legal and political. Although some of these currents originated in then contemporary movements that were altering the American landscape, others originated in ancient sources that influenced the trajectory of Western civilization and the development of the Western legal tradition.<sup>8</sup>

The architects of American legal and political systems drew upon traditions and ideas that had been cultivated in the Western world over centuries.<sup>9</sup> The natural law tradition is one such tradition,<sup>10</sup> a tradition grounded in Greek and Roman philosophy and Christian theology.<sup>11</sup> This tradition has left an indelible imprint on the Western legal tradition and permeated the thought of the founders of America and Indiana.<sup>12</sup> Although the natural law tradition has developed and changed over time, in the Western legal tradition it has been generally understood to teach that God the Creator has infused certain, fixed laws within nature and implanted them within the human mind and conscience.<sup>13</sup> Under

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1608 (1999); Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 254-60 (1983); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1060-76 (1996).

<sup>8</sup> This Article will not undertake a comprehensive study of these currents and their sources, but will present some of these currents in broad terms and focus upon the confluence of these currents in Indiana during the first half of the nineteenth century.

<sup>9</sup> JAMES MACGREGOR BURNS & JACK WALTER PELTASON, *GOVERNMENT BY THE PEOPLE: THE DYNAMICS OF AMERICAN NATIONAL GOVERNMENT* 65 (2d ed. 1954) (arguing that the traditions and ideas "were part of the intellectual luggage that the colonists had brought with them, or later imported, from the Old World").

<sup>10</sup> For general background material on the natural law tradition, see Brian Bix, *Natural Law Theory*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 223-40 (1996); J. BUDZISZEWSKI, *WRITTEN ON THE HEART: THE CASE FOR NATURAL LAW* (1997); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* (Robert P. George ed., 1992); *ORIGINS OF THE NATURAL LAW TRADITION* (Arthur L. Harding ed., 1954); BERYL HAROLD LEVY, *ANGLO-AMERICAN PHILOSOPHY OF LAW: AN INTRODUCTION TO ITS DEVELOPMENT AND OUTCOME* 3-15 (1991).

<sup>11</sup> HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 12 (1983).

<sup>12</sup> BERMAN, *supra* note 11, at 28 (noting that, even in the eleventh century, principles derived from the divine and natural law were used to judge emperors, kings, and lords); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, 4 (1977) (noting the prevalence, at the time of the founding of America, of the understanding that the common law was based upon the law of nature and its author).

<sup>13</sup> JOHN EIDSMOE, *CHRISTIANITY AND THE CONSTITUTION: THE FAITH OF OUR FOUNDING FATHERS* 40-41 (1987); BURNS & PELTASON, *supra* note 9, at 65 (stating that in this tradition "the natural law [are] known to all men through the use of reason and [are] binding on all," and "the laws of nature a[re] inherent, inescapable rules of human behavior-laws, in

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this tradition, human law is ultimately derived from and to be tested by reason and conscience.<sup>14</sup>

John Locke propounded a secularized version of this tradition:

The State of Nature has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one out to harm another in his Life, Health, Liberty, or Possession.<sup>15</sup>

Sir William Blackstone later reflected this tradition in commenting on the laws of England:

This will of his Maker is called the law of nature. For as God, when He created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when He created man, and endued him with free will to conduct himself in all parts of life, He laid down certain immutable laws of human nature, whereby that free will is in some degree regulated and restrained and gave him also the faculty of reason to discover the purport of those laws.

Considering the Creator only a Being of infinite power, He was able unquestionably to have prescribed whatever laws He pleased to His creature, man, however unjust or severe. But as He is also a Being of infinite wisdom, He has laid down only such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept. These are the eternal, immutable laws of good and evil, to which the Creator Himself in all his Dispensations conforms; and which He has enabled human reason to discover, so far as they are necessary for the conduct of human actions. Such, among others, are these principles: that we should live honestly, should hurt

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Cicero's words, that are in accordance with nature, apply to all men, and are unchangeable and eternal").

<sup>14</sup> BERMAN, *supra* note 11, at 12.

<sup>15</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 289 (1698) (Peter Laslett ed., 2d ed. 1967).

nobody, and should render to everyone his due; to which three general precepts Justinian has reduced the whole doctrine of law. . . .

This law of nature, being coeval with mankind and dictated by God Himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times; no human laws are of any validity, if contrary to this: and such of them as are valid derive all of their force, and all of their authority; mediately or immediately, from this original.<sup>16</sup>

The British colonies in America inherited this tradition. Thus, nearly fifty years before the Revolution, it was declared that “the Common Law, takes in the Law of Nature, the Law of Reason and the revealed Law of God; which are equally binding, at All times, in All Places, and to All Persons.”<sup>17</sup> During America’s founding era, Christian and deist thinkers could agree that the liberties and rights enjoyed by the people were based upon a “higher law” ordained by God that embodied “natural rights,” which were discoverable in nature and history.<sup>18</sup> According to the natural law, the essential natural, inalienable rights of humans include life, liberty, and property.<sup>19</sup> John Dickinson, one American founding father, reflected this sentiment when he wrote that rights “are born with us; exist with us; and cannot be taken away from us by any human power.”<sup>20</sup> It is worthy to note that the phrase “due process of law” is a fourteenth century English phrase meaning natural law, and thus the framers of the Fifth and Fourteenth Amendments to the United States Constitution wrote the natural law tradition into America’s fundamental law.<sup>21</sup>

Another set of ideas that molded thought in the founding era was the social compact (or contract) theory, which was particularly

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<sup>16</sup> SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Book I, Part I § II.

<sup>17</sup> HORWITZ, *supra* note 12, at 7 (quoting DANIEL DULANY, THE RIGHTS OF THE INHABITANTS OF MARYLAND TO THE BENEFIT OF THE ENGLISH LAWS (1728), in ST. G. SIOUSSAT, THE ENGLISH STATUTES IN MARYLAND 82 (1903)).

<sup>18</sup> JAMES Q. WILSON, AMERICAN GOVERNMENT 16 (1992); EIDSMOE, *supra* note 13, at 40-41.

<sup>19</sup> BURNS & PELTASON, *supra* note 9, at 65.

<sup>20</sup> BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 77 (1967) (quoting John Dickinson).

<sup>21</sup> BERMAN, *supra* note 11, at 12.



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influential in America in the 1700s and early 1800s.<sup>22</sup> This theory has roots in early Jewish thought and covenant theology and expanded and disseminated through the work of the religious descendants of the sixteenth century Swiss reformer John Calvin, including the Pilgrims, Congregationalists, Presbyterians, and other groups that dominated the colonial and early American landscape and dramatically influenced the development of American political and legal structures.<sup>23</sup> The social contract theory in this theological tradition taught that rulers derive their authority from God, but that God gives this authority to rulers through the people.<sup>24</sup>

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<sup>22</sup> LEVY, *supra* note 10, at 12.

<sup>23</sup> For a comprehensive overview of the covenant tradition from Jewish foundation to modern realities, see DANIEL J. ELAZAR, COVENANT AND POLITY IN BIBLICAL ISRAEL: BIBLICAL FOUNDATIONS AND JEWISH EXPRESSIONS (Covenant Tradition in Politics, Vol. 1) (1995) [hereinafter ELAZAR, COVENANT AND POLITY]; DANIEL J. ELAZAR, COVENANT AND COMMONWEALTH: FROM CHRISTIAN SEPARATION THROUGH THE PROTESTANT REFORMATION (Covenant Tradition in Politics, Vol. 2) (1996) [hereinafter ELAZAR, COVENANT AND COMMONWEALTH]; DANIEL J. ELAZAR, COVENANT AND CONSTITUTIONALISM: THE GREAT FRONTIER AND THE MATRIX OF FEDERAL DEMOCRACY (Covenant Tradition in Politics, Vol. 3) (1998) [hereinafter ELAZAR, COVENANT AND CONSTITUTIONALISM]; COVENANT AND CIVIL SOCIETY: THE CONSTITUTIONAL MATRIX OF MODERN DEMOCRACY (Covenant Tradition in Politics, Vol. 4) (1998); see also Michael J. DeBoer, *Book Reviews*, 16 J.L. & RELIGION 805-11 (2001) (reviewing Professor Elazar's four-volume series). Professor Elazar has convincingly argued that covenants are grounded in clear and binding relationships, building upon basic notions regarding partnership and equality. In interpreting the covenant tradition, Elazar explained that a covenant involved the coming together of "basically equal humans who consent with one [an]other through a moral binding pact supported by a transcendent power, establishing with the partners a new framework or setting them on the road to a new task that can only be dissolved by mutual agreement of all the parties to it." ELAZAR, COVENANT AND POLITY, *supra*, at 1. Recognizing that relationships are central to the concept of covenant, covenants establish lines of authority, distributions of power, bodies politic, and systems of law, and thus the covenant tradition provided a solid foundation upon which to build notions of federalism, the concept of power being located in the people, and the distributing and sharing of power. The covenant tradition grew from ancient biblical sources in the Jewish tradition, and was revived and adapted during and after the Protestant Reformation by theologians and thinkers in the Reformed tradition. See generally ELAZAR, COVENANT AND COMMONWEALTH, *supra*. In America, the covenant tradition evolved such that the notion of the covenant commonwealth joined with the notion of a civil society organized around a political covenant (compact or contract) and governed by written constitutions to which the people consent. See generally ELAZAR, COVENANT AND CONSTITUTIONALISM, *supra*. Strands of this tradition are found in the writings and thought of philosophers such as Thomas Hobbes, Baruch Spinoza, and John Locke and among the descendants of the Reformed Protestant tradition (including the Pilgrims, the Puritans, the Congregationalists, the Dutch Calvinists, and the Scottish Presbyterians). See generally *id.*

<sup>24</sup> EIDSMOE, *supra* note 13, at 24 (citing SAMUEL RUTHERFORD, *LEX, REX, OR THE LAW AND THE PRINCE* 1, 6-7 (1644) (reprinted 1982)).

John Locke articulated a more secular version of the social compact theory, according to which humans in a state of nature form a government by mutual consent and give it the limited authority to act in order to protect and support inalienable rights, such as life, liberty, health, and property.<sup>25</sup> The social compact theory, according to Locke, would not allow the legislature to assume a power to rule arbitrarily; rather it would require the legislature to dispense justice and decide the rights of the subjects by promulgating standing laws that established one rule that would apply for the rich and the poor, for the elites and the commoners.<sup>26</sup> Thus, Locke foreshadowed "some of most fundamental propositions of American constitutional law: Law must be general; it must afford equal protection to all; it may not validly operate retroactively; it must be enforced through the courts—legislative power does not include judicial power."<sup>27</sup>

Under the social compact theory, the people, not kings or aristocrats, would reign, and those doctrines used to keep the people subject and to shelter kings and aristocrats in a harbor of privileges, rights, and prerogatives would lose their force and effect. The beliefs that the monarchy was a divinely ordained institution and that station and heredity entitled persons to respect and privilege yielded to beliefs that the only moral foundation of legitimate government is the consent of the governed and that God had created all people with certain rights, including the right to choose their form of government and to alter their government.<sup>28</sup> Thus, the framers of the United States Constitution would proclaim, audaciously at the time, that "We the People of the United States . . . do ordain and establish this Constitution for the United States of America."<sup>29</sup>

Although the architects of the American republic drew upon ancient wisdom and blended in the Enlightenment outlook on reality, the American Revolution was a political and ideological revolution that came about by and indeed brought about a "radical change in the

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<sup>25</sup> *Id.* at 24-25, 62.

<sup>26</sup> JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT ch. 11, para. 36 (Everyman's ed. 1924). In 1647, this essential sentiment was expressed as follows: "the poorest he that is in England has a life to live as the richest he." Colonel Thomas Rainboro, "Debates on the Putney Project, 1647," quoted in A. T. MASON, FREE GOVERNMENT IN THE MAKING 12 (1949).

<sup>27</sup> Corwin, *The "Higher Law" Background of American Constitutional Law* (Pt. 2), 42 HARV. L. REV. 365, 390 (1929).

<sup>28</sup> WILSON, *supra* note 18, at 17.

<sup>29</sup> U.S. CONST. Preamble.

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principles, opinions, sentiments, and affections of the people.”<sup>30</sup> In fortifying the foundation of the American republican system of government, the natural law tradition together with the social compact theory provided a solid grounding for basic concepts of equality, democracy, individual rights and freedoms, and the limited powers of government.<sup>31</sup> So conceived, human rights and liberties exist before governments, and governments are instituted to safeguard and must respect these rights and liberties.<sup>32</sup>

The Declaration of Independence, principally drafted by Thomas Jefferson, was both a defense of rebellion against the King and a statement of American political and legal creed,<sup>33</sup> reflecting the natural law tradition<sup>34</sup> and the social compact theory:<sup>35</sup>

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<sup>30</sup> BAILYN, *supra* note 20, at 160 (quoting John Adams).

<sup>31</sup> BURNS & PELTASON, *supra* note 9, at 63 (noting that as the colonists moved closer to the Revolution, leaders such as Sam and John Adams in Massachusetts and Patrick Henry and Thomas Jefferson in Virginia “spoke of the natural rights of men and of government resting on the consent of the governed. They quoted Locke on individual liberty and human rights.”).

<sup>32</sup> Professors Burns and Peltason summarized as follows the understanding of these traditions in early America:

Most men obeyed the natural law, but living in a state of nature was inconvenience. There were always a few lawless souls, and whenever a person’s natural rights were violated, he had to enforce the law himself. Furthermore, when people had differences there was no common impartial judge to whom they could turn for a decision. Therefore, being endowed with reason, men decided to end this inconvenience by contracting among themselves to form a society and to establish a government for the purpose of protecting each man’s natural rights. By the terms of the social contract, each individual promised to abide by the decisions of the majority and to surrender to society his private right to enforce the law.

Government was thus limited by the purpose for which it was established. It had only the authority to enforce the natural law. When government becomes destructive of man’s inalienable rights, it ceases to have a claim on his allegiance. The people then have the duty to revolt and to create a government designed to promote their natural rights.

*Id.* at 65.

<sup>33</sup> *Id.* at 64.

<sup>34</sup> Levy has argued that the Declaration does not reference the social contract theory, suggesting that the Declaration was premised upon the natural law tradition. LEVY, *supra* note 10, at 45.

<sup>35</sup> Martin Diamond has argued that the Declaration of Independence was premised upon the social contract theory and presented equality as the equal entitlement of all to the rights that comprise political liberty:

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation. — We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.<sup>36</sup>

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The social contract theory upon which the Declaration is based teaches not equality as such but equal political liberty. The reasoning of the Declaration is as follows. Each man is equally born into the state of nature in a condition of absolute independence of every other man. That equal independence of each from all, as John Locke put it, forms a "Title to perfect Freedom" for every man. It is this equal perfect freedom, which men leave behind them when they quit the state of nature, from which they derive their equal "unalienable rights" in civil society. The equality of the Declaration, then, consists entirely in the equal entitlement of all to the rights which comprise political liberty, and nothing more.

Martin Diamond, *"The Declaration and the Constitution: Liberty, Democracy, and the Founders,"* THE PUBLIC INTEREST, NO. 41, at 49 (Fall 1975).

<sup>36</sup> THE DECLARATION OF INDEPENDENCE (1776). For Jefferson, the ideas expressed in the Declaration were not new; rather, it was

[n]ot to find out new principles or new arguments never before thought of, nor merely to say things which had never been said before, but to place before mankind the common sense of the subject. . . . [I]t was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc.

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In declaring the political independence of the colonies from the British crown, Jefferson established American legal and political orthodoxy, especially the belief in the equality of all Americans as created beings and their endowment with certain inalienable rights.

During the Revolutionary era, Thomas Jefferson was the leading voice emphasizing natural rights and equality,<sup>37</sup> yet after the Revolution, Jefferson's thought on the natural rights of all humans and their equality remained a powerful, shaping influence on American national identity and political culture. For Jefferson, the rights of every individual are grounded in the laws of nature, in the God who created nature, and not in a grant or gift from any government.<sup>38</sup> Government exists to serve the

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Letter from Thomas Jefferson to Henry Lee (May 8, 1825), in *THE POLITICAL WRITINGS OF THOMAS JEFFERSON* 88 (Edward Dumbauld ed. 1955).

<sup>37</sup> For a survey of Thomas Jefferson's view on equality, see LEVY, *supra* note 10, at 43-48.

<sup>38</sup> Thomas Jefferson, *Legal Argument*, 1770, in 1 *THE WRITINGS OF THOMAS JEFFERSON* 376 (Paul Leicester Ford ed., 1892-99) ("Under the law of nature, all men are born free, every one comes into the world with a right to his own person, which includes the liberty of moving and using it at his own will. This is what is called personal liberty, and is given him by the Author of nature, because necessary for his own sustenance."); Thomas Jefferson, *Rights of British America*, 1774, in 1 *THE WRITINGS OF THOMAS JEFFERSON* 209 (Lipscomb & Bergh eds., Memorial ed. 1903-04) ("A free people [claim] their rights as derived from the laws of nature, and not as the gift of their chief magistrate."); Thomas Jefferson, *Rights of British America*, 1774, in 1 *THE WRITINGS OF THOMAS JEFFERSON* 211 (Lipscomb & Bergh eds., Memorial ed. 1903-04) ("The God who gave us life gave us liberty at the same time; the hand of force may destroy, but cannot disjoin them."); Thomas Jefferson, *Notes on Virginia* Q.XVIII, 1782, in 2 *THE WRITINGS OF THOMAS JEFFERSON* 227 (Lipscomb & Bergh eds., Memorial ed. 1903-04) ("Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with His wrath?"); Thomas Jefferson to John Mannings, 1817, in 15 *THE WRITINGS OF THOMAS JEFFERSON* 124 (Lipscomb & Bergh eds., Memorial ed. 1903-04) ("The evidence of [the] natural right [of expatriation], like that of our right to life, liberty, the use of our faculties, the pursuit of happiness, is not left to the feeble and sophistical investigations of reason, but is impressed on the sense of every man. We do not claim these under the charters of kings or legislatures, but under the King of Kings. If He has made it a law in the nature of man to pursue his own happiness, he has left him free in the choice of place as well as mode, and we may safely call on the whole body of English jurists to produce the map on which nature has traced for each individual the geographical line which she forbids him to cross in pursuit of happiness.").

interests of the governed and to enable the people to live in safety and happiness and to enjoy their rights.<sup>39</sup> Thus, the people possess all authority and are sovereign.<sup>40</sup>

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<sup>39</sup> Thomas Jefferson to Francois D'Ivernois, 1795, in 7 THE WRITINGS OF THOMAS JEFFERSON 4 (Paul Leicester Ford ed. 1892-99) ("It is to secure our rights that we resort to government at all."); Thomas Jefferson to Benjamin Waring, 1801, in 10 THE WRITINGS OF THOMAS JEFFERSON 236 (Lipscomb & Bergh eds., Memorial ed. 1903-04) ("The will of the people . . . is the only legitimate foundation of any government, and to protect its free expression should be our first object."); Thomas Jefferson to Thaddeus Kosciuszko, 1810, in 12 THE WRITINGS OF THOMAS JEFFERSON 369 (Lipscomb & Bergh eds., Memorial ed. 1903-04) ("The freedom and happiness of man . . . [are] the sole objects of all legitimate government."); Thomas Jefferson to Thaddeus Kosciuszko, 1811, in 13 THE WRITINGS OF THOMAS JEFFERSON 41 (Lipscomb & Bergh eds., Memorial ed. 1903-04) ("The happiness and prosperity of our citizens . . . is the only legitimate object of government and the first duty of governors."); Thomas Jefferson to M. van der Kemp, 1812, in 13 THE WRITINGS OF THOMAS JEFFERSON 135 (Lipscomb & Bergh eds., Memorial ed. 1903-04) ("The only orthodox object of the institution of government is to secure the greatest degree of happiness to the general mass of those associated under it."); Thomas Jefferson to A. Coray, 1823, in 15 THE WRITINGS OF THOMAS JEFFERSON 482 (Lipscomb & Bergh eds., Memorial ed. 1903-04) ("The equal rights of man, and the happiness of ever individual, are now acknowledged to be the only legitimate objects of government. Modern times have the signal advantage, too, of having discovered the only device by which these rights can be secured, to wit: government by the people, acting not in person, but by representatives chosen by themselves, that is to say, by every man of ripe years and sane mind, who contributes either by his purse or person to the support of his country."); Thomas Jefferson to John Cartwright, 1824, in 16 THE WRITINGS OF THOMAS JEFFERSON 51 (Memorial ed.) (Lipscomb & Bergh, eds. 1903-04) ("The principles of government . . . [are] founded in the rights of man.").

<sup>40</sup> Thomas Jefferson, *Opinion on French Treaties*, 1793, in 3 THE WRITINGS OF THOMAS JEFFERSON 227 (Lipscomb & Bergh eds., Memorial ed. 1903-04) ("I consider the people who constitute a society or nation as the source of all authority in that nation . . ."); Thomas Jefferson to Pierre Samuel Dupont de Nemours 1813, in 19 THE WRITINGS OF THOMAS JEFFERSON 197 (Lipscomb & Bergh eds., Memorial ed. 1903-04) ("[The people] are in truth the only legitimate proprietors of the soil and government."); Thomas Jefferson to Spencer Roane, 1821, in 15 THE WRITINGS OF THOMAS JEFFERSON 328 (Lipscomb & Bergh eds., Memorial ed. 1903-04) ("[It is] the people, to whom all authority belongs."); Thomas Jefferson to William Johnson, 1823, in 15 THE WRITINGS OF THOMAS JEFFERSON 451 (Lipscomb & Bergh eds., Memorial ed. 1903-04) ("The ultimate arbiter is the people of the Union."); Thomas Jefferson to John Cartwright, 1824, in 16 THE WRITINGS OF THOMAS JEFFERSON 45 (Lipscomb & Bergh eds., Memorial ed. 1903-04) ("The constitutions of most of our States assert that all power is inherent in the people; that they may exercise it by themselves in all cases to which they thing themselves competent . . . , or they may act by representatives, freely and equally chosen; that it is their right and duty to be at all times armed; that they are entitled to freedom of person, freedom of religion, freedom of property, and freedom of the press."). Although the people are sovereign and governments exist to secure the rights of the people, Jefferson recognized that the people through their governments may restrict their natural rights. Thomas Jefferson, *Notes on Virginia Q. XVII*, 1782, in 2 THE WRITINGS OF THOMAS JEFFERSON 221 (Lipscomb & Bergh eds., Memorial ed. 1903-04) ("Our rulers can have authority over such natural rights only

Convinced that the will of the people is the only legitimate foundation of any government and that the will of the majority should be the law,<sup>41</sup> Jefferson perceived a threat from a minority of individuals (a faction) gaining power and using that power to oppress the people, to eviscerate their rights, and to grant privileges to themselves.<sup>42</sup> Even so, the majority must not disregard the rights and interests of the minority.<sup>43</sup>

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as we have submitted to them.”); Thomas Jefferson, *Opinion on Residence Bill*, 1790, in 3 THE WRITINGS OF THOMAS JEFFERSON 60 (Lipscomb & Bergh eds., Memorial ed. 1903-04) (“Every man, and every body of men on earth, possess the right of self-government. . . . This, like all other natural rights, may be abridged or modified in its exercise by their own consent, or by the law of those who depute them, if they meet in the right of others.”).

<sup>41</sup> Thomas Jefferson, *Notes on Virginia Q.VIII*, 1782, in 2 THE WRITINGS OF THOMAS JEFFERSON 120 (Lipscomb & Bergh eds., Memorial ed. 1903-04) (“Civil government being the sole object of forming societies, its administration must be conducted by common consent.”); Thomas Jefferson to George Washington, 1792, in 8 THE WRITINGS OF THOMAS JEFFERSON 397 (Lipscomb & Bergh eds., Memorial ed. 1903-04) (“The measures of the fair majority . . . ought to be respected.”); Thomas Jefferson, *The Anas*, 1793, in 1 THE WRITINGS OF THOMAS JEFFERSON 332 (Lipscomb & Bergh eds., Memorial ed. 1903-04) (“I subscribe to the principle, that the will of the majority honestly expressed should give law.”); Thomas Jefferson, *Address to the Cherokee Nation*, 1809, in 16 THE WRITINGS OF THOMAS JEFFERSON 456 (Lipscomb & Bergh eds., Memorial ed. 1903-04) (“All . . . being equally free, no one has a right to say what shall be law for the others. Our way is to put these questions to the vote, and to consider that as law for which the majority votes.”); Thomas Jefferson to William Johnson, 1823, in 15 THE WRITINGS OF THOMAS JEFFERSON 440 (Lipscomb & Bergh eds., Memorial ed. 1903-04) (“At the formation of our government, many had formed their political opinions on European writings and practices, believing the experiences of old countries, and especially of England, abusive as it was, to be a safer guide than mere theory. The doctrines of Europe were, that men in numerous associations cannot be restrained within the limits of order and justice, but by forces physical and moral, wielded over them by authorities independent of their will. Hence their organization of kings, hereditary nobles, and priests.”).

<sup>42</sup> Thomas Jefferson, *Virginia Allowance Bill*, 1778, in 2 THE WRITINGS OF THOMAS JEFFERSON 231 (Ed. Julian P. Boyd ed., 1950) (“It [is] inconsistent with the principles of civil liberty, and contrary to the natural rights of the other members of the society, that any body of men therein should have authority to enlarge their own powers, prerogatives or emoluments without restraint.”); Thomas Jefferson, to Annapolis Citizens, 1809, in 16 THE WRITINGS OF THOMAS JEFFERSON 337 (Lipscomb & Bergh eds., Memorial ed. 1903-04) (“Where the law of the majority ceases to be acknowledged, there government ends, the law of the strongest takes its place, and life and property are his who can take them.”).

<sup>43</sup> Thomas Jefferson, *First Inaugural*, 1801, in 3 THE WRITINGS OF THOMAS JEFFERSON 318 (Lipscomb & Bergh eds., Memorial ed. 1903-04) (“Bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate would be oppression.”); Thomas Jefferson to Pierre Samuel Dupont de Nemours, 1816, in 14 THE WRITINGS OF THOMAS JEFFERSON 490 (Lipscomb & Bergh eds., Memorial ed. 1903-04) (“The majority, oppressing an individual, is guilty of a crime, abuses its strength, and by acting on the law of the strongest breaks up the foundations of society.”).

Jefferson believed that equality is essential to the American form of government.<sup>44</sup> For Jefferson, human equality requires equal treatment by the government: “[a]n equal application of law to every condition of man is fundamental,”<sup>45</sup> “[the] best principles [of our republic] secure to all citizens a perfect equality of rights,”<sup>46</sup> and “[t]he most sacred of the duties of a government [is] to do equal and impartial justice to all its citizens.”<sup>47</sup> The government, thus, should not distinguish among individuals based upon country, class, or birth or grant unequal privileges.<sup>48</sup> Jefferson, however, recognized that not all humans were

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<sup>44</sup> Jefferson wrote that “[t]he equality among our citizens [is] essential to the maintenance of republican government.” Thomas Jefferson, *Thoughts on Lotteries*, 1826, in 17 THE WRITINGS OF THOMAS JEFFERSON 461 (Lipscomb & Bergh eds., Memorial ed. 1903-04). John Adams too valued equality. However, for Adams, equality did not involve any natural or intrinsic equality in humans; rather, equality referred to equality of treatment:

Inequalities of Mind and Body are so established by God Almighty in his constitution of Human Nature that no Art or policy can ever plain them down to a Level. I have never read Reasoning more absurd, Sophistry more gross, in proof of the Athanasian Creed, or Transubstantiation, than the subtle labours of Helvetius and Rousseau to demonstrate the natural Equality of Mankind. Jus cique [justice for everyone]; the golden rule; do as you would be done by; is all the Equality that can be supported or defended by reason, or reconciled to common Sense.

John Adams to Thomas Jefferson, in 2 CAPPON 355 (1813); see also DAVID MCCULLOUGH, JOHN ADAMS 377 (2001).

<sup>45</sup> Thomas Jefferson to George Hay, 1807, in 11 THE WRITINGS OF THOMAS JEFFERSON 341 (Lipscomb & Bergh eds., Memorial ed. 1903-04).

<sup>46</sup> Thomas Jefferson, *Reply to the Citizens of Wilmington*, 1809, in 16 THE WRITINGS OF THOMAS JEFFERSON 336 (Lipscomb & Bergh eds., Memorial ed. 1903-04).

<sup>47</sup> Thomas Jefferson, *Note in Destutt de Tracy, “Political Economy,”* 1816, in 14 THE WRITINGS OF THOMAS JEFFERSON 465 (Lipscomb & Bergh eds., Memorial ed. 1903-04).

<sup>48</sup> Thomas Jefferson to George Washington, 1784, in 4 THE WRITINGS OF THOMAS JEFFERSON 218 (Lipscomb & Bergh eds., Memorial ed. 1903-04) (“The hereditary branches of modern governments are the patrons of privilege and prerogative, and not of the natural rights of the people, whose oppressors they generally are.”); Thomas Jefferson, *Answers to de Meusnier Questions*, 1786, in 17 THE WRITINGS OF THOMAS JEFFERSON 89 (Lipscomb & Bergh eds., Memorial ed. 1903-04) (“In America, no other distinction between man and man had ever been known but that of persons in office exercising powers by authority of the laws, and private individuals. Among these last, the poorest laborer stood on equal ground with the wealthiest millionaire, and generally on a more favored one whenever their rights seem to jar.”); *Id.* (“Of distinction by birth or badge, [Americans] had no more idea than they had of the mode of existence in the moon or planets. They had heard only that there were such, and knew that they must be wrong.”); Thomas Jefferson, *First Inaugural*, 1801, in 3 THE WRITINGS OF THOMAS JEFFERSON 320 (Lipscomb & Bergh eds., Memorial ed. 1903-04) (“[We in America entertain] a due sense of our equal right to the use of our own faculties, to the acquisitions of our own industry, to honor and confidence from our fellow-citizens resulting not from birth but from our actions and their sense of them.”); Thomas Jefferson to Hugh White, 1801, in 10 THE WRITINGS OF THOMAS JEFFERSON 258



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secure in the inalienable rights given by God, and it was his "sincere[] pray[er] that all the members of the human family may, in the time prescribed by the Father of us all, find themselves securely established in the enjoyment of life, liberty, and happiness."<sup>49</sup>

Jefferson also acknowledged the important place equality held in state constitutions: "The foundation on which all [our state constitutions] are built is the natural equality of man, the denial of every pre-eminence but that annexed to legal office and particularly the denial of a pre-eminence by birth."<sup>50</sup> Later he would write:

The Constitutions of our several States vary more or less in some particulars. But there are certain principles in which all agree, and which all cherish as vitally essential to the protection of the life, liberty, property, and safety of the citizen: 1. Freedom of religion, restricted only from acts of trespass on that of others; 2. Freedom of person, securing every one from imprisonment or other bodily restraint but by the laws of the land. This is effected by the well-known law of *habeas corpus*; 3. Trial by jury, the best of all safeguards for the person, the property, and the fame of every individual; 4. The exclusive right of legislation and taxation in the representatives of the people; 5. Freedom of the press, subject only to liability for personal injuries.<sup>51</sup>

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(Lipscomb & Bergh eds., Memorial ed. 1903-04) ("To unequal privileges among members of the same society the spirit of our nation is, with one accord, adverse."); Thomas Jefferson to the Emperor of Morocco, 1803, in 19 THE WRITINGS OF THOMAS JEFFERSON 136 (Lipscomb & Bergh eds., Memorial ed. 1903-04) ("All religions are equally independent here, our laws knowing no distinction of country, of classes among individuals and with nations, our [creed] is justice and reciprocity."); Thomas Jefferson to Messrs. Bloodgood and Hammond, 1809, in 12 THE WRITINGS OF THOMAS JEFFERSON 318 (Lipscomb & Bergh eds., Memorial ed. 1903-04) ("The true principles of our Constitution ... are wisely opposed to all perpetuations of power, and to every practice which may lead to hereditary establishments."); Thomas Jefferson to A. Coray, 1823, in 15 THE WRITINGS OF THOMAS JEFFERSON 483 (Lipscomb & Bergh eds., Memorial ed. 1903-04) ("Hereditary bodies ... always on the watch for their own aggrandizement, profit of every opportunity of advancing the privileges of their order, and encroaching on the rights of the people.").

<sup>49</sup> Thomas Jefferson, *Reply to Ellicot Thomas et al.*, 1807, in 16 THE WRITINGS OF THOMAS JEFFERSON 290 (Lipscomb & Bergh eds., Memorial ed. 1903-04).

<sup>50</sup> Thomas Jefferson to George Washington, 1784, in 4 THE WRITINGS OF THOMAS JEFFERSON 217 (Lipscomb & Bergh eds., Memorial ed. 1903-04).

<sup>51</sup> Thomas Jefferson to A. Coray, 1823, in 15 THE WRITINGS OF THOMAS JEFFERSON 489 (Lipscomb & Bergh eds., Memorial ed. 1903-04).

The American Revolution did not simply bring about political changes; it also spawned dramatic social changes.<sup>52</sup> Like waves on an ocean, democratic forces, including a recognition of self-evident truths and inalienable rights, a belief in the equality of all individuals, and a populist spirit, rippled throughout the new nation and new territories. During the first several generations following the Revolution, democratic and egalitarian ideals became ingrained in American consciousness and leavened American popular culture.<sup>53</sup> As regard for tradition, authority, education, and station lessened and elite control over politics, law, religion, medicine, and the press diminished, ordinary individuals reveled in their newfound authority and freedom and celebrated their equality.<sup>54</sup>

These social changes were nowhere more evident or dramatic than in America's churches and the religious movements that swept through the states and territories during the first half century after the Revolution, during a period known as the Second Great Awakening.<sup>55</sup> In the early American republic, a symbiotic relationship existed between politics and religion,<sup>56</sup> and populist democracy and populist Christianity

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<sup>52</sup> NATHAN O. HATCH, *THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY* 6, 12-16 (1989).

<sup>53</sup> Historian Sidney E. Mead perceptively noted that the period between the Revolution and the Civil War was marked by six images of man, society, government, and destiny: the free individual with full opportunity to develop every latent possibility and natural power; the concept of human and social perfectability; the belief in human and social progress; the equality of humans to be act as free individuals; the inclination toward individual consent and voluntary participation; and the tendency toward paternalism and social reform. SIDNEY E. MEAD, *THE LIVELY EXPERIMENT: THE SHAPING OF CHRISTIANITY IN AMERICA* 90-102 (1963).

<sup>54</sup> HATCH, *supra* note 52, at 17-46.

<sup>55</sup> HATCH, *supra* note 52, at 5-6; MARK A. NOLL, *A HISTORY OF CHRISTIANITY IN THE UNITED STATES AND CANADA* 144 (1992).

<sup>56</sup> Alexis de Tocqueville, a French observer of early nineteenth century American society, remarked:

On my arrival in the United States the religious aspect of the country was the first thing that struck my attention; and the longer I stayed there, the more I perceived the great political consequences resulting from this new state of things. In France I had almost always seen the spirit of religion and the spirit of freedom marching in opposite directions. But in America I found they were intimately united and that they reigned in common over the same country.

1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 308 (Henry Reeve trans., 1835 & 1840; Francis Bowen trans., 1862) (Phillips Bradley ed., 1945).

Religion in America takes no direct part in the government of society, but it must be regarded as the first of their political institutions; for if it does not impart a taste for freedom, it facilitates

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spread together and took root in the new states and territories, resulting in the democratization of American Christianity and the Christianization of American society.<sup>57</sup> In this fertile soil, egalitarian forces contributed to dynamic developments in America's religious history.

In the eastern states and on the frontier, the religious movements that succeeded most profoundly were generally those movements whose leaders wedded most closely their basic beliefs and practices with popular appeal and the ideals of populist democracy.<sup>58</sup> During the decades prior to the Revolution, the Congregationalists, the Presbyterians, and the Episcopalians were among the religious groups that dominated the colonial religious landscape, and these groups emphasized the sovereignty of God, the inability of sinful people to save themselves, and God's election of some to salvation.<sup>59</sup> However, during the decades following the Revolution, upstart groups such as the Methodists, the Baptists, and the Disciples of Christ dramatically eclipsed those that had dominated prior to the Revolution,<sup>60</sup> and these

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the use of it. Indeed, it is in this same point of view that the inhabitants of the United States themselves look upon religious belief. I do not know whether all Americans have a sincere faith in their religion—for who can search the human heart?—but I am certain that they hold it to be indispensable to the maintenance of republican institutions. This opinion is not peculiar to a class of citizens or to a party, but it belongs to the whole nation and to every rank of society.

*Id.* at 305-06.

<sup>57</sup> HATCH, *supra* note 52, at 5; see also SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 387 (1972) (noting that "evangelical Protestant churches, with their message and methods tuned to the patriotic aspirations of a young nation, reached their high point of cultural influence"). For an overview of these developments in early American religious history, see generally *id.* at 403-71.

<sup>58</sup> HATCH, *supra* note 52, at 3-9; NOLL, *supra* note 55, at 152-53.

<sup>59</sup> NOLL, *supra* note 55, at 169-70; ROGER FINKE & RODNEY STARK, THE CHURCHING OF AMERICA, 1776-1990: WINNERS AND LOSERS IN OUR RELIGIOUS ECONOMY 54-56 (1992) [hereinafter FINKE & STARK, CHURCHING]; see also Roger Finke & Rodney Stark, *How the Upstart Sects Won America: 1776-1850*, J. FOR SCI. STUDY OF RELIGION 28, 31 (1989) [hereinafter Finke & Stark, Upstart].

<sup>60</sup> FINKE & STARK, CHURCHING, *supra* note 59, at 59-108 (discussing how the "upstart sects," including the Methodists and the Baptists, "won" America); AHLSTROM, *supra* note 57, at 435-54 (discussing the growth of popular denominations such as the Methodists and Baptists, the emergence of the Disciples of Christ, and the slow expansion of the formerly dominant Congregational, Presbyterian, and Episcopal denominations). Also among the groups experiencing remarkable growth in America during this period were black churches, the Mormons, the Lutherans, the Unitarians and Universalists, the German and Dutch Reformed, the Quakers, and the Roman Catholics. See Finke and Stark, Upstart, *supra* note 59, at 31. For some of these groups (i.e. Lutherans, German and Dutch

upstart groups emphasized the primacy of the individual conscience and the freedom and ability of every person to come to salvation.<sup>61</sup>

These burgeoning groups blended democratic and egalitarian ingredients with their religious messages to remarkable effect. In promoting democratic and egalitarian values, this religious populism exhibited a distrust of learned theologians, professional elitism, traditional orthodoxies, authoritarian structures, and established institutions, but a supreme confidence in the ordinary person.<sup>62</sup> Methodist preacher Lorenzo Dow reflected, as well as anyone, the egalitarian ethos that marked the first half century after the Revolution when he wrote:

By what rule of right can one man exercise authority with a command over others? Either it must be a gift of God, or, secondly, it must be delegated by the people—or less, thirdly, it must be ASSUMED!

A power without a right, is assumption; and must be considered as a piece of unjust tyranny. . . .

But if all men are “BORN EQUAL,” and endowed with unalienable RIGHTS by their CREATOR, in the blessings of life, liberty, and the pursuit of happiness—then there can be no just reason, as a cause, why he may or should not think, and judge, and act for himself in matters of religion, opinion, and private judgment.<sup>63</sup>

As these democratically-energized religious movements expanded, African-Americans and women became fuller participants in many Christian groups and even leaders in church and public life.<sup>64</sup> Also during this period, camp meetings, which have been called “festivals of democracy,”<sup>65</sup> became prevalent, with multitudes of ordinary people, black and white, men and women, gathering to listen to preachers who

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Reformed, and Roman Catholic), immigration accounts for a significant aspect of their growth during this period. See AHLSTROM, *supra* note 57, at 540; NOLL, *supra* note 55, at 5.

<sup>61</sup> HATCH, *supra* note 52, at 35, 40-43; NOLL, *supra* note 55, at 169-70.

<sup>62</sup> HATCH, *supra* note 52, at 9-11, 17-46.

<sup>63</sup> LORENZO DOW, HISTORY OF COSMOPOLITE 356-57 (1814).

<sup>64</sup> HATCH, *supra* note 52, at 78-80, 102-13; NOLL, *supra* note 55, at 180-85.

<sup>65</sup> HATCH, *supra* note 52, at 58 (quoting MICHAEL CHEVALIER, SOCIETY, MANNERS AND POLITICS IN THE UNITED STATES: BEING A SERIES OF LETTERS FROM NORTH AMERICA 317 (1839)).

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typically delivered messages with a strong egalitarian and democratic flavor.<sup>66</sup>

Indiana inherited this culture and history and the values that flourished in early America. The pioneers who settled in Indiana brought with them a host of beliefs, ideals, and institutions, as one leading Indiana historian has written:

The image of the individual pioneer confronting the inhospitable wilderness is a false one. Not only did nearly all pioneers settle as families, but they also built social relationships beyond the family. They brought with them a knowledge of community institutions and a desire for social ties and social order, and they expanded and developed these ways of living together to create a society that shared fundamental values and beliefs and that gave individuals a sense of living among others and even a responsibility for others.<sup>67</sup>

Established in 1800, the Indiana Territory was first governed under the Northwest Ordinance.<sup>68</sup> In this territorial setting, southern planters, a minority with aristocratic tendencies, dominated governmental leadership and established little regard for the ability of the common person to criticize or direct the conduct of governmental officials or to assume the responsibility of self-government.<sup>69</sup> However, the poor farmers and frontiersmen who opposed the southern planters and advocated democratic principles insisted that "even the poorest had a right to a voice in the determination of the policies which affect his life as well as the career of the richest."<sup>70</sup> During this territorial period, the democratic forces took significant steps in subduing the more aristocratic

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<sup>66</sup> NOLL, *supra* note 55, at 167 (1992); FINKE & STARK, CHURCHING, *supra* note 59, at 92-105.

<sup>67</sup> JAMES H. MADISON, *THE INDIANA WAY* 98 (1986).

<sup>68</sup> WILLIAM P. McLAUCHLAN, *THE INDIANA STATE CONSTITUTION: A REFERENCE GUIDE* 2 (1996).

<sup>69</sup> JOHN D. BARNHART, *VALLEY OF DEMOCRACY: THE FRONTIER VERSUS THE PLANTATION IN THE OHIO VALLEY, 1775-1818*, 195 (1953) (reprint 1969) [hereinafter BARNHART]; *see also* John D. Barnhart, *Democratic Influences in Territorial Indiana*, 43 *INDIANA MAG. OF HIST.* 8-22 (1947).

<sup>70</sup> BARNHART, *supra* note 69, at 195. The struggle between an aristocratic minority of wealthy landowners and a democratic majority of poor common folks was not unique to Indiana, but was experienced through the Ohio Valley during the first four decades following American independence. *Id.* at 3-160, 197-235.

forces that prevailed in the eastern and southern portions of America and were gathering a foot-hold in Indiana.<sup>71</sup>

On May 13, 1816, Congress approved the election of delegates to a constitutional convention in Indiana, and destined Indiana to be a free state from its very inception.<sup>72</sup> The delegates to the Constitutional Convention of 1816 met in Corydon beginning on June 10, 1816.<sup>73</sup> The forty-three delegates were quickly chosen and included mostly farmers, about a dozen ministers, some officeholders, and a small number of lawyers.<sup>74</sup> Meeting in sessions between June 10 and June 29, the delegates signed the new Indiana Constitution on June 29, 1816, which became effective immediately without being submitted to Indiana voters.<sup>75</sup>

The 1816 Constitution drew heavily upon the Ohio, Kentucky, and Pennsylvania constitutions.<sup>76</sup> During the 1816 Convention, the democratic voices of popular participation in government prevailed over the aristocratic voices of elitism, ultimately ensuring that the provisions adopted would advance principles of democracy and political inclusion.<sup>77</sup> Natural law and natural rights theory shaped the philosophy of the framers of the 1816 Constitution,<sup>78</sup> and the language they adopted reflected natural law conceptions and terms.<sup>79</sup> Under the 1816 Constitution, the people were recognized to have inherent political power as the political sovereigns, and the people would rule through their General Assembly, which was the branch of state government with

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<sup>71</sup> *Id.* at 176-77.

<sup>72</sup> MCLAUCHLAN, *supra* note 68, at 2.

<sup>73</sup> *Id.* at 3.

<sup>74</sup> WILLIAM E. WILSON, INDIANA: A HISTORY 91 (1966). However, another historian has written that more than half the delegates had some legal training or experience. HOWARD H. PECKHAM, INDIANA: A BICENTENNIAL HISTORY (1978).

<sup>75</sup> MCLAUCHLAN, *supra* note 68, at 4.

<sup>76</sup> *Id.* at 3; WILSON, *supra* note 74, at 93. Professor Wilson has noted that the delegates copied large parts of Articles I and III verbatim from the Ohio Constitution, and the remaining twelve articles were patterned after the Kentucky, Ohio, and Pennsylvania constitutions. WILSON, *supra* note 74, at 93. These three states had been the birthplaces of many of the delegates. *Id.* at 93. Notwithstanding the substantial borrowing, Article IX, which included sections on education and state institutions among other things, represents original work by the delegates. *Id.* at 93-95.

<sup>77</sup> BARNHART, *supra* note 69, at 193; C.A. BYERS, *Growth of the Constitution of Indiana*, 6 THE INDIANIAN 279-80 (1890); PECKHAM, *supra* note 74, at 44-45.

<sup>78</sup> *Price v. State*, 622 N.E.2d 954, 958-59 (Ind. 1993).

<sup>79</sup> *Id.* at 959 & n.4; JOHN D. BARNHART & DONALD F. CARMONY, 1 INDIANA FROM FRONTIER TO INDUSTRIAL COMMONWEALTH 156 (1954).

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the most power.<sup>80</sup> Thus, a populist character and a liberal Jeffersonian Republicanism marked the 1816 Constitution.<sup>81</sup>

As pioneers migrated to Indiana, they often founded communities where people of like mind and similar values could come together to live, construct their unique social order, and establish utopian experiments consistent with their values.<sup>82</sup> Some of these communities were religiously motivated, but others were constituted upon more secular goals.<sup>83</sup> One such secular community, the "Community of Equality,"<sup>84</sup> founded by Robert Owen in the mid-1820s, sought a just and equal community through a rejection of the traditional family structure, religion, and private property.<sup>85</sup> This community abolished private property, promoted the equality of men and women (although blacks were not included), encouraged the contribution of all members, and shared its benefits equally among all.<sup>86</sup> Although this community ultimately did not succeed as an experiment, a number of the people brought together by this experience made lasting impacts on American and Indiana history, most notably one of Robert Owen's sons, Robert Dale Owen, who would become a central figure in Indiana constitutional history, promote equality as a fundamental constitutional value, and advocate the rights of women.<sup>87</sup>

Considering that "[o]f all the social and community institutions that flourished on the frontier none was more important than evangelical Protestantism,"<sup>88</sup> Indiana's religious history is significant to the story of

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<sup>80</sup> DONALD F. CARMONY, INDIANA, 1816-1850: THE PIONEER ERA 1-2 (1998); MADISON, *supra* note 67, at 127; MCLAUCHLAN, *supra* note 68, at 3; WILSON, *supra* note 74, at 97.

<sup>81</sup> Price, 622 N.E.2d at 962; CARMONY, *supra* note 80, at 1, 452.

<sup>82</sup> MADISON, *supra* note 67, at 115-20; PECKHAM, *supra* note 74, at 56-60, 80-85; WILSON, *supra* note 74, at 62-81.

<sup>83</sup> MADISON, *supra* note 67, at 115-17; PECKHAM, *supra* note 74, at 56-60; WILSON, *supra* note 74, at 62-63. For a general discussion of these communities in early American religious history, see AHLSTROM, *supra* note 57, at 491-509.

<sup>84</sup> WILSON, *supra* note 74, at 63.

<sup>85</sup> MADISON, *supra* note 67, at 117; WILSON, *supra* note 74, at 69-71.

<sup>86</sup> MADISON, *supra* note 67, at 117; PECKHAM, *supra* note 74, at 56-57; WILSON, *supra* note 74, at 69-71.

<sup>87</sup> MADISON, *supra* note 67, at 119-20; WILSON, *supra* note 74, at 76-80; *see infra* text accompanying note 222.

<sup>88</sup> MADISON, *supra* note 67, at 98. Peckham has written that "Indiana seemed indeed to be a religious state, and at mid-[nineteenth]-century it was overwhelmingly Protestant." PECKHAM, *supra* note 74, at 88.

equality in Indiana.<sup>89</sup> The open-air camp meetings or revivals that had accompanied the dramatic growth of certain Protestant denominations in the first half of the nineteenth century also came to Indiana with similar effect, but in smaller numbers than in Kentucky and Tennessee.<sup>90</sup> These camp meetings “appealed to people as individuals.”<sup>91</sup> As in other portions of the country, the Methodists, the Baptists, and the Disciples of Christ were among the religious groups that prospered the most as they blended the American democratic spirit with their doctrinally grounded belief in the equality of individuals.<sup>92</sup> These religious traditions

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<sup>89</sup> For extensive discussions of religion in Indiana, see ELIZABETH K. NOTTINGHAM, *METHODISM AND THE FRONTIER: INDIANA PROVING GROUND* (1966); L.C. RUDOLPH, *HOOSIER FAITHS* (1995) [hereinafter RUDOLPH, FAITHS]; L.C. RUDOLPH, *HOOSIER ZION: THE PRESBYTERIANS IN EARLY INDIANA* (1963). In discussing religion in frontier Indiana, one historian has written:

[F]rontiersmen are men of faith. They do not see either the wilderness or themselves as they are, but as they will become. The frontier was the Promised Land, which could not be entered save by those who had faith. They were idealists, believing in the perfectibility of man and hence in both individualism and reform—but not in tolerance. Toleration implies a critical and speculative outlook, a suspension of judgment, or indifference; whereas frontiersmen have too intense a faith and too much idealism to be either hesitant or indifferent. New land to settle invites and encourages strong individuals of quick, sure judgments who tend to think alike. They have to possess courage, perseverance, industry, mutual concern, and they respect others who have the same qualities.

PECKHAM, *supra* note 74, at 79.

<sup>90</sup> MADISON, *supra* note 67, at 101-02; PECKHAM, *supra* note 74, at 85-86. For a discussion of Methodist camp meetings in Indiana in the second decade of the nineteenth century, see NOTTINGHAM, *supra* note 89, at 59-70.

<sup>91</sup> PECKHAM, *supra* note 74, at 85.

<sup>92</sup> See *supra* notes 55-66 and accompanying text; PECKHAM, *supra* note 74, at 86-87; RUDOLPH, FAITHS, *supra* note 89, at x-xi. One historian has explained:

By 1820, Indiana's inhabitants were in large part extreme Arminians in theology, whether they knew it or not. Not for them was predestined election, a mysterious caprice of God, but everyone could achieve regeneration and salvation for himself by confession and good works. Their faith was consistent with their frontier experience, and the circuit riders of the Methodist denomination preached that good works would be rewarded. Nature was a challenge; men were judged on what they did with it. A corollary of that belief was the message of the Old Testament that the earth was provided for man to exploit. Further, like forests and swamps and wild animals, the Indians, too, were obstacles to be removed. They were also probably minions of the Devil, there to be regenerated by Christianity and agriculture if possible, or forced out, if not; tolerance of willful heathen was no virtue at all. The real virtues were good works, industry, perseverance, and faith in the future. Ultimately, these were regarded



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concerned themselves with the relationship between each individual and God as well as the relationships among people, and thus they sought to shape the social and political order and to exert influence on matters of morality.<sup>93</sup> Methodism in particular spawned an atmosphere that was open, personal, and democratic.<sup>94</sup>

The Quakers, who were outspoken in their opposition to slavery, joined with other religious groups to attack the institution, and most Hoosiers viewed slavery as a violation of the laws of God and man.<sup>95</sup> However, racial prejudice was widespread in pioneer Indiana, and even among religiously devout Hoosiers, negative racial sentiment was not uncommon, although strong forces against slavery<sup>96</sup> and movements to improve the conditions faced by the African-American community were also found.<sup>97</sup>

By 1850, a broad range of religious beliefs and practices was found among the expanding population of Indiana,<sup>98</sup> and the wide array of religious communities included Jewish, Roman Catholic, Baptist, Brethren, Disciples of Christ, Lutheran, Methodist, Presbyterian, and Quaker.<sup>99</sup> In Indiana, the variety of religious communities and beliefs fostered competition among the groups and some conflict, but no single religious tradition reigned supreme.<sup>100</sup> The 1850 census indicated that, among the population of nearly a million inhabitants, more than 2,400 churches could be found in Indiana; thus, one church existed for every 530 people.<sup>101</sup> Protestant churches were most numerous with Methodist churches numbering 795, Baptist churches 770, Presbyterian churches 295, Christian (Disciples of Christ) churches 193, Quaker (Society of

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as American virtues. They left no room for predestination, servility to creeds or priests, and other-worldly concerns.

PECKHAM, *supra* note 74, at 80.

<sup>93</sup> MADISON, *supra* note 67, at 104-08.

<sup>94</sup> *Id.* at 100 (citing NOTTINGHAM, *supra* note 89).

<sup>95</sup> *Id.* at 99, 106-07.

<sup>96</sup> The "underground railroad," organized by a Quaker, Levi Coffin, provided a pathway through Indiana for slaves to flee the South to freedom in the North. PECKHAM, *supra* note 74, at 65-66.

<sup>97</sup> For additional discussion of the complex story of race in Indiana, see *infra* text accompanying notes 232-41.

<sup>98</sup> RUDOLPH, FAITHS, *supra* note 89, at x-xi.

<sup>99</sup> See BARNHART & CARMONY, *supra* note 79, at 377-87; MADISON, *supra* note 67, at 98-104; PECKHAM, *supra* note 74, at 85-90.

<sup>100</sup> MADISON, *supra* note 67, at 100.

<sup>101</sup> PECKHAM, *supra* note 74, at 88. Based upon figures from the federal census, Professor Madison sets the number of churches as 2,032. MADISON, *supra* note 67, at 99.

Friends) churches 91, Lutheran churches 59, and United Brethren churches 59.<sup>102</sup> Methodist adherents numbered 180 per 1,000 in the population, and Baptist adherents numbered 80 per 1,000 in the population.<sup>103</sup> However, the combined number of Congregationalists, Episcopalians, and Presbyterians totaled only 51 out of 1,000 in the Indiana population.<sup>104</sup> Even so, many Indiana residents were unaffiliated with any religious community, including religious freethinkers.<sup>105</sup> By the early 1850s, the African Methodist Episcopal Church had 1,387 members, and fewer than 200 African-Americans were members in the Methodist church.<sup>106</sup>

Indiana's political history following the adoption of the 1816 Constitution is also important to the story of equality in Indiana. By the 1820s, equality had joined the idea of liberty as a core aspect of republicanism for many Americans.<sup>107</sup> Beginning in 1824, with Andrew Jackson's first run for the presidency, and continuing through the last stages leading up to the Civil War, a political movement gained strength and swept across America, stirring the democratic spirit and indelibly inscribing the value of equality on the conscience of the young republic.<sup>108</sup> This movement, Jacksonian Democracy, was characterized

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<sup>102</sup> PECKHAM, *supra* note 74, at 88 (citing THORNBROUGH & RIKER, READINGS IN INDIANA HISTORY 477-78). Catholic churches numbered sixty-nine in 1850. *Id.* However, by 1916, with the influx of immigrants, Catholics became the largest denomination in Indiana, with numbers totaling approximately 272,000. *Id.* at 89-90. The number of Jewish persons in Indiana has been quite small. In 1890, the number of Jews in Indiana was 3,600. *Id.* at 88.

<sup>103</sup> FINKE & STARK, CHURCHING, *supra* note 59, at 287.

<sup>104</sup> *Id.*

<sup>105</sup> MADISON, *supra* note 67, at 99.

<sup>106</sup> *Id.* at 108.

<sup>107</sup> HARRY L. WATSON, LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA 50 (1990).

<sup>108</sup> THOMAS A. BAILEY & DAVID M. KENNEDY, THE AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC 221-55 (7th ed. 1983). Professor Remini has noted that one of the two basic qualities that characterized Americans in the Jacksonian era was equality. ROBERT V. REMINI, THE REVOLUTIONARY AGE OF ANDREW JACKSON 17 (1976). He wrote:

The second basic quality about these Americans was that they were champions of equality—that is, of course, for those who were white and male. Women did not need equality. They were up there on their pedestals shining forth beauty and goodness. To give them equality would demean their status in society. So the poor unfortunate female had no rights. She was chattel. She could not vote or hold office; her “right” to property was limited; she could not enter most professions; she could not make a will, sign a contract, or witness a deed without her father’s or husband’s consent; and her children could be taken from her if her husband so directed. Nor was there any concerted drive for equality for blacks or Indians on the part of part of

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by a stiff opposition to economic and political privilege, a distrust of entrenched government power, a belief in limited government, and a commitment to the protection of the people and natural rights.<sup>109</sup> Jacksonian Democrats emphasized states' rights, advocated equality of opportunity, exalted the equality and power of the common person, and represented the farmers, the clerks, the shopkeepers, the laborers, and the urban masses.<sup>110</sup> Notwithstanding the focus on the common person and equality, the Jacksonian movement was "virtually indifferent to social inequalities" such as women's rights, prison reform, educational improvements, protection of minors, and other forms of social betterment, and on the issues of the treatment of Native Americans and slaves, the record of the Jacksonians is marked by bigotry and mistreatment, greed and injustice.<sup>111</sup>

In declaring his veto of the 1832 Bank bill, Jackson urged:

It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes. Distinctions in society will always exist under

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most Americans. Women, blacks, and Indians just didn't enter the thinking of these people when they argued for equality.

*Id.* Likewise, Professor Watson has argued that Jackson viewed political equality as the cornerstone of the American Republic. WATSON, *supra* note 107, at 11 (quoting a letter by Jackson in 1833 in which Jackson called "equality among the people in the rights conferred by government" the "great radical principal of freedom"). For a comprehensive review of Andrew Jackson's life and work, see generally ROBERT V. REMINI, 1 ANDREW JACKSON AND THE COURSE OF AMERICAN EMPIRE 1767-1821 (1977), 2 ANDREW JACKSON AND THE COURSE OF AMERICAN FREEDOM 1822-1832 (1981), 3 ANDREW JACKSON AND THE COURSE OF AMERICAN DEMOCRACY 1833-1845 (1984) [hereinafter REMINI]. For a review of the political movement associated with Andrew Jackson, see GEORGE DANGERFIELD, THE AWAKENING OF AMERICAN NATIONALISM 1815-1828 (1965); ESSAYS ON JACKSONIAN AMERICA (Frank Otto Gatell ed., 1970); THE AGE OF JACKSON (Robert V. Remini ed., 1972); ROBERT V. REMINI, THE LEGACY OF ANDREW JACKSON: ESSAYS ON DEMOCRACY, INDIAN REMOVAL, AND SLAVERY (1988) [hereinafter REMINI, ESSAYS]; ROBERT V. REMINI, THE REVOLUTIONARY AGE OF ANDREW JACKSON (1976) [hereinafter REMINI, REVOLUTIONARY]; ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON (1953); CHARLES SELLERS, THE MARKET REVOLUTION: JACKSONIAN AMERICA 1815-1846 (1991); F.F. VAN DEUSEN, THE JACKSONIAN ERA 1828-1848 (1959); WATSON, *supra* note 107.

<sup>109</sup> MARVIN MEYERS, *The Jacksonian Persuasion*, in ESSAYS ON JACKSONIAN AMERICA 206-15 (Frank Otto Gatell ed., 1970); REMINI, *supra* note 108, at xi-xxvi; REMINI, ESSAYS, *supra* note 108, at 7-44; REMINI, REVOLUTIONARY, *supra* note 108, at 15-16.

<sup>110</sup> CARMONY, *supra* note 80, at 573; REMINI, *supra* note 108, at xi-xxvi; REMINI, ESSAYS, *supra* note 108, at 7-44; REMINI, REVOLUTIONARY, *supra* note 108, at 14-15.

<sup>111</sup> REMINI, *supra* note 108, at xix; see also WATSON, *supra* note 107, at 13-14 (noting the "undemocratic" quality of Jacksonian Democracy as to slaves and women).

every just government. Equality of talents, of education, or of wealth can not be produced by human institutions. In the full enjoyment of the gifts of heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society—the farmer, mechanics, and laborers—who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government. There are no necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and, as Heaven does its rains, shower it favor alike on the high and low, the rich and the poor, it would be an unqualified blessing. . . .

Nor is our Government to be maintained or our Union preserved by invasions of the rights and powers of the several States. In thus attempting to make our General Government strong we make it weak. Its true strength consists in leaving individuals and States as much as possible to themselves—in making itself felt, not in its power, but in its beneficence; not in its control, but in its protection; not in binding the States more closely to the center, but leaving each to move unobstructed in its orbit.

Experience should teach us wisdom. Most of the difficulties our Government now encounters and most of the dangers which impend over our Union has sprung from an abandonment of the legitimate objects of Government by our national legislation, and the adoption of such principles as are embodied in this act. Many of our rich men have not been content with equal protection and equal benefits, but have besought us to make them richer by act of Congress. By attempting to gratify their desires we have in the results of our legislation arrayed section against section, interest against interest, and man against man, in a fearful commotion which threatens to shake the foundations of

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our Union. It is time to pause in our career to review our principles, and if possible revive that devoted patriotism and spirit of compromise which distinguished the sages of the Revolution and the fathers of our Union. If we can not at once, in justice to interests vested under improvident legislation, make our Government what it ought to be, we can at least take a stand against all new grants of monopolies and exclusive privileges, against any prostitution of our Government to advancement of the few at the expense of the many, and in favor of compromise and gradual reform in our code of laws and system of political economy.<sup>112</sup>

In his farewell address, Jackson warned that unless Americans checked the “spirit of monopoly and thirst for exclusive privileges you will in the end find that the most important powers of the Government have been given or bartered away.”<sup>113</sup> The Jacksonian movement became a potent and revolutionary political force, completing America’s transition from monarchy to aristocracy to democracy.<sup>114</sup>

Andrew Jackson found vigorous support in Indiana, and significant majorities of Indiana voters backed Andrew Jackson in his bids for the presidency in 1824, 1828, and 1832, although Jackson did not prevail in the 1824 presidential election.<sup>115</sup> Following the 1828 election, those loyal to the Jackson organization were installed in federal offices in Indiana, and by 1832 Jackson supporters filled appointed and elective offices throughout the state.<sup>116</sup>

In the 1840s, the Democrats consolidated their dominance in Indiana over the Whig party, the successors to the Federalists and the predecessors of the Republicans. Accusing Whigs of mismanagement and corruption, identifying the state’s economic troubles and failed internal improvements with the Whigs, and arguing that the Whigs were the party of the aristocracy and of the merchants and bankers who used the government for their own private benefit, the Democrats claimed to be the party of the common person. Thus, the Democrats invoked the

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<sup>112</sup> 2 JAMES D. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 1152-54 (1897).

<sup>113</sup> *Id.* at 1525.

<sup>114</sup> REMINI, ESSAYS, *supra* note 108, at 7-44.

<sup>115</sup> MADISON, *supra* note 67, at 133-34; WILSON, *supra* note 74, at 98.

<sup>116</sup> MADISON, *supra* note 67, at 134; WILSON, *supra* note 74, at 98.

Jeffersonian and the Jacksonian legacies of democracy, individual rights, and limited governments.<sup>117</sup>

As these democratic and egalitarian currents converged in Indiana during the first half of the nineteenth century<sup>118</sup> and as Indiana became increasingly aware of significant problems in state and local governance under the 1816 Constitution,<sup>119</sup> sentiment grew in Indiana like in other states that progress and reform required the adoption of a new state constitution, that the Indiana Constitution should be rewritten.<sup>120</sup> Among the moving forces behind the decision to rewrite the Indiana Constitution were perceptions promoted by Jacksonian Democrats that the legislature had too much power, that more frequent elections and more elective officers were necessary, and that the people no longer controlled government.<sup>121</sup> Additionally, the people came to believe that the General Assembly was in session too often, chose too many state officials, was too occupied with local and special legislation such as the granting of divorces and micro-managing of local issues, and hid unpopular legislation in popular bills that addressed very different subjects.<sup>122</sup> Hoosiers also became concerned that the State was granting money from the treasury or public property to individuals,<sup>123</sup> had

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<sup>117</sup> MADISON, *supra* note 67, at 137-38.

<sup>118</sup> Even as these egalitarian currents swept through Indiana in the first half of the nineteenth century and the common person gained increasingly greater status, Indianans swept the Indian tribes from the state. During this period, Hoosiers, through their government and with the help of the federal government, acquired title to Indian lands and actively (and sometimes forcibly) removed Indians from the state. *Id.* at 122-26; PECKHAM, *supra* note 74, at 60-61; WILSON, *supra* note 74, at 38-40.

<sup>119</sup> One historian has provided the following description of the first forty years of Indiana as a state:

In the first forty years of statehood, Hoosiers were sanguine, yet uncertain of the direction they wanted to take. Freedom to manage their own affairs, after sixteen years of appointed officials and outside threats, was exhilarating, but sign posts were missing. Consequently, they would try more than one life style, entertain various expressions of Christian faith, go at education backwards, rush disastrously into internal improvements, pursue inconsistent racial policies, join new political parties, move their capital, rewrite their state constitution, and argue vehemently about extinguishing slavery in the nation. But nothing dimmed their faith in the perfectibility of mankind or in themselves. They would prevail.

PECKHAM, *supra* note 74, at 46.

<sup>120</sup> CARMONY, *supra* note 80, at 405; MADISON, *supra* note 67, at 138-39.

<sup>121</sup> WILSON, *supra* note 74, at 101.

<sup>122</sup> MADISON, *supra* note 67, at 139; WILSON, *supra* note 74, at 101.

<sup>123</sup> HOUSE JOURNAL, 33d sess. 24 (1849).

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overextended itself financially, and had become heavily indebted through its involvement in banking and massive internal improvements.<sup>124</sup>

Among these factors, the problem of local and special legislation was of central concern. In the 1840s, the General Assembly enacted increasingly more and more local and special legislation,<sup>125</sup> which resulted in the perception that local and special legislation was a growing evil. On January 11, 1848, Governor James Whitcomb remarked:

Occasion has been repeatedly taken in my former messages, to allude to the great amount of our local or special legislation, the danger of injustice by its means to individual interests, its expense to the treasury, and the large portion of time it necessarily occupies to the detriment of that mature and thorough consideration which is due to subjects of a general character.<sup>126</sup>

On December 6, 1848, Governor Whitcomb added: "If calling a convention to amend the constitution were productive of no other result than furnishing an effectual remedy for this growing evil [of special and local legislation], it would be abundantly justified."<sup>127</sup>

In 1849, Indiana voters approved the calling of a convention to rewrite the Constitution.<sup>128</sup> At that time, the party of Andrew Jackson dominated the Indiana General Assembly with approximately sixty-three percent Democrats to thirty-seven percent Whigs.<sup>129</sup> Thus, a

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<sup>124</sup> CARMONY, *supra* note 80, at 405; MCLAUCHLAN, *supra* note 68, at 8-9; PECKHAM, *supra* note 74, at 62-64; WILSON, *supra* note 74, at 101.

<sup>125</sup> HOUSE JOURNAL, 33d sess. 23 (1849).

<sup>126</sup> HOUSE JOURNAL, 32d sess. 131 (1848).

<sup>127</sup> HOUSE JOURNAL, 33d sess. 24 (1849). One year later, on December 4, 1849, Governor Paris C. Dunning in addressing the General Assembly commented:

Special legislation is a growing evil which has attracted much attention amongst the masses of the people, and to which much well founded opposition exists in the public mind. Indeed, it has for years past engaged full three-fourths of the time of the General Assembly, to the exclusion (from their due consideration) of many other questions of great importance to the people of the State.

<sup>1</sup> CHARLES KETTLEBOROUGH, CONSTITUTION MAKING IN INDIANA 195 (1916).

<sup>128</sup> WILSON, *supra* note 74, at 97.

<sup>129</sup> MCLAUCHLAN, *supra* note 68, at 8-9.

Democrat-controlled General Assembly authorized the second Constitutional Convention.<sup>130</sup>

The second Constitutional Convention met from October 7, 1850, to February 10, 1851.<sup>131</sup> Among the one hundred fifty-four delegates to the Convention, two-thirds were Democrats, and one-third Whigs.<sup>132</sup> In all, fifty-six delegates were attorneys or were persons who had studied law, were judges, or would become judges.<sup>133</sup> This lengthier second Constitutional Convention allow the delegates to engage in considerable debate, to articulate well-formed opinions, and to fashion constitutional language that would reflect their collective will.<sup>134</sup> On August 4, 1851, nearly seventy-five percent of Indiana voters approved the new Constitution,<sup>135</sup> and the Constitution came into effect on November 1, 1851.<sup>136</sup>

In the Constitution of 1851, the delegates restricted the ability of the state government to become indebted<sup>137</sup> and to engage in deficit

<sup>130</sup> WILSON, *supra* note 74, at 100.

<sup>131</sup> MCLAUCHLAN, *supra* note 68, at 10; WILSON, *supra* note 74, 101-02.

<sup>132</sup> CARMONY, *supra* note 80, at 407; MADISON, *supra* note 67, at 139. The precise composition of the delegates was ninety-five Democrats and fifty-five Whigs. KETTLERBOROUGH, *supra* note 127, at lxxxiii.

<sup>133</sup> Brent E. Dickson, Thomas A. John, & Katherine A. Wyman, *Lawyers and Judges as Framers of Indiana's 1851 Constitution*, 30 IND. L. REV. 397, 397 (1997). As Justice Dickson has noted, they "participated as equal partners with the other delegates from all walks of Hoosier life in their grand quest for better government." *Id.*

<sup>134</sup> WILSON, *supra* note 74, at 101. See generally REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1850 (2 vols. 1850) [hereinafter REPORT]; JOURNAL OF THE CONVENTION OF THE PEOPLE OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION (1851) [hereinafter JOURNAL].

<sup>135</sup> MCLAUCHLAN, *supra* note 68, at 11. The vote was 113,230 to 27,638. WILSON, *supra* note 74, at 102.

<sup>136</sup> MCLAUCHLAN, *supra* note 68, at 11.

<sup>137</sup> IND. CONST. art. X. In 1881, the original Article XIII of the Indiana Constitution, which had restricted the migration of slaves, negroes, and mulattoes, see *infra* footnotes 237-47 and accompanying text, was replaced by a new Article XIII, which limited the ability of political and municipal corporations to become indebted and reads as follows:

No political or municipal corporation in this State shall ever become indebted, in any manner or for any purpose to an amount, in the aggregate, exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporations, shall be void: *Provided*, That in time of war, foreign invasion, or other great public calamity, on petition of a majority of the property owners in number and value, within the limits of such corporation, the public authorities, in their



spending,<sup>138</sup> limited the state's ability to overcommit itself financially through ventures in banking and business,<sup>139</sup> mandated general laws,<sup>140</sup> prohibited special or local laws,<sup>141</sup> and prohibited logrolling.<sup>142</sup> The new

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discretion, may incur obligations necessary for the public protection and defense to such amount as may be requested in such petition.

<sup>138</sup> IND. CONST. art. X. In its original version, Article X provided as follows:

SEC. 1. The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious or charitable purposes, as may be specially exempted by law.

SEC. 2. All the revenues derived from the sale of any of the public works belonging to the State, and from the net annual income thereof, and any surplus that may, at any time, remain in the treasury, derived from taxation for general State purposes, after the payment of the ordinary expenses of the government, and of the interest on bonds of the State, other than bank bonds, shall be annually applied, under the direction of the General Assembly, to the payment of the principal of the public debt.

SEC. 3. No money shall be drawn from the treasury, but in pursuance of appropriations made by law.

SEC. 4. An accurate statement of the receipts and expenditures of the public money, shall be published with the laws of each regular session of the General Assembly.

SEC. 5. No law shall authorize any debt to be contracted, on behalf of the State, except in the following cases: to meet casual deficits in the revenue; to pay the interest on the State debt; to repel invasion, suppress insurrection, or, if hostilities be threatened, provide for the public defense.

SEC. 6. No county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription; nor shall any county loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any such company; nor shall the General Assembly ever, on behalf of the State, assume the debts of any county, city, town or township, nor of any corporation whatever.

<sup>139</sup> IND. CONST. arts. X, XI. For a discussion of Article XI, see *infra* note 179 and accompanying text.

<sup>140</sup> IND. CONST. art. IV, § 23. For a discussion of Article IV, sections 22 and 23, see *infra* notes 201-04 and accompanying text.

<sup>141</sup> IND. CONST. art. IV, §§ 22-23. For a discussion of Article IV, sections 22 and 23, see *infra* notes 201-04 and accompanying text.

<sup>142</sup> IND. CONST. art. IV, § 19. Article IV, section 19 in its original version provided as follows: "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." *Id.* In its current version, it provides: "An act, except an act for the codification, revision or rearrangement of laws, shall be confined to one subject and matters properly connected therewith." *Id.*

Constitution provided for biennial sessions of sixty-one days for the General Assembly.<sup>143</sup> With these provisions and others, the framers attempted to address several of the key problems under the Constitution of 1816 and limit the power of the General Assembly.<sup>144</sup>

The very first declarations by the framers in the 1851 Constitution demonstrate the confluence of these currents in legal, political, and religious thought and history and reflect their common understanding of the Indiana Constitution. The framers declared in the Preamble:

TO THE END, that justice be established, public order maintained, and liberty perpetuated; WE, the People of the State of Indiana, grateful to ALMIGHTY GOD for the free exercise of the right to choose our own form of government, do ordain this Constitution.<sup>145</sup>

Article I, section 1 added:

WE DECLARE, That all men are created equal; that they are endowed by their CREATOR with certain unalienable 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,

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<sup>143</sup> IND. CONST. art. IV, § 9 (readings as adopted "The sessions of the General Assembly shall be held biennially at the capital of the State, commencing on the Thursday next after the first Monday of January, in the year one thousand eight hundred and fifty-three, and on the same day of every second year thereafter, unless a different day or place shall have been appointed by law. But if, in the opinion of the Governor, the public welfare shall require it, he may at any time by proclamation, call a special session.").

<sup>144</sup> CARMONY, *supra* note 80, at 410-23, 434-40, 450-51; MCLAUCHLAN, *supra* note 68, at 11.

<sup>145</sup> IND. CONST. Preamble (1851). The Preamble to the 1816 version of the Indiana Constitution provided in part as follows:

We the Representatives of the People of the Territory of Indiana, . . . in order to establish Justice, promote the welfare, and secure the blessings of liberty to ourselves and our posterity; do ordain and establish the following constitution or form of Government, and do mutually agree with each other to form ourselves into a free and Independent state, by the name of the State of Indiana.

an infeasible right to alter and reform their government.<sup>146</sup>

Together, these provisions express certain basic elements drawn from the natural law tradition and the social contract theory, blended with ideas that flourished in the Jeffersonian and Jacksonian eras, and energized by religious sentiments that grew during the religious awakening of the early nineteenth century. Created equal, possessing natural rights, and acting as sovereigns over their government, the people would ordain their own Constitution and freely exercise their right to choose their own form of government.

Understood in its historical, religious, and philosophical context, equality did not mean that all humans are the same in terms of natural abilities, characteristics, talents, or virtues.<sup>147</sup> The value of equality meant that humans equally possess natural rights as creatures of God. The value of equality also had a certain normative quality, establishing standards by which laws, conventions, and conduct would be evaluated and compelling the government through its laws to treat individuals

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<sup>146</sup> IND. CONST. art. I, § 1. Article I, sections 1 and 2 of the Indiana Constitution of 1816 provided as follows:

SEC. 1. That the general, great and essential principles of liberty and free Government may be recognized and unalterably established; WE declare, That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights; among which are the enjoying and defending life and liberty, and of acquiring, possession, and protecting property, and pursuing and obtaining happiness and safety.

SEC. 2. That all power is inherent in the people; and all free Governments are founded on their authority, and instituted for their peace, safety and happiness. For the advancement of these ends, they have at all times an unalienable and infeasible right to alter or reform their Government in such manner as they may think proper.

<sup>147</sup> In the founding era, John Adams wrote: "Was there, or will there ever be a nation whose individuals were all equal, in natural and acquired qualities, in virtues, talents, and riches? The answer in all mankind must be in the negative." MCCULLOUGH, *supra* note 44, at 377 (quoting John Adams). Adams recognized that humans exhibit many inequalities—in wealth, education, family position, and such—withstanding the moral and political equality of rights and duties in America. *Id.* Notwithstanding the recognition in early America that equality did not mean "sameness," the notion of equality could be understood to describe some essential way in which all humans are equals. See generally JOHN E. COONS & PATRICK M. BRENNAN, BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT (1999).

with equal respect and to consider the claims of individuals equally.<sup>148</sup> Just six years after the new Indiana Constitution was ratified, Abraham Lincoln, a favorite son of Indiana,<sup>149</sup> expressed these sentiments well in his speech on the *Dred Scott v. Sandford*<sup>150</sup> decision by the United States Supreme Court:

The authors of that notable instrument [the Declaration of Independence]. . . did not intend to declare all men equal in all respects. They did not mean to say all were equal in color, size, intellect, moral developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal—equal in “certain inalienable rights, among which are life, liberty, and the pursuit of happiness.” This they said, and this they meant. They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. In fact they had no power to confer such a boon. They meant simply to declare the right, so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.<sup>151</sup>

### III. EQUALITY IN THE INDIANA CONSTITUTION

The best reflection of the framers’ and ratifiers’ conception of equality is the text of the Indiana Constitution itself. Within the constitution are provisions that recognize the basic equality of all

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<sup>148</sup> The Author is indebted to Professors John E. Coons and Patrick M. Brennan and their thoughtful examination of the descriptive and normative senses of equality in *BY NATURE EQUAL: THE ANATOMY OF A WESTERN INSIGHT* (1999).

<sup>149</sup> Although born in Kentucky, Lincoln had grown up in Indiana, moving to Illinois with his family when he was twenty-one years of age. PECKHAM, *supra* note 74, at 47-48, 69.

<sup>150</sup> 60 U.S. (2 How.) 393 (1957).

<sup>151</sup> Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), in 2 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 398, 405-06 (Roy P. Basler et al. eds., 1953).

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individuals, thereby describing individuals as equals in certain essential ways, and provisions that mandate the government to treat individuals equally.

A. *Provisions Expressing the Basic Equality of Indiana Citizens*

The essential equality of all human beings is expressed unequivocally in the first provision of the Indiana Constitution after the Preamble. As their first declaration regarding the rights of Indiana citizens, the framers proclaimed:

WE DECLARE, That all men<sup>152</sup> are created equal; that they are endowed by their CREATOR with certain unalienable<sup>153</sup> 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.<sup>154</sup>

In Article I, section 1, the framers drew upon the Declaration of Independence of 1776, of which Thomas Jefferson was the primary author.<sup>155</sup> Inspired by the words and the philosophy behind the

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<sup>152</sup> The present version of Article I, section 1 substitutes the term “people” for “men.” IND. CONST. art. I, § 1 (amended November 6, 1984).

<sup>153</sup> The present version of Article I, section 1 reads “inalienable” rather than “unalienable.”

<sup>154</sup> Article I, sections 1 and 2 of the Indiana Constitution of 1816 provided as follows:

SEC. 1. That the general, great, and essential principles of liberty and free government may be recognized, and unalterably established: WE DECLARE, That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights; among which are the enjoying and defending life and liberty, and of acquiring, possession, and protecting property, and pursuing and obtaining happiness and safety.

SEC. 2. That all power is inherent in the people; and all free governments are founded on their authority, and instituted for their peace, safety, and happiness. For the advancement of these ends, they have, at all times, an unalienable and indefeasible right to alter or reform their government in such manner as they may think proper.

IND. CONST. of 1816, art. I, §§ 1-2.

<sup>155</sup> REPORT, *supra* note 134, at 952-64 (discussing this language from the Declaration of Independence); BURNS & PELTASON, *supra* note 9, at 31.

Declaration of Independence, the framers of the Indiana Constitution began the Indiana Bill of Rights with a declaration of the basic equality of all individuals, the inalienability of rights, the locus of power and authority in the people, and the right of the people to reform their government. Certain delegates opposed this provision, but the proponents of the provision prevailed.

In their debate regarding this provision, the delegates to the Convention highlighted what these words were intended to convey. In discussing Article I, section 1, Delegate William M. Dunn of Jefferson County argued:

The first part of this section expresses that sentiment which occupies so prominent a place in our Declaration of Independence: "We hold these truths to be self evident, that all men 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." To this sentiment I cling with fondness of affection which has been so beautifully expressed by [Delegate Rariden]. It has revolutionary associations. It was made by the fathers of the republic, and comes down to us hallowed by the memory of their long and arduous struggles to maintain it. In the "unanimous declaration of the thirteen United States of America," we find the first authoritative enunciation ever made of the great principle that all men are created free and equal. The oppressed of every nation received the announcement with joy and hope. They have repeated it from one to another until it has become the watchword of liberty throughout the world. Wherever there is now a man struggling for liberty, his heart swells with emotion as he repeats this sentiment, and turns his eyes to the Republic of the west as affording the world an example of freedom and equality—of a government instituted and sustained by the consent of the governed. Under the influence of this principle thrones have crumbled to the dust, and despots have been compelled to relax the bonds of their subjects. It has not yet fulfilled its destiny, nor will it until universal liberty prevails throughout the earth. And shall we now discard this principle which our fathers proclaimed

defiantly in the face of the most powerful nation on the globe, and for the support of which they cheerfully endured all the privations and calamities of a protracted war? Shall we strike it in disgrace from our bill of rights? I trust not, sir. Let us give to this sentiment the first place in our bill of rights, that our children and our children's children may early learn it, and cherish it in their hearts as one of the fundamental principles of our government.

[Delegate Pettit] says very truly, that the existence of slavery in our country is inconsistent with this declaration, and that our practices give the lie to all our professions on the subject of freedom and equality. Our fathers felt this inconsistency, but they boldly proclaimed what they believed to be the true principle of government, trusting that in time slavery would cease to exist, and with it this gross inconsistency. The history of those times and the debates in the Convention that formed the Constitution of the United States, show that the men of the Revolution looked upon slavery as a temporary institution—one that circumstances beyond our control had established among us—but one that must fall before the advancing progress of Christianity and philanthropy. Let us cherish the same hopes, and let us not accommodate the declaration of our principles to the existence of slavery, but let us rather earnestly labor in every way we properly can, for the removal of the inconsistency that stares us in the face, by the removal of slavery itself.<sup>156</sup>

Delegate Robert Dale Owen of Posey County, one of the sons of Robert Owen who founded Owen community, speaking as Chairman of the Committee on Rights and Privileges, explained the Committee's actions on Article I, section 1:

Among the "inalienable rights of all men"—black and white—there is no distinction—is the right of acquiring, possessing, and protecting property. Now, sir, it is quite clear, that if we prevent negroes, under any

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<sup>156</sup> REPORT, *supra* note 134, at 956-57.

circumstances, from coming into this State, or from holding real estate, we have no right to put such a declaration as this into our Constitution; until that matter is decided one way or the other, common consistency requires that we should refrain from reporting the section. . . .

I will say for myself, that there was another subject—I do not know that it had influence with other members of the Convention, but it had great weight with me—that in regard to the property of married women, which, as it has not, at the time of the report, been acted upon, seemed to me to require that we should postpone the reporting of this section. When we employ, in a Constitution, the words “all men,” we use the term “men” in a general sense. We include both sexes. As, for example, when we say: “All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences.” This, of course, guaranties liberty of conscience to women, as well as men. So when we say: “All men have an inalienable right to enjoy, possess, and protect property,” the declaration extends to women as well as to men. Now, unless we change the old principle of the common law, which merges, in the husband, the legal existence of the wife, women, during the entire period of their married life—and that is their usual condition—have no more active or available rights, to acquire, or to enjoy, or to protect property, than the negro slave has. Unless, therefore, we change that principle, we have no right to insert in our Constitution any such declaration as that contained in the section under consideration. As to one-half of the white citizens of this State, that declaration is an absolute falsehood.<sup>157</sup>

1: Delegate John B. Howe of LaGrange County said of Article I, section

[Delegate Pettit] contended that the proposition that all men are born equally free and independent is not

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<sup>157</sup> *Id.* at 957-58



true. In the sense in which he uses the words, he is undoubtedly correct; but with his intellect certainly he ought to have been able to approximate to the meaning which existed in the mind of the immortal author of these words when he first committed them to paper. In the sense of Jefferson and the framers of the Declaration of Independence, the assertion is true, and always will be true. The assertion refers to the rights of man as existing under the law of nature; and by that law, in contra-distinction to the law of man, all men are born equally free. That is the way in which the term "men" is used.

It does not require a grammarian to know that men are not "born" in the sense in which [Delegate Pettit] used the term. All know that this "man" is a generic term, including the whole human race, and refers undoubtedly to the time of their birth. It simply declares that all men are born free, and that by the law of man, and usurpation alone, they have become enslaved. That is the meaning precisely, and nothing more nor less. The objection that slavery now exists has nothing whatever to do with the matter. Now we all know—for we have all both heard and read—what is the origin of slavery. Is slavery legitimate by the law of nature or of man? Can you hold slaves by the law of nature? Every schoolboy will respond "no" to the question, and tell you that it exists only by usurpation. The words, therefore, are not only true, but beautifully true; and as an abstract proposition it is eminently just. As I said before, I care very little whether it is retained in the new Constitution or not. It will be equally true whether we adopt it or reject it. But inasmuch as our ancestors have seen proper to adopt these words, and inasmuch as they were in the mouth of every freeman of the country at the time, and have become nationalized, and immortalized by the circumstances under which they were written, I think we ought to retain them. There certainly can be no impropriety in doing so; but, on the contrary, I regard them as manifestly proper. If there be one political document that has been given to immortality more than another, it is precisely that Declaration. Nothing

whatever in all Grecian or Roman times can possibly excel this in classic purity or excellence. Let us then adopt it.

And let me now refer for a moment to an argument used by [Delegate Owen] that these words conflict with the section in regard to the rights of women.

Now we are not going to determine by this article what the laws of nature are. I have said that by the laws of nature all men are equally free and independent; that by the laws of nature every one, whether man or woman, is entitled to the first fruits of his industry and his possessions. By the law of nature the savage who first builds and occupies a hut is entitled to it; but when he enters into society he must conform to the rules and regulations which that society may adopt; and the mere fact that by marrying a woman her property is thereby transferred to her husband, is nothing more nor less than transferring the property as it were by deed. She is not compelled to marry. It is usually with her a matter of choice. It is a contract like all other contracts so far as property is concerned; and when she marries she transfers her property to her husband by the law of the land. But what, let me ask, has this to do with the laws of nature. I may as well say that whether these words are good or not, whether they are right or not, no argument which I have heard against them has shown to me their impropriety; but, on the contrary, the very absurdity of the arguments made use of shows to me their truth and excellence.<sup>158</sup>

Although the framers recognized the equality of all men under the natural law, it is a regrettable historical reality that the framers and ratifiers of the Indiana Constitution of 1851 created inconsistencies by including provisions that contradicted the value of equality that they affirmed for themselves. Now, the equality and liberty that white men were recognized to possess in the early years under the Constitution exteare understood to be possessed by all persons, regardless of race, national origin, or gender.

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<sup>158</sup> *Id.* at 959.

*B. Provisions Mandating the Equal Treatment of Indiana Citizens*

*1. Equal Treatment in the Recognition of Basic Rights and Freedoms*

In Article I of the Indiana Constitution, the Indiana Bill of Rights, the framers recognized a broad range of rights that all Hoosiers possess. These rights are equally possessed by all Hoosiers, and the Constitution obligates the government to treat Indiana citizens equally in their exercise of these rights. In recognizing these rights, the framers in many provisions expressly limited the government's power to burden the enjoyment of these rights by all people.

*a. As to the Rights to Life, Liberty, and the Pursuit of Happiness*

In Article I, section 1, the framers recognized that all Hoosiers "are endowed by their CREATOR with certain unalienable rights," including the rights to "life, liberty, and the pursuit of happiness."<sup>159</sup> Just a few years after the framers adopted this language, the Indiana Supreme Court wrote:

[T]he legislature cannot forbid and punish the doing of that which the constitution permits; and cannot take from the citizen that which the constitution says he shall have and enjoy. If it can, then we think all will admit that the constitution itself is worthless, the liberties of the people a dream, and our government as despotic as any on earth.

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The first section of the first article declares, that all men are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. Under our constitution, then, we all have some natural rights that have not been surrendered, and which government cannot deprive us of, unless we shall first forfeit them by our crimes; and

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<sup>159</sup> IND. CONST. art. I, § 1. Article I, section 1 of the Indiana Constitution of 1816 provided in part: "[A]ll men . . . have certain natural, inherent, and unalienable rights; among which are, the enjoying and defending life and liberty, and of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety." IND. CONST. of 1816, art. I, § 1.

to secure to us the enjoyment of these rights, is the great end and aim of the constitution itself.

It thus appears conceded that rights existed anterior to the constitution—that we did not derive them from it, but established it to secure to us the enjoyment of them; and it here becomes important to ascertain with some degree of precision what these rights, natural rights, are.

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We lay down this proposition, then, as applicable to the present case; that the right of liberty and pursuing happiness secured by the constitution, embraces the right, in each compos mentis individual, of selecting what he will eat and drink, in short, his beverages, so far as he may be capable of producing them, or they may be within his reach, and that the legislature cannot take away that right by direct enactment. If the constitution does not secure this right to the people, it secures nothing of value. If the people are subject to be controlled by the legislature in the matter of their beverages, so they are as to their articles of dress, and in their hours of sleeping and waking. And if the people are incompetent to select their own beverages, they are also incompetent to determine anything in relation to their living, and should be placed at once in a state of pupillage to a set of government sumptuary officers; eulogies upon the dignity of human nature should cease; and the doctrine of the competency of the people for self-government be declared a deluding rhetorical flourish. If the government can prohibit any practice it pleases, it can prohibit the drinking of cold water. Can it do that? If not, why not? If we are right in this, that the constitution restrains the legislature from passing a law regulating the diet of the people, a sumptuary law, (for that under consideration is such, no matter whether its objects be morals or economy, or both,) then the legislature cannot prohibit the manufacture and sale, for use as a beverage, of ale, porter, beer, etc., and cannot declare those manufactured, kept and sold for that purpose, a nuisance, if such is the use to which those articles are put by the people. It all resolves itself into

this, as in the case of printing, worshipping God, etc. If the constitution does not protect the people in the right, the legislature may probably prohibit; if it does, the legislature cannot. We think the constitution furnishes the protection.<sup>160</sup>

*b. As to the Freedom of Religion, and the Rights of Every Conscience*<sup>161</sup>

In Article I, section 2, the framers recognized that “[a]ll men<sup>162</sup> shall be secured in the natural right to worship ALMIGHTY GOD, according to the dictates of their own consciences.”<sup>163</sup>

Now on October 30, 1850, the Committee on Rights and Privileges recommended the following version: “All men shall be secured in the natural and indefeasible right to worship Almighty God, according to the dictates of their own consciences.”<sup>164</sup> On December 4, 1850, considering the committee report, Delegate Michael G. Bright of

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<sup>160</sup> *Herman v. State*, 8 Ind. 545, 554-559 (1855) (internal citations omitted). Nearly a century later, the Supreme Court of Indiana again considered the meaning of this provision, recognizing that these rights are enjoyed by everyone:

However, the personal liberty clause, Art. 1, § 1 of the Constitution of Indiana, or the right to pursue any proper vocation, is regarded as an unalienable right and a privilege not to be restricted except perhaps by a proper exercise of the police power of the state. Liberty as used in the constitution not only means freedom from servitude and restraint, but embraces the right of every one to be free in the use of their powers in the pursuit of happiness in such calling as they may choose subject only to the restraints necessary to secure the common welfare. The privilege of contracting is both a liberty and a property right and is protected by the constitution of both the state and nation.

*Kirtley v. State*, 227 Ind. 175, 179-80, 84 N.E.2d 712, 714 (1949) (citations omitted).

<sup>161</sup> Article I, section 3 of the Indiana Constitution of 1816 provided in part:

That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; That no man shall be compelled to attend, erect, or support any place of Worship, or to maintain any ministry against his consent: That no human authority can, in any case whatever, control or interfere with the rights of conscience: . . . and no religious test shall be required as a qualification to any office of trust or profit.

IND. CONST. of 1816, art. I, § 3.

<sup>162</sup> The present version of Article I, section 2 substitutes “people” for “men.” IND. CONST. art. I, § 2 (amended November 6, 1984).

<sup>163</sup> The First Article of the Ordinance of 1787 stated: “No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.” THE ORDINANCE OF 1787 § III, art. I (1787).

<sup>164</sup> JOURNAL, *supra* note 134, at 165.

Jefferson County sought to amend the proposed language by striking “shall be secured in” and inserting the word “possess,”<sup>165</sup> and Delegate William C. Foster of Monroe County proposed adding the words “possess and” after “men.”<sup>166</sup> In the floor debate regarding whether the provision would read “all men possess” or “all men shall be secured,” Delegate Bright declared:

We are now on the bill of rights, and all that we aim at is a declaration of rights. Among other rights, we propose to say that all men are born free and equal, and that all power is inherent in the people. Then comes the section under consideration, declaring that all men possess the natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. As it is reported, it provides that “all men shall be secured.” Now how are they to be secured? We do not propose to dictate future security to the people. We say that it is an inherent right now—not a right that is to be hereafter legislated upon and secured to them. They possess it now. It is a mere declaration of abstract right; and it seems to me, that, instead of saying we shall be secured in that right, we ought to make the declaration that we possess it now, and at all times, and that it cannot be interfered with.<sup>167</sup>

Delegate Owen, the Chairman of the Committee, disagreed with Delegate Bright, believing that the section already declared that the right existed, but that it was important that “its existence shall be secured to all men.”<sup>168</sup> Delegate Owen argued:

No Legislature could ever refuse to secure to the people this right without a manifest violation of the Constitution. . . . We provide here in our organic law that all men shall be secured in the right to worship Almighty God, &c. We intended by this that they should be so secured, and it will be the duty of the Legislature to enact such laws as will prevent any and

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<sup>165</sup> *Id.* at 350.

<sup>166</sup> *Id.*

<sup>167</sup> REPORT, *supra* note 134, at 965-66.

<sup>168</sup> *Id.* at 965.

every religious society from being disturbed in their worship.<sup>169</sup>

Delegate James W. Borden of Allen, Adams, and Wells counties agreed with Delegate Bright, urging, "Suppose that the Legislature should have a majority which was not disposed to allow the right to be enjoyed. . . . We want to have it declared that we 'possess' the right."<sup>170</sup> Delegate John B. Howe of LaGrange County responded:

[I]n the name of common sense, why assert the notorious truth, that all men in this country, and in every other country, have a right to worship Almighty God as they please? If you assert anything at all, therefore, why not assert that they shall be secured in that right? I feel satisfied that you cannot insert a more appropriate term. What does it mean? It means, that, inasmuch as all men have a right to worship God according to their own creed, they shall be protected in that right. For example, if their meetings should be wantonly disturbed, that the creating of such disturbance should be regarded as a criminal offense, and punished accordingly. The object of the provision is, that the law should recognize the right and protect it by proper legislation; that is all. It is simply tying up the hands of the Legislature so that they cannot decree otherwise.<sup>171</sup>

Delegate Cromwell W. Barbour of Vigo County added:

The term "natural and indefeasible right" is an acknowledgment that we possess it. The very terms used in the section show that we possess the right, and why, therefore, should we repeat the same thing in the section. It appears to me that the section not only says that all men possess the right, but it goes a step further, and says that they shall be secured in it. I think there can be no objection to the phraseology as it now stands.

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

If the right is "natural and infeasible," of course we possess it.<sup>172</sup>

When this provision was referred to the Committee on Revision, Arrangement, and Phraseology on December 5, 1850, it read: "All men shall be secured in the natural and infeasible right to worship Almighty God, according to the dictates of their own consciences."<sup>173</sup> When the provision came back from that Committee on February 1, 1851, it was in its final form: "All men shall be secured in the natural right to worship ALMIGHTY GOD, according to the dictates of their own consciences."<sup>174</sup>

Article I, section 3 declares that "[n]o law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience." In a resolution adopted on October 22, 1850, the Committee on Rights and Privileges was "directed to inquire into the expedience of incorporating the following section in Article 1 of the Constitution":

That the free exercise and enjoyment of religious opinions and worship without discrimination or preference, shall always be allowed in this State to all mankind, and no person shall be rendered incompetent to be a witness on account of his opinions on religious belief; but that liberty of conscience, hereby secured, shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of this State.<sup>175</sup>

On October 30, 1850, the Committee on Rights and Privileges recommended that the provision read that "[n]o law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience,"<sup>176</sup> which was the version adopted by the Convention.

In this provision the framers restricted governmental power by prohibiting any law that would control the free exercise and enjoyment

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<sup>172</sup> *Id.* at 966.

<sup>173</sup> JOURNAL, *supra* note 134, at 867.

<sup>174</sup> *Id.* at 871.

<sup>175</sup> *Id.* at 120-21.

<sup>176</sup> *Id.* at 165-66.



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of religion opinions or that would interfere with any individual's rights of conscience. The scope of protection under this provision is broad, extending to practices, beliefs, and conscience. By prohibiting any law that would invade these protected domains, the protection would extend not only to every individual but also to every group.

In Article I, section 4, the framers mandated that "[n]o preference shall be given, by law, to any creed, religious society, or mode of worship;<sup>177</sup> and no man<sup>178</sup> shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent." The "no preference" clause mandated equal treatment as to creeds, religious institutions, and modes of worship. Thus, through its laws, the government may not prefer any particular creed, any particular religious group, or any particular mode of worship.

The "consent" clause provides additional protections as to the conscience of every individual. When it comes to matters of religion, the government must respect every individual's conscience and beliefs and must not compel any person to attend, support, or maintain any religion, religious institution, or ministry. To safeguard the conscience, consent is a prerequisite. Similarly, in Article I, section 6, the framers restricted government power to fund religious institutions. Thus, the framers declared in Article I, section 6: "No money shall be drawn from the treasury, for the benefit of any religious or theological institution."

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<sup>177</sup> IND. CONST. art. I, § 4 (amended 1984). Article I, section 3 of the Indiana Constitution of 1816 provided in part: "no preference shall ever be given by law to any religious societies, or modes of worship . . ." IND. CONST. of 1816, art. I, § 3. On October 30, 1850, the Committee on Rights and Privileges recommended the following language: "No discrimination shall be made by law between religious societies, nor preference be given by law to any mode of worship." JOURNAL, *supra* note 134, at 165-66. On December 4, 1850, Delegate John Pettit of Tippecanoe County moved to insert the terms "or sects" after "worship." *Id.* at 349. Delegate John S. Newman of Wayne County sought to replace the Committee's proposal with the following: "No preference shall be given by law to any religious societies or modes of worship or creeds, and no religious test shall be required as qualification to any office of trust or profit." *Id.* at 349. The following language was referred to the Committee on Revision, Arrangement, and Phraseology on December 5, 1850: "No preference shall be given by law to any religious societies, or modes of worship, or creeds, and no religious test shall be required as a qualification to any office of trust or profit." *Id.* at 867. On February 1, 1851, this portion of Article I, section 4 read that "[n]o preference shall be given, by law, to any creed, religious society, or mode of worship," which was the version adopted by the Convention. *Id.* at 871.

<sup>178</sup> The present version of Article I, section 4 substitutes the term "person" for "man." IND. CONST. art. I, § 4 (amended November 7, 1984).

In Article I, sections 5, 7, and 8, the framers adopted additional religious liberty protections for all Hoosiers. In Article I, section 5, the constitution mandated that “[n]o religious test shall be required, as a qualification for any office of trust or profit.” Article I, section 7 mandated that “[n]o person shall be rendered incompetent as a witness, in consequence of his opinions on matters of religion.” In Article I, section 8, the framers demonstrated sensitivity to matters of conscience by requiring that “[t]he mode of administering an oath or affirmation, shall be such as may be most consistent with, and binding upon, the conscience of the person, to whom such oath or affirmation may be administered.”<sup>179</sup>

*c. As to the Freedom of Expression*

In Article I, section 9, the framers required that “[n]o 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.”<sup>180</sup> In this provision, the framers prohibited the government from restraining Hoosiers in their expression of their thoughts and opinions and from restricting Hoosiers in their right to speak, write, and print on any subject. By broadly prohibiting any law restraining or restricting the freedom of expression enjoyed by Hoosiers, the government cannot prefer some speaking, writing, printing, or expression over others.

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<sup>179</sup> Article XI, section 4 of the Indiana Constitution of 1816 provided: “The manner of administering an oath or affirmation shall be such as is most consistent with the conscience of the deponent, and shall be esteemed the most solemn appeal to God.” IND. CONST. of 1816, art XI, § 4.

<sup>180</sup> Article I, section 9 of the Indiana Constitution of 1816 provided:

That the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every Citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.

IND. CONST. of 1816, art. I, § 9.

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d. *As to Every Individual's Particular Services and Property*

In Article I, section 21, the framers required: "No man's<sup>181</sup> particular services shall be demanded without just compensation; no man's property shall be taken by law; nor, except in case of the State, without such compensation first assessed and tendered."<sup>182</sup> By this provision, the framers prohibited the government from placing a burden on any person by requiring that person to provide particular services or by taking such person's property without just compensation.

In the debate regarding the meaning of the term "particular services," Delegate Othniel L. Clark of Tippecanoe County stated, "I take it that the word particular, in the old Constitution, means, not that general service which every citizen is bound to render, but something specific—something that is required of him as an individual, in contra-distinction to what is required, generally, of all citizens."<sup>183</sup> Delegate John B. Niles of LaPorte County argued, "I prefer the old word particular to the word personal used by the committee, as it will distinguish between such services and those general services which all good citizens owe to the State in protecting the interests and preserving the good order of society."<sup>184</sup> Delegate Clark reiterated, "[t]here are

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<sup>181</sup> The present version of Article I, section 21 reads "person" rather than "man." IND. CONST. art. I, § 21 (amended November 6, 1984).

<sup>182</sup> Article I, section 7 of the Indiana Constitution of 1816 provided: "That no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without a just compensation being made therefore." IND. CONST. of 1816, art. I, § 1.

<sup>183</sup> REPORT, *supra* note 134, at 359. Soon after the Convention, the Supreme Court of Indiana considered the meaning of "particular services" in the context of witness fees in criminal matters, stating:

[W]e are prepared to say, that the services of witnesses in criminal cases are not particular, but are of the class of general services which every man in community is bound to render for the general, as well as his own individual good. It is as much the duty and interest of every citizen to aid in prosecuting crime as it is to aid in subduing any domestic or foreign enemy; and it is equally the interest and duty of every citizen to aid in furnishing to all, high and low, rich and poor, every facility for a fair and impartial trial when accused; for none is exempt from liability to accusation and trial. These are matters of general interest and public concern, are vital, indeed, to the very existence of free government, and render the services of witnesses on such occasions matters of general public interest, and not particular, in the sense of the constitution.

Israel v. State, 8 Ind. 467, 468 (1856).

<sup>184</sup> REPORT, *supra* note 134, at 368.

duties which all citizens are occasionally called on to perform; services which the necessities of the State demand alike from all; obligations which all citizens owe to their Government, the common defense of all.”<sup>185</sup> Thus, the framers required a measure of equal treatment when the government demands individual citizens to provide their particular services or yield their property to the government.

*e. As to the Right to Contract*

In Article I, section 24, the framers instructed that “[n]o . . . law impairing the obligation of contracts, shall ever be passed.”<sup>186</sup> By restricting governmental exercises of its police powers, this provision protects the contractual rights of all citizens from governmental intrusion.

*f. As to the Right to Assemble and Instruct Representatives*

In Article I, section 31, the framers mandated: “No law shall restrain any of the inhabitants of the State from assembling together in a peaceable manner, to consult for their common good; nor from instructing their representatives; nor from applying to the General Assembly for redress of grievances.”<sup>187</sup> In recognizing the rights of all Indiana inhabitants to assemble peaceably and to consult for their common good, the framers concomitantly restricted the government’s power to restrain any inhabitant from exercising these rights, as well as their rights to instruct their representatives and to apply to the state legislature for redress of grievances. All inhabitants, including individual persons and groups, are protected in their enjoyment of the rights recognized in this provision.

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<sup>185</sup> *Id.* at 371-72.

<sup>186</sup> Article I, section 18 of the Indiana Constitution of 1816 provided in part: “[N]or any law impairing the validity of contracts, shall ever be made . . . .” IND. CONST. of 1816, art. I, § 18.

<sup>187</sup> Article I, section 19 of the Indiana Constitution of 1816 provided: “That the people have a right to assemble together, in a peaceable manner, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances.” IND. CONST. of 1816, art. I, § 19.

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g. *As to the Right to Bear Arms*

In Article I, section 32, the framers provided that “[t]he people shall have a right to bear arms, for the defense of themselves and the State.”<sup>188</sup> In recognizing this right, the framers recognized that every Hoosier possessed this right.

h. *As to Emigration*

In Article I, section 36, the framers mandated that “[e]migration from the State shall not be prohibited.”<sup>189</sup> In proscribing any prohibition on emigration from Indiana, the framers recognized a right that could be exercised by any person.

i. *As to Slavery and Involuntary Servitude*

A free state from its inception, Indiana prohibited slavery and involuntary servitude in Article I, section 37: “There shall be neither slavery, nor involuntary servitude, within the State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted. No indenture of any Negro or Mulatto, made and executed out of the bounds of the State, shall be valid within the State.”<sup>190</sup> In addition to proscribing slavery and involuntary servitude, the framers, as to slaves and indentured servants residing in Indiana, invalidated the obligations made and executed outside of Indiana.

2. Equal Treatment in the Administration of Justice in Indiana Courts

In Article I, section 12, the framers established principles that would govern the administration of civil and criminal justice in Indiana. They

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<sup>188</sup> Article I, section 20 of the Indiana Constitution of 1816 provided: “That the people have a right to bear arms for the defence of themselves, and the state . . . .” IND. CONST. of 1816, art. I, § 20.

<sup>189</sup> Article I, section 23 of the Indiana Constitution of 1816 provided: “That emigration from the state shall not be prohibited.” IND. CONST. of 1816, art. I, § 23.

<sup>190</sup> Article XI, section 7 of the Indiana Constitution of 1816 provided:

There shall be neither slavery nor involuntary servitude in this state, otherwise than for punishment of crimes, whereof the party shall have been duly convicted. Nor shall any indenture of any negro or mulatto hereafter made, and executed out of the bounds of this state, be of any validity within the state.

IND. CONST. of 1816, art XI, § 7. Article I, section 37 presently provides as follows: “There shall be neither slavery, nor involuntary servitude, within the State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted.” IND. CONST. art. I, § 37 (amended November 6, 1984).

declared: "All courts shall be open; and every man,<sup>191</sup> 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."<sup>192</sup> In governing the civil and criminal justice systems, the three clauses in this provision mandate equality of treatment.

Although the "open courts" clause did not identify for whom the courts shall be open, the "remedies" clause completed the idea, ensuring that every person would have remedy by the due course of law for injury to his or her person, property, or reputation. The "justice" clause mandated that the justice administered by Indiana courts be characterized by certain qualities. The clause providing that justice shall be administered "freely, and without purchase" ensured that courts would not be influenced to treat parties differently based upon financial factors. The clause providing that justice shall be administered "completely, and without denial" ensured that all parties would receive all of the justice they are entitled to under the law and would not be denied what they are due. The clause providing that justice shall be administered "speedily, and without delay" ensured that courts would not extend special treatment as to how quickly justice is done. The cumulative effect of Article I, section 12 is that Indiana courts must treat persons equally in their administration of justice.

### 3. Equal Treatment in Legislative Enactments

#### *a. As to Privileges or Immunities*

In Article I, section 23, the framers declared that "[t]he 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."<sup>193</sup> This provision regulated the treatment of citizens by the

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<sup>191</sup> The present version of Article I, Section 12 reads "person" rather than "man." IND. CONST. art. I, § 12 (amended November 6, 1984).

<sup>192</sup> Article I, section 11 of the Indiana Constitution of 1816 provided: "That all Courts shall be open, and every person, for an injury done him, in his lands, goods, person, or reputation, shall have remedy by the due course of law; and right and justice administered without denial or delay." IND. CONST. of 1816, art. I, § 11.

<sup>193</sup> This provision predates that Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment provides in relevant part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due

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General Assembly and required the government to distribute privileges or immunities equally.

Delegate Daniel Read of Monroe and Brown counties proposed the substance of Article I, section 23 at the Constitutional Convention.<sup>194</sup> Delegate Read was strongly opposed to laws under which the state undertook extensive internal improvements, laws involving state funds in banking, and laws lending state credit or trust funds to corporations.<sup>195</sup> He was concerned about the state granting exclusive privileges and thereby creating monopolies and about the state partnering with some citizens to the exclusion of others.<sup>196</sup>

At the Convention, Delegate Horace P. Biddle of Cass County, who would become an Indiana Supreme Court justice, stated:

[T]he proposition is a plain one, that there shall be no exclusive monopolies—no privilege granted to one man which shall not, under the same circumstances, belong to all men.

It is a sound judicial principle, that may be applied safely and justly to the rights of all men. This principle leaves men of capital precisely where it leaves men in their natural condition—equal. If the majority of this Convention will not grant to all men equal rights, let them vote against the proposition. If they do not desire to leave the road of capital, of skill, of enterprise, of talent, of industry, of worth, open alike to every citizen of Indiana, let them vote against it. And if gentlemen on this floor, in the middle of the nineteenth century, wish to declare before the world that all men are not created

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process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. Thus, the federal provision prohibits states from denying equal protection of the laws, while the Indiana provision explicitly involves the granting of privileges or immunities.

<sup>194</sup> JOURNAL, *supra* note 134, at 575; REPORT, *supra* note 134, at 1385, 1393.

<sup>195</sup> Collins v. Day, 644 N.E.2d 72, 76 (Ind. 1994) (quoting 1 JAMES ALBERT WOODBURN, HISTORY OF INDIANA UNIVERSITY 1820-1902, 191 (1940)).

<sup>196</sup> *Id.*

with equal rights, then, I say again, let them vote against this proposition.<sup>197</sup>

Delegate Abel C. Pepper of Ohio and Switzerland Counties explained that “[t]he section proposed by [Delegate Read], is intended to prohibit the Legislature from establishing monopolies, or granting special privileges.”<sup>198</sup> Delegate Othniel L. Clark of Tippecanoe County indicated that the proposal “provides that if the Legislature grants to one set of persons a privilege, it shall grant the same privilege to all other persons. If they grant a privilege to a corporation, they shall grant the same privilege to all other persons who ask for the privilege.”<sup>199</sup> Thus, by prohibiting the General Assembly from granting privileges or immunities to any citizen or class of citizens that it does not equally grant to all citizens, this provision requires equality of treatment.

*b. As to Local or Special Laws*

In Article IV, the legislative article, the framers sought to remedy some of the key problems that arose under the 1816 Constitution. One of the most troublesome issues involved the General Assembly enacting laws addressing local and special matters. Delegate John Pettit of Tippecanoe County insisted that “[local legislation] is the whole error—the whole incongruity—the whole oppression of our law, and almost the whole necessity of calling this Convention, was to do away with this local legislation. . . . All that is most necessary is to have uniformity in our laws.”<sup>200</sup>

In section 22 of Article IV, the framers wrote:

The General Assembly shall not pass local or special laws, in any of the following enumerated cases, that is to say: Regulating the jurisdiction and duties of Justices of the peace and constables; For the punishment of crimes and misdemeanors; Regulating the practice in courts of justice; Providing for changing the venue in civil and criminal cases; Granting divorces; Changing the names of persons; For laying out, opening and working on highways, and for the election or appointment of

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<sup>197</sup> REPORT, *supra* note 134, at 1394.

<sup>198</sup> *Id.* at 1395.

<sup>199</sup> *Id.* at 1397.

<sup>200</sup> *Id.* at 1771.



supervisors; Vacating roads, town plats, streets, alleys and public squares; Summoning and empanelling grand and petit jurors, and providing for their compensation; Regulating county and township business; Regulating the election of county and township officers, and their compensation; For the assessment and collection of taxes for State, county, township or road purposes; Providing for supporting common schools, and for the preservation of school funds; In relation to fees or salaries; In relation to interest on money; Providing for opening and conducting elections of State, county, or township officers, and designating the places of voting; Providing for the sale of real estate belonging to minors or other persons laboring under legal disabilities, by executors, administrators, guardians or trustees.<sup>201</sup>

Rather than legislating on matters of local or special concern, the framers mandated that the General Assembly focus its legislative attention on matters of general concern. Thus, in Article IV, section 23, they insisted: "In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State."

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<sup>201</sup> Article IV, section 22 presently reads as follows:

The General Assembly shall not pass local or special laws: Providing for the punishment of crimes and misdemeanors; Regulating the practice in courts of justice; Providing for changing the venue in civil and criminal cases; Granting divorces; Changing the names of persons; Providing for laying out, opening, and working on, highways, and for the election or appointment of supervisors; Vacating roads, town plats, streets, alleys, and public squares; Summoning and empanelling grand and petit juries, and providing for their compensation; Regulating county and township business; Regulating the election of county and township officers and their compensation; Providing for the assessment and collection of taxes for State, county, township, or road purposes; Providing for the support of common schools, or the preservation of school funds; Relating to fees or salaries, except that the laws may be so made as to grade the compensation of officers in proportion to the population and the necessary services required; Relating to interest on money; Providing for opening and conducting elections of State, county, or township officers, and designating the places of voting; Providing for the sale of real estate belonging to minors or other persons laboring under legal disabilities, by executors, administrators, guardians, or trustees.

IND. CONST. art. IV, § 22 (amended March 14, 1881 and November 6, 1984).

In Article IV, section 24, the framers provided for the General Assembly to enact general legislation providing for suits against the state, but forbade special laws authorizing particular suits or compensating individuals for damages: "Provision may be made, by general law, for bringing suit against the State, as to all liabilities originating after the adoption of this Constitution;<sup>202</sup> but no special act authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed."<sup>203</sup> By mandating laws of general and uniform application, and restricting the ability to pass local or special legislation, the framers restricted the ability of the General Assembly to engage in unequal treatment as to specific individuals, groups, or localities.

*c. As to Titles and Hereditary Distinctions*

Reflecting similar language found in the United States Constitution,<sup>204</sup> in Article I, section 35, the framers prohibited "[t]he General Assembly . . . [from] grant[ing] any title of nobility, nor confer[ring] hereditary distinctions."<sup>205</sup> This provision reiterated the framers' commitment to the equality of all individuals. The General Assembly may not designate citizens variously or distinguish among citizens so that some citizens would receive titles of nobility or some other distinction because of their birth.

*d. As to the Penal Code*

In Article I, section 18, the framers set forth the basic philosophy that must govern the General Assembly's enactment of the penal code—the penal code must "be founded on the principles of reformation, and not of vindictive justice."<sup>206</sup> By so directing, this provision counseled the

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<sup>202</sup> The phrase "as to all liabilities originating after the adoption of this Constitution" has been removed from the present version of Article IV, section 24. IND. CONST. art. IV, § 24 (amended November 6, 1984).

<sup>203</sup> The term "act" changed to "law." IND. CONST. art. IV, § 24 (amended November 6, 1984).

<sup>204</sup> U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States").

<sup>205</sup> Article I, section 22 of the Indiana Constitution of 1816 provided: "That the Legislature shall not grant any title of nobility, or hereditary distinctions, nor create any office, the appointment to which shall be for a longer term than good behaviour." IND. CONST. of 1816, art. I, § 22.

<sup>206</sup> Article IX, section 4 of the Indiana Constitution of 1816 provided in part:

It shall be the duty of the general assembly, as soon as circumstances will permit, to form a penal code, founded on the

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legislature to enact a penal code that aims to reform offenders, rather than one designed to seek revenge or that does not seek the restoration of those convicted. Thus, although offenders by their illegal conduct distinguish themselves from the rest of the citizenry and thus justify different treatment by the government, this provision tempers the treatment by the General Assembly of those who violate the state's laws.

*e. As to Education*

When it came to the Indiana system of public education, the framers mandated a general and uniform system that would be equally open or available to all. In Article VIII, section 1, they wrote:

Knowledge and learning, general diffused throughout a community, being essential to the preservation of a free government; it should be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.<sup>207</sup>

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principles of reformation, and not of vindictive justice: . . . on such principles, that such persons may therein, find employment, and every reasonable comfort, and lose, by their usefulness, the degrading sense of dependence.

IND. CONST. of 1816, art. IV, § 4.

<sup>207</sup> Article IX, sections 1 and 2 of the Indiana Constitution of 1816 provided:

SEC. 1. Knowledge and learning generally diffused through a community, being essential to the preservation of a free government, and spreading the opportunities and advantages of education through the various parts of the country being highly conducive to this end, it shall be the duty of the general assembly, to provide by law for the improvement of such lands as are, or hereafter may be granted by the United States, to this state, for the use of schools, and to apply any funds which may be raised from such lands, or from any other quarters, to the accomplishment of the grand object for which they are or may be intended. . . . The general assembly shall from time to time, pass such laws as shall be calculated to encourage intellectual, scientific, and agricultural improvement, by allowing rewards and immunities for the promotion and improvement of arts, sciences, commerce, manufactures, and natural history; and to countenance and encourage the principles of humanity, industry, and morality.

SEC. 2. It shall be the duty of the general assembly, as soon as circumstances will permit, to provide by law, for a general system of

Four years after the constitution was ratified, Justice Hovey, who served as a convention delegate, wrote that this provision was intended to avoid certain evils of the old system: "inequality in education, inequality in taxation, lack of uniformity in schools, and a shrinking from legislative responsibilities."<sup>208</sup>

*f. As to Property Taxes*

When it came to the Indiana property tax system, uniformity and equality also mattered to the framers. Thus, in Article X, section 1, they mandated: "The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal."<sup>209</sup>

Delegate Daniel Read of Monroe and Brown counties proposed the substance of Article X, section 1. At the Convention, he argued:

[N]o provisions are more proper for a Constitution, than those requiring equality of assessment for purposes of taxation. The duty of the legislature to devise a system which will secure such equality and which will cause all the property of the State to be brought under taxation, should be held forth in the Constitution.<sup>210</sup>

He also urged:

I have noticed that the Governors of our State in the annual messages for a number of years past, have called attention of the Legislature, and the people of the State at large, to the great inequality of assessment and taxation as existing under our laws. In many parts of the State the subject has excited much attention. . . . There is

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education ascending in a regular gradation from township schools to a state university, wherein tuition shall be gratis, and equally open to all.

IND. CONST. art. IX, §§ 1, 2. The Northwest Ordinance provided in part: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

<sup>208</sup> *Greencastle Township v. Black*, 5 Ind. 557, 563 (1855).

<sup>209</sup> Article X, section 1(a) presently provides as follows: "The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal. . . ." IND. CONST. art X, § 1 (amended November 8, 1966).

<sup>210</sup> REPORT, *supra* note 134, at 941.

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manifest injustice in permitting property in the hands of the wealthy, which ought to be taxed as other property, to escape taxation altogether, or to be taxed only on a very small part of its value.<sup>211</sup>

He added:

I do not suppose . . . that these inequities can be corrected by the Constitution, nor even wholly by the laws. But I would lay down the rule in the Constitution. It will be in the minds of the people. It will be before the Legislature. It will strengthen those who wish to secure a system of just and equal taxation. The rule will be a part of the organic law, and the people and the legislature will endeavor to work up to a rule so manifestly just and equitable. If the rights of society are to be equal—if men are to stand upon the same platform, if none are to enjoy special privileges or exemptions which others do not enjoy, let the rule requiring it go into the Constitution. Whatever else we omit, let us not omit a principle so fundamental in its character, and lying at the very foundation of free government.<sup>212</sup>

Although six and a half decades after the Convention, Governor Samuel Ralston expressed the enduring meaning of this provision on January 7, 1915, when he addressed the General Assembly and argued that the words “uniform and equal” should not be removed from Article X, section 1:

[Article X, section 1] provides for a system of taxation that is “uniform and equal.” I like these words. They appeal to man’s innate sense of justice, and it would seem that they should have a permanent place in a government founded in a love for justice, and especially it seems they are most appropriate on which to rest that greatest function of government, the power to lay and collect taxes.<sup>213</sup>

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<sup>211</sup> *Id.* at 946.

<sup>212</sup> *Id.*

<sup>213</sup> 2 KETTLBOROUGH, *supra* note 127, at §§ 532, 588.

g. *As to Corporations, Banks, and Moneyed Institutions*<sup>214</sup>

In advance of the 1850-51 Convention, the State of Indiana found itself in trouble financially after it had established banks and undertaken considerable debt. To remedy this problem, Article XI limited the state's involvement in the banking business. In establishing these limitations, the framers withdrew certain powers, prohibited special legislation as to financial institutions, and mandated general and uniform treatment:

Section 1. The General Assembly shall not have power to establish or incorporate any bank or banking company, or moneyed institution, for the purpose of issuing bills of credit, or bills payable to order or bearer, except under the conditions prescribed in this Constitution.

Section 2. No banks shall be established otherwise than under a general banking law, except as provided in the fourth section of this article.

Section 3. If the General Assembly shall enact a general banking law, such law shall provide for the registry and countersigning, by an officer of State, of all paper credit designed to be circulated as money; and ample collateral security, readily convertible into specie, for the redemption of the same in gold or silver, shall be required, which collateral security shall be under the control of the proper officer or officers of State.

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<sup>214</sup> Article X, Section 1 of the Indiana Constitution of 1816 provided in part:

There shall not be established or incorporated, in this state, any bank or banking company or moneyed institution, for the purpose of issuing bills of credit, or bills payable to order or bearer: *Provided*, that nothing herein contained shall be so construed as to prevent the general assembly from establishing a state bank, and branches, not exceeding one branch for any three counties, to be established at such place, within such counties, as the directors of the state bank may select; . . . *Provided*, that nothing herein contained shall be so construed, as to prevent the general assembly from adopting either of the aforesaid banks as the state bank: And in case either of them shall be adopted as the state bank, the other may become a branch, under the rules and regulations herein before prescribed.

IND. CONST. of 1816, art. I, § 1.

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Section 13. Corporations, other than banking, shall not be created by special act, but may be formed under general laws.

4. Equal Treatment in the Enforcement of Criminal Laws

In the Bill of Rights, the framers also recognized a number of rights that apply to those accused of committing crimes. Through these provision, the framers ensured that these rights and protections would apply equally to citizens who were being investigated, prosecuted, or incarcerated by the government. Together these provisions require equality of treatment.

Certain of these provisions restrict the government's power when it enforces the law. In Article I, section 11, the framers protected Hoosiers against unreasonable searches and seizures:

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.<sup>215</sup>

This provision established important protections of Hoosiers from unreasonable searches and seizures of their person or property by the government and mandated that warrants satisfy certain requirements. Article I, section 24 required that "[n]o ex post facto law . . . shall ever be passed."<sup>216</sup> Thus, the constitution prevented the government from punishing a person for conduct made illegal after that person had already engaged in the conduct.<sup>217</sup>

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<sup>215</sup> Article I, section 8 of the Indiana Constitution of 1816 provided:

The rights of the people, to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, 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 persons or things to be seized.

IND. CONST. of 1816, art. I, § 8.

<sup>216</sup> Article I, section 18 of the Indiana Constitution of 1816 provided in part: "No ex post facto law . . . shall ever be made . . ." *Id.* at art. I, § 18.

<sup>217</sup> Thomas Jefferson decades earlier had commented on the injustice of *ex post facto* laws: "Every man should be protected in his lawful acts, and be certain that no *ex post facto* law shall punish or endamage him for them." Thomas Jefferson to Issac McPherson, 1813, in 13

In Article I, sections 13 and 14, the framers provided a number of protections for all who are accused of committing crimes and facing criminal prosecution:

Section 13. 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.<sup>218</sup>

Section 14. No person shall be put in jeopardy twice for the same offense. No person in any criminal prosecution shall be compelled to testify against himself.<sup>219</sup>

The framers also provided certain protections for every person detained or incarcerated by the government:

Section 15. No person arrested, or confined in jail, shall be treated with unnecessary rigor.

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THE WRITINGS OF THOMAS JEFFERSON 326 (Lipscomb & Bergh eds., Memorial ed. 1903-04). He added:

The sentiment that *ex post facto* laws are against natural right is so strong in the United States that few, if any, of the State constitutions have failed to proscribe them. The Federal Constitution indeed interdicts them in criminal cases only; but they are equally unjust in civil as in criminal cases, and the omission of a caution which would have been right, does not justify the doing what is wrong.

*Id.* at 327.

<sup>218</sup> Article I, section 13 of the Indiana Constitution of 1816 provided in part:

That in all criminal prosecutions, the accused hath a right 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, to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment or presentment, a speedy public trial by an impartial jury of the county or district in which the offence shall have been committed . . .

IND. CONST. of 1816, art. I, § 13.

<sup>219</sup> Article I, section 13 of the Indiana Constitution of 1816 provided in part: "That in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself, nor shall be twice put in jeopardy for the same offence." IND. CONST. of 1816, art. I, § 13.



Section 16. 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.<sup>220</sup>

Section 27. The privilege of the writ of habeas corpus shall not be suspended, except in case of rebellion or invasion; and then, only if the public safety demand it.<sup>221</sup>

Regardless of how heinous the offense, the framers set limits regarding the government's treatment of a person accused or convicted of committing a crime. By preserving the privilege of the writ of habeas corpus, the framers ensured that those detained or incarcerated by the government would have the ability to challenge the lawfulness of their detention or imprisonment.

*C. Provisions Allowing Exceptions to the Equal Treatment of Indiana Citizens*

Although the framers typically mandated equality, generality, and uniformity of treatment as to individuals and institutions, the framers created certain exceptions within the constitution. The framers recognized these exceptions to promote certain policy interests or to respond to a unique concern that reverberated throughout America in the nineteenth century.<sup>222</sup>

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<sup>220</sup> Article I, sections 14, 15, and 16 of the Indiana Constitution of 1816 provided:

SEC. 14. That all persons shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or the presumption great . . . .

SEC. 15. Excessive bail shall not be required, excessive fines shall not be imposed, nor cruel and unusual punishments inflicted.

SEC. 16. All penalties shall be proportioned to the nature of the offence.

IND. CONST. of 1816, art. I, §§ 14-16.

<sup>221</sup> Article I, section 14 of the Indiana Constitution of 1816 provided in part: "[T]he privilege of the writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion, the public safety may require it." IND. CONST. of 1816, art. I, § 14.

<sup>222</sup> In addition to the exceptions to equal treatment recognized in the Constitution, the Constitutional Convention also considered resolutions and petitions regarding the rights of women. Delegate Owen introduced the following resolution at the Constitutional Convention:

That women hereafter married in this State shall have the right to acquire and possess property, to their sole use and disposal; and that laws shall be passed, securing to them, under equitable conditions, all property, real and persona, whether owned by them before marriage,

## 1. The Right to Vote

Although the framers mandated in Article II, section 1 that “[a]ll elections shall be free and equal,”<sup>223</sup> the framers did not extend the right to vote to every Hoosier, only to white male citizens meeting the requirements set forth in Article II, section 2:

In all elections, not otherwise provided for by this Constitution, every white male citizen of the United States, of the age of twenty-one years and upwards, who

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or acquired afterwards, by purchase, gift, devise or descent, and also providing for the registration of the wife’s separate property.

Journal, *supra* note 134, at 30. A resolution was introduced by Delegate William Steele of Wabash County that a “provision be incorporated in the Constitution of the State of Indiana to instruct our representatives to provide by law the right of petition to all white females of the age of eighteen and upwards to the Indiana Legislature for such laws as will tend to protect their best interest and that of their posterity.” *Id.* at 48. Delegate Milroy submitted a resolution providing:

That it be referred to the committee on the rights and privileges of the inhabitants of this State, to enquire into the expedience of adding another section to our present bill of rights, to read as follows: Women who may enter into the married state from and after the ratification of this Constitution by the people, shall not lose or forfeit any legal rights by said marriage.

*Id.* at 70-71. Delegate Borden submitted the following resolution:

That there be incorporated in the Constitution the principle, that the real and personal estate of every female acquired before marriage, and all property to which she may afterwards become entitled by gift, grant, inheritance or devise, shall be and remain the separate estate and property of such female, and shall not be liable for the debts, obligations, or engagements of her husband; and may be aliened, devised, or bequeathed by her as if she were unmarried.

*Id.* at 77. Delegate Owen submitted the following resolution:

That the committee on rights and privileges of the inhabitants of the State inquire into the expedience of incorporating in the bill of rights, the following section: Women hereafter married in this State shall have the right to acquire and possess property, to their sole use and disposal; and laws shall be passed, securing to them, under equitable conditions, all property, real and personal, whether owned by them before marriage, or acquired afterwards, by purchase, gift, devise or descent, and also providing for the registration of the wife’s separate property.

*Id.* at 101-02. Citizens of Dearborn County submitted a petition on the subject of the rights of married women. *Id.* at 676. Women of Henry County submitted a petition on the rights of married women. *Id.* at 820. However, the Constitutional Convention did not ultimately approve any of these proposed provisions. *See id.* at 905-06.

<sup>223</sup> Article I, section 4 of the Indiana Constitution of 1816 provided: “That elections shall be free and equal.” IND. CONST. of 1816, art. I, § 4.

shall have resided in the State during the six months immediately preceding such election; and every white male, of foreign birth, of the age of twenty-one years and upwards, who shall have resided in the United States one year, and shall have resided in this State during the six months immediately preceding such election, and shall have declared his intention to become a citizen of the United States, conformably to the laws of the United States on the subject of naturalization, shall be entitled to vote in the township or precinct where he may reside.<sup>224</sup>

*Article II, section 2 was amended over time to extend the voting franchise to all races and both genders.*

## 2. The Practice of Law

In Article VII, section 21, the framers provided that “[e]very person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice.”<sup>225</sup> Although this provision on its face recognized the right of every voter to practice law, Article II limited the right to vote to certain white males. In 1893, the Indiana Supreme Court, considering among other authorities two equality provisions in the Indiana Bill of Rights, ruled that Article VII, section 23 does not exclude women, and that women are entitled to practice law.<sup>226</sup> Article VII, section 21 was repealed on November 8, 1932.

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<sup>224</sup> Article II, section 2 presently provides: “A citizen of the United States, who is at least eighteen (18) years of age and who has been a resident of a precinct thirty (30) days immediately preceding an election, may vote in that precinct.” IND. CONST. art. II, § 2 (amended March 14, 1881; September 6, 1921; November 2, 1976; November 7, 1984; November 3, 1998). The voting franchise was extended to all races in 1881, to each gender in 1921, and the voting age was lowered to eighteen in 1976. In 1921, the provision extending the right to vote to non-citizens who intended to become Indiana citizens was removed in 1921. MCLAUCHLAN, *supra* note 68, at 64.

<sup>225</sup> This provision was repealed on November 8, 1932.

<sup>226</sup> *In re Leach*, 34 N.E. 641, 642-43 (Ind. 1893) (citing Article I, §§ 1, 23).

3. The Establishment of Certain State Institutions<sup>227</sup>

The framers placed duties upon the General Assembly to provide institutions for the education of those who have disabilities affecting hearing, speaking, and seeing, for the treatment of the mentally ill, and for the correction and reformation of juvenile offenders. Article IX provided:

Section 1. It shall be the duty of the General Assembly to provide, by law, for the support of Institutions for the education of the Deaf and Dumb, and of the Blind; and also for the treatment of the Insane.<sup>228</sup>

Section 2. The General Assembly shall provide Houses of Refuge, for the correction and reformation of juvenile offenders.<sup>229</sup>

Section 3. The county boards shall have power to provide farms, as an asylum, for those persons who, by reason of age, infirmity, or other misfortune, have claims upon the sympathies and aid of society.<sup>230</sup>

As to these individuals, the framers determined that the General Assembly should enact special laws for their benefit.

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<sup>227</sup> Article IX, section 4 of the Indiana Constitution of 1816 provided:

It shall be the duty of the general assembly, as soon as circumstances will permit, to form a penal code, founded on the principles of reformation, and not of vindictive justice: And also to provide one or more farms, to be an asylum for those persons who, by reason of age, infirmity, or other misfortunes, may have a claim upon the aid and beneficence of society, on such principles, that such persons may therein find employment, and every reasonable comfort, and lose, by their usefulness, the degrading sense of dependence.

IND. CONST. of 1816, art. IX, § 4.

<sup>228</sup> The present version has been rephrased, referring to "the deaf, the mute, and the blind." IND. CONST. art. IX, § 1 (amended November 6, 1984). Although the handicapped and mentally ill had few resources in the first several decades of Indiana history, the General Assembly established a school for deaf and mute children, and another for the blind, and a hospital for the mentally ill in the 1840s. MADISON, *supra* note 67, at 131. Notwithstanding this exhibition of humanitarian sentiment and sense of responsibility for the care of such individuals, such efforts were not matched by significant commitment of public resources. *Id.*

<sup>229</sup> The present version refers to "institutions" rather than "houses of refuge." IND. CONST. art. IX, § 2 (amended November 7, 1984).

<sup>230</sup> In the present version, the provision refers to "counties" and has changed the verb to "may provide." *Id.* (amended November 6, 1984).

#### 4. Property Taxes

Although the framers mandated equality and uniformity as to property taxes, they allowed the General Assembly to exempt certain property used for certain purposes from the property tax system. Under Article X, section 1, the General Assembly was to provide for a uniform and equal rate of assessment and property taxation, as for both real and personal property, "excepting such only for municipal, educational, literary, scientific, religious or charitable purposes, as may be specially exempted by law."<sup>231</sup> Thus, the framers and ratifiers of the Indiana Constitution allowed special treatment as to property devoted to certain purposes favored by public policy.

#### 5. Black Suffrage and Migration<sup>232</sup>

Although the framers and ratifiers of the Indiana Constitution believed in equality and promoted that value throughout the 1851 Constitution, they exhibited a profound contradiction when it came to matters of race, escaped slaves, and migration by African-Americans.<sup>233</sup> In 1850, the population of Indiana numbered 988,416, but the number of African-Americans was just over 11,000.<sup>234</sup> During the middle third of the nineteenth century, some Hoosiers assisted escaped slaves as they fled slave states on the underground railroad, portions of which ran through Indiana, and participated in the establishment and activities of anti-slavery societies.<sup>235</sup> However, many Hoosiers were troubled regarding the migration of African-Americans, and considered

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<sup>231</sup> Article X, section 1 presently provides in part:

(a) . . . . The General Assembly may exempt from property taxation any property in any of the following classes: (1) Property being used for municipal, educational, literary, scientific, religious or charitable purposes; (2) Tangible personal property other than property being held for sale in the ordinary course of a trade or business, property being held, used or consumed in connection with the production of income, or property being held as an investment; (3) Intangible personal property. (b) The General Assembly may exempt any motor vehicles, mobile homes, airplanes, boats, trailers or similar property, provided that an excise tax in lieu of the property tax is substituted therefor.

Ind. Const. art. X, § 1 (amended November 8, 1966).

<sup>232</sup> This provision was repealed and replaced by a provision on municipal debt on March 14, 1881.

<sup>233</sup> CARMONY, *supra* note 80, at 442-50; PECKHAM, *supra* note 74, at 65-68.

<sup>234</sup> MADISON, *supra* note 67, at 168-69.

<sup>235</sup> *Id.* at 107.

colonization in the African republic of Liberia and other means of removing blacks from the nation.<sup>236</sup> As one historian has written, in pioneer Indiana, few Hoosiers "believed in the equality of the races or made efforts to improve the unfortunate lot of many African Americans, slave or free."<sup>237</sup>

Acting upon these concerns and prejudices, the framers of the 1851 Constitution failed to treat African-Americans with equality. In Article II, section 5, they deprived African-Americans of the right to vote.<sup>238</sup> In Article XIII,<sup>239</sup> the framers required special treatment for those African-Americans who would migrate to Indiana and mandated the General Assembly to enact laws enforcing these provisions:

Section 1. No negro or mulatto shall come into, or settle in, the State, after the adoption of this Constitution.

Section 2. All contracts made with any negro or mulatto coming into the State, contrary to the provisions of the foregoing section, shall be void; and any person who shall employ such negro or mulatto, or otherwise encourage him to remain in the State, shall be fined in any sum not less than ten dollars, nor more than five hundred dollars.

Section 3. All fines which may be collected for a violation of the provisions of this article, or of any law

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<sup>236</sup> *Id.* The Indiana Colonization Society was found in 1829. *Id.* Even among anti-slavery, colonization was considered as an option. PECKHAM, *supra* note 74, at 66. The morality and wisdom of colonization as well as the motivations behind this proposal were widely debated among individuals, churches, anti-slavery groups, and other social groups. MADISON, *supra* note 67, at 107. A variety of laws were hostile to African-Americans, and both of the Indiana Constitutions prohibited them from voting. *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> This provision stated that "[n]o Negro or Mulatto shall have the right of suffrage." IND. CONST. art. II, § 5 (repealed March 14, 1881).

<sup>239</sup> Article XIII passed with a 93 to 40 vote. MADISON, *supra* note 67, at 169. A number of delegates recognized the contradiction to basic legal values and their Christian faith and voiced opposition to this Article, and one delegate declared that Article XIII was "an outrage upon all the principles of our boasted institutions. . . ." *Id.* (quoting EMMA LOU THORNBROUGH, *THE NEGRO IN INDIANA: A STUDY OF A MINORITY* 66-67 (1957)). When this Article was separately submitted to the Indiana electorate for a vote, the vote in favor of this Article was more than overwhelming than with the delegates. *Id.* John B. Howe of LaGrange County argued that the Article should be deleted because the Article "is not only opposed to the fundamental principles of liberty, justice, and equality, but . . . it is in defiance of the Constitution of the United States itself." CARMONY, *supra* note 80, at 443.

which may hereafter be passed for the purpose of carrying the same into execution, shall be set apart and appropriated for the colonization of such negroes and mulattoes, and their descendants, as may be in the State at the adoption of this Constitution, and may be willing to emigrate.

Section 4. The General Assembly shall pass laws to carry out the provisions of this article.<sup>240</sup>

Providently, the inequalities of the black suffrage and migration provisions were ultimately corrected. In 1866, the Indiana Supreme Court declared these provisions in Article XIII null and void because they were repugnant to the United States Constitution in view of the Civil War Amendments.<sup>241</sup> A decade and a half later, on March 14, 1881, these provisions were formally repealed. Nevertheless, this blatant contradiction remains conspicuous, and this page of Indiana's history remains one of the state's most regrettable legacies.<sup>242</sup>

#### IV. RECENT APPLICATIONS BY THE INDIANA SUPREME COURT

Since the early 1990s, the Indiana Supreme Court has decided a broad range of state constitutional cases that have vast implications for equality and equal treatment under the law in Indiana. Together, these decisions demonstrate that the value of equality continues to inspire, instruct, and shape law and government in Indiana.

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<sup>240</sup> IND. CONST. art. XIII, §§ 1-4.

<sup>241</sup> *Smith v. Moody*, 26 Ind. 299 (1866). For a survey of the Indiana Supreme Court's slave cases and its persistent affirmations of basic human rights, see RANDALL T. SHEPARD, *FOR HUMAN RIGHTS: SLAVE CASES AND THE INDIANA SUPREME COURT, TRACES OF INDIANA AND MIDWESTERN HISTORY* 34 (2003); Sandra Boyd Williams, *The Indiana Supreme Court and the Struggle Against Slavery*, 30 IND. L. REV. 305 (1997).

<sup>242</sup> It is a lamentable aspect of Indiana history that, throughout the nineteenth and much of the twentieth centuries, African-Americans in Indiana were subjected to considerable hostility and violence and to widespread discrimination and prejudice on account of their race. MADISON, *supra* note 67, at 169-73.

A. *Protecting the Rights of All Indiana Citizens by Limiting Governmental Police Power*

1. Freedom of Expression

In 1993, in *Price v. State*,<sup>243</sup> the Indiana Supreme Court determined that Article I, section 9 recognizes broad protection as to the right of every individual to speak freely on any subject whatsoever, especially when such speech is political speech. The court noted the framers' perspective that the state's exercise of its police powers was designed to facilitate the enjoyment of individual rights.<sup>244</sup> In holding that the government's restriction upon an individual's freedom of expression is confined within certain constitutional limitations, the court declared:

[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.<sup>245</sup>

Government action is considered a material burden upon a core constitutional value "[i]f the right, as impaired, would no longer serve the purpose for which it was designed."<sup>246</sup> The court thus established a constitutional standard for evaluating government infringements upon the rights of individuals protected by the Indiana Bill of Rights.

As to the larger meaning of Article I, section 9, the court stated that the "substantive content" of this provision is "that popular comment on public concerns should not be restrained."<sup>247</sup> The court found that, by 1850, the importance of free interchange on public affairs was well-accepted and concluded that section 9 "enshrines pure political speech as a core value."<sup>248</sup> The court determined that, because the government

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<sup>243</sup> 622 N.E.2d 954 (Ind. 1993). Chief Justice Shepard wrote for the majority, and Justice DeBruhl and Krahulik concurred. Justices Dickson and Givan dissented.

<sup>244</sup> *Id.* at 959.

<sup>245</sup> *Id.* at 960 (internal quotation marks and citations omitted).

<sup>246</sup> *Id.* at 960-61 n.7.

<sup>247</sup> *Id.* at 961.

<sup>248</sup> *Id.* at 963.



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may not punish expression if doing so imposes “a material burden upon a core constitutional value,” section 9 limits the government’s authority over expression to “sanctioning encroachments upon the rights of individuals or interference with exercises of the police power.”<sup>249</sup>

## 2. Freedom of Religion

In 2001, in *City Chapel Evangelical Free, Inc. v. City of South Bend*,<sup>250</sup> the court determined that the seven religious freedom provisions (Article I, sections 2 through 8) broadly protect the right of every Indiana citizen to worship and practice religion. Having determined that these provisions should not be equated with those of their counterpart in the First Amendment to the United States Constitution,<sup>251</sup> the court explained that the framers and ratifiers of sections 2 and 3 did not intend to afford only narrow protection for an individual’s internal thoughts and private practices of religion and conscience.<sup>252</sup> Rather, by protecting the rights to worship according to the dictates of conscience, to exercise religious opinion freely, and to act in accordance with conscience, sections 2 and 3 advance core constitutional values that restrain government interference with the practice of religion, not simply in private, but also in community with other persons.<sup>253</sup> Because the Indiana religious freedom provisions advance core constitutional values, the government may not materially burden these values.<sup>254</sup>

In reaching this conclusion, the court noted that section 2, by requiring that “all men shall be secured” in the right to worship, places a

<sup>249</sup> *Id.* at 959-60.

<sup>250</sup> 744 N.E.2d 443 (Ind. 2001). Justice Dickson wrote for the court, and Justice Rucker concurred in his opinion in its entirety. Chief Justice Shepard joined in Justice Dickson’s Indiana constitutional analysis, but dissented as to his federal constitutional analysis. Although Justice Boehm disagreed with Justice Dickson’s determination, he expressed his agreement with the Indiana constitutional analysis. *Id.* at 456 (stating that “the various provisions . . . prevent the State from imposing material burdens on the exercise of religious practice” and that “this protection extends beyond the private devotion vel non of individuals and also includes the public and group activities associated with religious practices.”).

<sup>251</sup> *Id.* at 446 (stating that “[c]learly, the religious liberty provisions of the Indiana Constitution were not intended merely to mirror the federal First Amendment. We reject the contention that the Indiana Constitution’s guarantees of religious protection should be equated with those of its federal counterpart and that federal jurisprudence therefore governs the interpretation of our state guarantees.”).

<sup>252</sup> *Id.* at 450.

<sup>253</sup> *Id.* (utilizing the court’s core constitutional analysis articulated in *Price v. State*, 622 N.E.2d 954 (Ind. 1993)).

<sup>254</sup> *Id.*

duty upon the General Assembly to safeguard and secure this right through its laws,<sup>255</sup> and that section 3, by prohibiting any law “in any case whatever” from controlling or interfering with this right, demonstrates the intent to provide unrestrained protection for the articulated values.<sup>256</sup> Considering the wide range of religions, denominations, religious communities, and practices in Indiana by 1850, the court observed that the respect of the framers and ratifiers for the variety of religious opinions and practices was underscored by their inclusion of section 7 (prohibiting rendering a witness incompetent because of any religious opinion) and section 8 (directing that oaths or affirmations be administered in a mode consistent with an individual’s conscience) in the Bill of Rights.<sup>257</sup> Drawing insight from an 1893 Indiana Supreme Court decision, the court observed that the religious liberty provisions “take away all power of the state to interfere with religious beliefs” and that, “[i]n other words, the law allows every one [sic] to believe as he pleases, and practice that belief so long as that practice does not interfere with the equal rights of others.”<sup>258</sup>

In 2003, in *Embry v. O’Bannon*,<sup>259</sup> a plurality of the Indiana Supreme Court held that the state’s dual-enrollment programs, under which public school corporations received additional state funding for providing various instructional services to private school students on private school premises, did not violate Article I, section 6 of the Indiana Constitution, which mandates that “[n]o money shall be drawn from the treasury, for the benefit of any religious or theological institution.”<sup>260</sup> The plurality determined that the dual-enrollment programs provide educational benefits to Indiana children who apart from the programs would not receive certain educational resources and training and that the

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<sup>255</sup> *Id.* at 447-48.

<sup>256</sup> *Id.* at 448.

<sup>257</sup> *Id.* at 449.

<sup>258</sup> *Id.* (quoting *Smith v. Pedigo*, 145 Ind. 361, 365, 33 N.E. 777, 779 (1893)).

<sup>259</sup> 798 N.E.2d 157 (Ind. 2003). Justice Dickson, joined by Justice Rucker, wrote the plurality opinion for the court. Chief Justice Shepard concurred in result. Justice Sullivan in a separate opinion, joined by Chief Justice Shepard, concurred in the result of the plurality opinion on the constitutional question whether the dual-enrollment programs violated Article I, section 6. Justice Boehm concurred in the result of the plurality opinion, writing that “expenditure of public funds for proper educational purposes is not ‘for the benefit of’ a religious institution even if the delivery point of the educational services is a parochial school,” and that “the legislation involved in this case is constitutional because it does not expend funds for the benefit of a religious institution.” *Id.* at 169-70.

<sup>260</sup> *Id.* at 167-70.

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programs benefit the State of Indiana by furthering its objective to encourage education for all Indiana students.<sup>261</sup>

The plurality noted that Indiana appellate courts had already interpreted Article I, section 6 both to permit the state and its political subdivisions to contract with religious organizations for goods or the delivery of services, notwithstanding possible incidental benefit to the institutions, and to prohibit the use of public funds only when used directly for such institutions' activities of a religious nature.<sup>262</sup> Finding that any benefits to parochial schools when the dual-enrollment programs were, at most, relatively minor and incidental and that the programs did not directly fund activities of a religious nature, the plurality concluded that the dual-enrollment programs did not violate Article I, section 6. Thus, the court approved the equal treatment and use of religious organizations by the state and its subdivisions in the provision of goods and delivery of services and the equal treatment of Indiana school children in the provision of public educational services, whether those children attend one of Indiana's public schools or one of the many religious and private schools.

### 3. Freedom of Contract

In 1991, in *Clem v. Christole*,<sup>263</sup> the Indiana Supreme Court determined that Article I, section 24, which prohibits any law impairing the obligation of contracts, prevents the government from invading the freedom of contract unless the government's exercise of its police powers is necessary for the general public and reasonable under the circumstances.<sup>264</sup> Recognizing that "[c]ontracts enable individuals to order their personal and business affairs according to their particular needs and interests,"<sup>265</sup> the court concluded that this prohibition is implicated when a law is retrospectively applied so that it interferes with existing legal contracts under which rights have vested.<sup>266</sup> Although the government may, in exercising its police powers, prohibit contracts that are against public policy, if this police power exception is construed too broadly, exercises of police power would eviscerate the constitutional

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<sup>261</sup> *Id.* at 167.

<sup>262</sup> *Id.* at 164-65, 167 (discussing *State ex rel. Johnson v. Boyd*, 28 N.E.2d 256 (Ind. 1940), and *Center Township of Marion County v. Coe*, 572 N.E.2d 1350 (Ind. Ct. App. 1991)).

<sup>263</sup> 582 N.E.2d 780 (Ind. 1991).

<sup>264</sup> *Id.* at 784.

<sup>265</sup> *Id.* (quoting *Allied Structural Steel Co. v. Spanaus*, 438 U.S. 234, 245 (1978)).

<sup>266</sup> *Id.* at 783-84.

protection.<sup>267</sup> Thus, the court required a heightened standard to protect the freedom of contract from legislation targeting certain existing contracts and mandated that a statute invading the right can only be sustained as a valid exercise of police power if the statute both relates to the claimed objective and employs means that are reasonable and appropriate to secure the objective.<sup>268</sup>

*B. Ensuring Equal Treatment in the Criminal Justice System by Guarding Against Disproportionate Penalties*

In 1992, in *Clark v. State*,<sup>269</sup> the Indiana Supreme Court recognized that Article I, section 16, which mandates that “all penalties shall be proportioned to the nature of the offense,” provides a right to criminal defendants to have the proportionality of their penalties reviewed under the Indiana Constitution.<sup>270</sup> Although a defendant’s sentence may fall within parameters affixed by the legislature, the court has a constitutional duty to review the duration of that sentence to prevent manifest injustice because it is possible for the statute to be constitutional, but unconstitutional as applied to a particular criminal defendant.<sup>271</sup> The court wrote:

There are cases to be found . . . of defendants who have been found guilty and imprisoned under valid statutes, where courts of appeal have held such imprisonments to be in violation of the Constitution, by reason of their length, they being so severe and so entirely out of proportion to the gravity of the offenses actually committed as “to shock public sentiment and violate the judgment of a reasonable people.”<sup>272</sup>

The court in 1993, in *Conner v. State*,<sup>273</sup> added that this provision places limitations on the government’s ability to exact punishment for criminal behavior.<sup>274</sup> Paradoxically, the practical effect of this line of

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<sup>267</sup> *Id.* at 783.

<sup>268</sup> *Id.* at 784.

<sup>269</sup> 561 N.E.2d 759 (Ind. 1990).

<sup>270</sup> *Id.* at 765.

<sup>271</sup> *Id.* Article VII, section 4 recognizes the Indiana Supreme Court’s authority to review and revise sentences in order to prevent manifest injustice. See *Fointno v. State*, 487 N.E.2d 140, 144 (Ind. 1986).

<sup>272</sup> *Clark*, 561 N.E.2d at 765 (quoting *Cox v. State*, 181 N.E. 469, 472 (Ind. 1932)).

<sup>273</sup> 626 N.E.2d 803 (Ind. 1993).

<sup>274</sup> *Id.* at 806.

constitutional precedent is that Indiana courts are to consider carefully whether uniform and equal applications of criminal statutes result in injustice and when appropriate to impose sentences that are carefully fashioned to specific cases and particular criminal defendants.

C. *Ensuring Equal Treatment in the Criminal Justice System by Protecting Against Double Jeopardy*

In 1999, the Indiana Supreme Court, in *Richardson v. State*, interpreted the meaning of the term "same offense" contained in Article I, section 14, which prohibits any person being "put in jeopardy twice for the same offense."<sup>275</sup> The court concluded that the double jeopardy protection under the Indiana Constitution extends to cases in which a defendant, in one trial, faces prosecution and penalties for multiple offenses.<sup>276</sup> The court also determined that the Indiana Constitution requires courts, in considering whether a criminal defendant is being convicted and sentenced for the "same offense," to look not simply at the statutes under which a defendant is prosecuted, but also to the actual evidence presented at trial, to ensure that each offense is established by separate and distinct facts.<sup>277</sup>

Mindful of the government's superior power and the vulnerability of the accused, the court recognized that the double jeopardy protection safeguards "the integrity of jury acquittals and the finality interest[s] of [all] defendant[s], shields against excessive and oppressive prosecutions [of criminal defendants], and ensure[s] that defendants will not undergo the anxiety and expense of repeated prosecution and the increased probability of conviction upon reprosecution."<sup>278</sup> Thus, the protection against double jeopardy safeguards accused individuals against potential abuse by the government when it singles out an individual for prosecution.

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<sup>275</sup> 717 N.E.2d 32 (Ind. 1999). Justice Dickson joined by Chief Justice Shepard, wrote for the court. Justice Sullivan concurred with a separate opinion. Justice Boehm, joined by Justice Selby, concurred in result with a separate opinion.

<sup>276</sup> *Richardson*, 717 N.E.2d at 37 n.3, 43, 49-55.

<sup>277</sup> *Id.* at 49-50.

<sup>278</sup> *Id.* at 37 n.3.

*D. Ensuring Equal Treatment by Prohibiting the State from Demanding Particular Services*

In 1991, in *Bayh v. Sonnenburg*, the Indiana Supreme Court determined that the Article I, section 21 prohibition against any person's particular services being demanded without just compensation prevents the government from requiring any individual to provide certain services (such as those an individual performs to earn a living) that are not required of all citizens.<sup>279</sup> However, this prohibition does not extend to the various general services (such as testifying before a jury) that every citizen is bound to render as part of the social compact.<sup>280</sup> In 2001, the court held that this provision "prevents requiring a specific lawyer to accept employment without compensation in a specific case, [that] the obligation to provide pro bono service is one of the profession as a whole, and [that] Article I, section 21 prevents a court from imposing this obligation disproportionately on any single attorney."<sup>281</sup>

*E. Ensuring Equal Treatment by Restricting the Granting of Unequal Privileges and Immunities*

In 1994, in *Collins v. Day*,<sup>282</sup> the Indiana Supreme Court determined that Article I, section 23, which prohibits laws granting unequal privileges and immunities,

imposes two requirements upon statutes that grant unequal privileges or immunities to differing classes of persons. First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.<sup>283</sup>

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<sup>279</sup> 573 N.E.2d 413 (Ind. 1991).

<sup>280</sup> *Id.* at 413, 416.

<sup>281</sup> *Sholes v. Sholes*, 760 N.E.2d 156, 162-64 (Ind. 2001).

<sup>282</sup> 644 N.E.2d 72 (Ind. 1994). Justice Dickson wrote for the court, and Chief Justice Shepard, Justice DeBruhl, and Justice Givan concurred. Justice Sullivan dissented without opinion.

<sup>283</sup> *Id.* at 80. The court established that this provision has independent meaning, separate and distinct from Fourteenth Amendment and that the tiered-scrutiny analysis in federal Fourteenth Amendment jurisprudence does not apply in the Indiana Equal Privileges and Immunities analysis. *Id.* at 75.

The court emphasized that “[t]he protections assured by Section 23 apply fully, equally, and without diminution to prohibit any and all improper grants of unequal privileges or immunities, including not only those grants involving suspect classes or impinging upon fundamental rights but other such grants as well.”<sup>284</sup> In reaching this conclusion, the court found that the framers’ intent was “to prohibit the state legislature from affirmatively granting any exclusive privilege or immunity involving the state’s participation in commercial enterprise,” and not “to prevent abridgement of any existing privileges or immunities, nor to assure citizens the equal protection of the laws.”<sup>285</sup>

Having determined that the provision applies both to the granting of special privileges and the imposition of special burdens and extends beyond the state’s involvement in commercial enterprise,<sup>286</sup> the court identified several “recurrent themes” that provided the basis for its two-part test.<sup>287</sup> First, when legislation

singles out one person or class of persons to receive a privilege or immunity not equally provided to others, [the] classification must be based upon distinctive, inherent characteristics [that] rationally distinguish the unequally treated class, and the disparate treatment accorded by the legislation must be reasonably related to [those] distinguishing characteristics.<sup>288</sup>

Second, “any privileged classification must be open to any and all persons who share the inherent characteristics [that] distinguish and justify the classification, with the special treatment accorded to any particular classification extended equally to all such persons.”<sup>289</sup> Third, “courts must accord considerable deference to the manner in which the legislature has balanced the competing interest involved.”<sup>290</sup> The court anticipated that Indiana’s “independent state privileges and immunities jurisprudence w[ould] evolve in future cases . . . to assure and extend

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<sup>284</sup> *Id.* at 80.

<sup>285</sup> *Id.* at 77.

<sup>286</sup> *Id.* at 77-78.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 78-79. The court noted that this requirement thus incorporates and satisfies the often expressed concerns that “legislative classifications be ‘just,’ ‘natural,’ ‘reasonable,’ ‘substantial,’ ‘not artificial,’ ‘not capricious,’ and ‘not arbitrary.’” *Id.* at 79.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 79-80.

protection to all Indiana citizens in addition to that provided by the federal Fourteenth Amendment.”<sup>291</sup>

Since the Indiana Supreme Court issued its *Collins* decision, the court’s application of these equal privileges and immunities clauses have varied, and the court’s decisions have often been fractured opinions regarding the meaning and application of the standards. In 1999, in *Martin v. Richey*,<sup>292</sup> the Indiana Supreme Court applied the *Collins* test and determined that the two-year statute of limitations in the medical malpractice act, as applied to the plaintiff, failed the second part of the *Collins* test and thus violated the Indiana equal privileges and immunities provision.<sup>293</sup> Under the second part of the *Collins* test,<sup>294</sup> the court determined that when applied to the plaintiff, a medical malpractice claimant who could not discover her malpractice injury within the two-year period, the statute of limitations was not uniformly applicable and equally available to all persons similarly situated.<sup>295</sup> Thus, the court held that the “plaintiff [c]ould not be foreclosed from bringing her malpractice suit when, unlike many other medical malpractice plaintiffs, she could not reasonably be expected to discover the asserted malpractice and resulting injury within the two-year period given the nature of the asserted malpractice and of her medical condition.”<sup>296</sup>

In 2000, in *Boggs v. Tri-State Radiology, Inc.*,<sup>297</sup> the Indiana Supreme Court again considered the statute of limitations in the medical

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<sup>291</sup> *Id.* at 81.

<sup>292</sup> 711 N.E.2d 1273 (Ind. 1999). Justice Selby wrote for the court, and Justices Dickson and Boehm joined her opinion. Justice Sullivan concurred in result, but Chief Justice Shepard wrote in dissent.

<sup>293</sup> *Id.* at 1281-82.

<sup>294</sup> As to the first part of the test, the court had already determined that the legislative classification scheme, which distinguishes between victims of medical malpractice and victims of other torts, or between health care providers and other tortfeasors, is reasonably related to the goal of maintaining sufficient medical treatment and controlling malpractice insurance costs, and therefore is not unreasonable.” *Id.* at 1280-81 (citing *Rohrbaugh v. Wagoner*, 413 N.E.2d 891, 894-95 (Ind. 1980); *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 589-90, 604 (Ind. 1980)). The court reiterated that the “medical malpractice statute of limitations rationally furthers the goal of controlling malpractice costs by encouraging the prompt presentation of claims and . . . limiting unfair exposure to defending health care providers that stems from dimmed memories or the loss of evidence over time.” *Id.*

<sup>295</sup> *Id.* at 1281-82.

<sup>296</sup> *Id.* at 1282.

<sup>297</sup> 730 N.E.2d 692 (Ind. 2000). Justice Boehm, joined by Chief Justice Shepard and Justice Dickson, formed the majority. Justices Sullivan and Rucker in dissent argued that the *Martin* decision dictated a result opposite the result reached by the *Boggs* majority.



malpractice act and held that the statute of limitations was constitutional as applied to the plaintiff because she became aware of her injury eleven months before the statute of limitations expired and thus could have filed her claim within the two-year statutory period.<sup>298</sup> Under the *Boggs* decision, the statute of limitations is not unconstitutional as applied to plaintiffs who are unable to learn of their injuries at the time of the malpractice but who do in fact, or should, become aware of their injuries well before the end of the limitations period.<sup>299</sup> According to the court, "as long as the statute of limitations does not shorten the window of time [for filing] so unreasonably that it [becomes] impractical for a plaintiff to file a claim at all, . . . it is constitutional as applied to that plaintiff."<sup>300</sup>

Also in 2000, in *McIntosh v. Melroe Co.*, a plurality of the court upheld the General Assembly's classification scheme in the statute of repose provision of the product liability act.<sup>301</sup> For the plurality, the age of the product, not claimants, was the basis for the different treatment under the statute.<sup>302</sup> Thus, depending upon the age of the product at issue, every Hoosier could potentially recover for or be barred from recovering for an injury from the product.<sup>303</sup> In deferring to the legislature, the plurality determined that the classification of products was rationally related to legislative goals and constituted a permissible balancing of policies.<sup>304</sup>

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<sup>298</sup> *Id.* at 694.

<sup>299</sup> *Id.* at 697.

<sup>300</sup> *Id.*

<sup>301</sup> 729 N.E.2d 972 (Ind. 2000). Justice Boehm joined by Chief Justice Shepard wrote the plurality opinion. Justice Sullivan concurred in part and concurred in result. Justice Dickson, joined by Justice Rucker, dissented, arguing that the first part of the *Collins* test has two sub-elements: "(a) such classification must be based upon distinctive, inherent characteristics that rationally distinguish the unequally treated class; and (b) the disparate treatment accorded by the legislation must be reasonably related to such distinguishing characteristics." *Id.* at 991 (Dickson, J., dissenting) (quoting *Collins v. Day*, 664 N.E.2d 72, 79 (Ind. 1994)). Justice Dickson, who authored the court's *Collins* opinion, explained that although deference to the legislature is appropriate as to part 1(b) and part two of the *Collins* test, it is not appropriate as to part 1(a); rather, courts must carefully review legislative classifications. *Id.* at 993. For the dissent, the repose provision distinguishes two classes of persons for unequal treatment, and because the legislative classification in the repose provision is not based upon distinctive, inherent characteristics that rationally distinguish the unequally treated classes and therefore arbitrarily breaks up a natural class, the provision violates Article I, section 23. *Id.* at 993-94.

<sup>302</sup> *Id.* at 981.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

In 2003, in *Alliedsignal, Inc. v. Ott*, the Indiana Supreme Court revisited the statute of repose in the product liability act, considering a challenge by a claimant wife whose husband died of lung cancer alleged to have been caused by asbestos-containing products.<sup>305</sup> The court noted that the act provides two different time limits that apply to asbestos-related litigation. First, Indiana Code section 34-20-3-1 applies generally to all product liability claims and establishes a two-year statute of limitations and a ten-year statute of repose.<sup>306</sup> Second, Indiana Code section 34-20-3-2 applies to at least some asbestos liability claims, excepting certain asbestos-related actions from the operation of the ten-year statute of repose in section 34-20-3-1.<sup>307</sup> When a product liability action qualifies under section 34-20-3-2, no firm statute of repose arises, and a different timetable applies.<sup>308</sup> The court found that the more favorable time period under section 34-20-3-2, a discovery-type accrual of claim provision, only applies if the defendant is a person or entity that mined and sold commercial asbestos.<sup>309</sup>

The court held the repose provision in section 34-20-3-1 did not violate the constitutional provision prohibiting the granting of unequal privileges or immunities.<sup>310</sup> The court found that, although the legislation created a distinction between asbestos victims and other victims, the classification resulting from the distinction worked in the favor of asbestos plaintiffs.<sup>311</sup> Considering that asbestos plaintiffs are subject to the same statute of repose as other product liability claimants with respect to all defendants other than persons who mined and sold commercial asbestos, the court also determined that the plaintiff wife and the asbestos plaintiffs generally do not suffer any cognizable harm from the distinction.<sup>312</sup>

Also in 2003, in *Humphreys v. Clinic for Women, Inc.*,<sup>313</sup> a case challenging the state's funding of abortions under Medicaid, the court held: (1) that Article I, section 23 does not require the Indiana Medicaid

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<sup>305</sup> 785 N.E.2d 1068 (Ind. 2003).

<sup>306</sup> *Id.* at 1070-71.

<sup>307</sup> *Id.* at 1071.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 1071-73.

<sup>310</sup> *Id.* at 1077.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> 796 N.E.2d 247 (Ind. 2003). Justice Sullivan wrote the opinion.

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program to pay for all abortions that are medically necessary,<sup>314</sup> but (2) that so long as the Indiana Medicaid program pays for abortions to preserve the lives of pregnant women and where rape or incest causes pregnancy, the program must also pay for abortions in cases of pregnancies that create for pregnant women serious risk of substantial and irreversible impairment of a major bodily function.<sup>315</sup> The court emphasized that courts are to defer to the legislature as it exercises its discretion and attempts to balance competing interests and to construe statutes in a way as to further the purpose of the legislature without offending the Indiana Constitution.<sup>316</sup>

As to the first holding, the court found that, under the first prong of the *Collins* test, the state could constitutionally refuse to pay for an abortion for a Medicaid-eligible pregnant woman facing health risks but choose to pay for an abortion when necessary to preserve the life of a Medicaid-eligible pregnant woman or when the pregnancy was caused by rape or incest.<sup>317</sup> The court determined that the state's justifications for the classification—namely, the unavailability of federal financial participation, the interest in protecting fetal life, fiscal policy, and administrative efficiency—were constitutionally sufficient and not arbitrary or manifestly unreasonable.<sup>318</sup> Under the second prong of the *Collins* test, the court determined that the Indiana Medicaid program pays for abortions for all persons in the classification of Medicaid-eligible pregnant women seeking to terminate their pregnancies when necessary to preserve their lives or when the pregnancy resulted from rape or incest.<sup>319</sup>

In its second holding, the court invoked the “as applied” doctrine to reach its conclusion that, even though the statutory and regulatory Medicaid program was constitutional on its face, it was unconstitutional as applied to Medicaid-eligible pregnant women whose pregnancies would create serious risk of substantial and irreversible impairment of a

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<sup>314</sup> *Id.* at 248-49, 253-57. Chief Justice Shepard and Justice Dickson concurred in this holding in separate opinions. *Id.* at 260-64. Justice Boehm in a separate opinion, joined by Justice Rucker, dissented as to this holding. *Id.* at 264-71.

<sup>315</sup> *Id.* at 249, 257-59. Justice Boehm and Justice Rucker concurred in this holding. *Id.* at 260. Chief Justice Shepard and Justice Dickson dissented as to this holding in separate opinions. *Id.* at 260-64.

<sup>316</sup> *Id.* at 253.

<sup>317</sup> *Id.* at 253-57.

<sup>318</sup> *Id.* at 255-57.

<sup>319</sup> *Id.* at 257.

major bodily function.<sup>320</sup> For the court, Medicaid-eligible pregnant women whose pregnancies create serious risk of substantial and irreversible impairment of a major bodily function were virtually indistinguishable, in terms of characteristics, from Medicaid-eligible pregnant women whose abortions are necessary to preserve their lives or whose pregnancies were caused by rape or incest.<sup>321</sup> Thus, the court expanded the Indiana Medicaid program and found Article I, section 23 to require the state to pay for abortions sought by Medicaid-eligible pregnant women whose pregnancies create serious risk of substantial and irreversible impairment of a major bodily function.

*E. Guaranteeing Equal Treatment by Restricting Special or Local Laws*

In 2003, the Supreme Court of Indiana in *Municipal City of South Bend v. Kimsey*<sup>322</sup> reviewed its jurisprudence under Article IV, sections 22 and 23 regarding special and local legislation and clarified the constitutional standards.<sup>323</sup> The court recognized “that [a] statute is ‘general’ if it applies ‘to all persons or places of a specified class throughout the state,’”<sup>324</sup> and that “a statute is ‘special’ if it ‘pertains to, [operates upon, benefits, or] affects a particular case, person, place, or thing, as opposed to the general public.’”<sup>325</sup>

The court articulated a two-part test for determining whether a statute is an unconstitutional special or local law: (1) is the statute special or general legislation?<sup>326</sup> and (2) can a general law be made applicable?<sup>327</sup> If legislation identifies a locality whether by name, distinguishing characteristic, or otherwise, it is special legislation.<sup>328</sup> For a special or local law to be constitutional, the law must be reasonably related to inherent characteristics of a locality that distinguish it from other localities and justify special legislative treatment, and the law must apply equally to other localities that share those characteristics.<sup>329</sup> If the characteristics or conditions a law addresses are found in a variety of places throughout the state, a general law can be made applicable, and

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<sup>320</sup> *Id.* at 257-59.

<sup>321</sup> *Id.* at 258.

<sup>322</sup> 781 N.E.2d 683 (Ind. 2003). Justice Sullivan dissented in a separate opinion.

<sup>323</sup> *Id.* at 689.

<sup>324</sup> *Id.* at 687 (quoting BLACK’S LAW DICTIONARY 870 (7th ed. 1999)).

<sup>325</sup> *Id.* at 689 (quoting BLACK’S LAW DICTIONARY, *supra* note 323, at 890).

<sup>326</sup> *Id.* at 689-90 (citing *Williams v. State*, 724 N.E.2d 1070, 1085 (Ind. 2000)).

<sup>327</sup> *Id.* at 689-90, 694-96 (citing *Williams*, 724 N.E.2d at 1085).

<sup>328</sup> *Id.* at 692.

<sup>329</sup> *Id.*

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thus a general law is required by Article IV.<sup>330</sup> In such an instance, special legislation is not permitted.<sup>331</sup>

F. *Ensuring Equal Treatment by Mandating a Uniform and Equal Rate of Property Assessment and Taxation*

In 1996, in *Boehm v. Town of St. John*,<sup>332</sup> the Indiana Supreme Court determined that Article X, section 1 mandates that equality, uniformity, and just valuation characterize the property tax system established by the General Assembly.<sup>333</sup> The court explained that, by establishing certain minimum requirements for the property tax system, this provision restricts the otherwise discretionary powers of the legislature.<sup>334</sup> In adopting this provision, the framers “specifically require[d] uniform and equal assessment and taxation, and just valuation,” and thereby “elevated and preserved the[] importance [of these values] as fundamental principles.”<sup>335</sup> Thus, “the great object of [this provision] was to ensure that property taxes [a]re imposed on all forms of property wealth equally and uniformly [and] . . . that each taxpayer’s property wealth bear its proportion of the overall property tax burden.”<sup>336</sup> The court concluded:

Seeking to ensure that each taxpayer’s property wealth bear its proportion of the overall property tax burden, the Indiana Constitution requires that our property tax system achieve substantially uniform and equal rates of property assessment and taxation and authorizes the legislature to allow a variety of methods to secure such just valuation.<sup>337</sup>

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<sup>330</sup> *Id.* at 692-93.

<sup>331</sup> *Id.* at 693.

<sup>332</sup> 675 N.E.2d 318 (Ind. 1996). Justice Dickson wrote for the majority, and Justices Sullivan and Selby concurred. Chief Justice Shepard dissented, believing that the uniform and equal assessment and taxation provision requires a system of assessment based on actual market value. *Id.* at 328-29 (Shepard, J., dissenting). Justice Boehm did not participate.

<sup>333</sup> *Id.* at 327.

<sup>334</sup> *Id.* at 323.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at 324 (quoting *Town of St. John v. State Bd. of Tax Comm’rs*, 665 N.E.2d 965 (Ind. Tax 1996)).

<sup>337</sup> *Id.* at 327.

As a method or mode of valuation, fair market value (or its substantial equivalent) would satisfy the Indiana Constitution's requirement of uniformity, equality, and just valuation.<sup>338</sup>

In 1998, the court revisited the meaning of this provision and the property tax system in *State Board of Tax Commissioners v. Town of St. John*.<sup>339</sup> The court reiterated the meaning of Article X, section 1:

[T]he Property Taxation Clause requires the General Assembly to provide for a system of assessment and taxation characterized by uniformity, equality, and just valuation based upon property wealth, but the Clause does not require absolute and precise exactitude as to the uniformity and equality of each individual assessment. The system must also assure that individual taxpayers have a reasonable opportunity to challenge whether the system prescribed by statute and regulations was properly applied to individual assessments, but the Clause does not create a personal, substantive right of uniformity and equality. It does not establish an entitlement to individual assessments for abstract evaluation of property wealth, nor does it mandate the consideration of independent property wealth evidence in individual assessments or tax appeals.<sup>340</sup>

The court ultimately construed the statute establishing the property tax assessment system so that it could be upheld as constitutional.<sup>341</sup> The court determined, however, that the cost schedules promulgated by the Indiana Board of Tax Commissioners lacked meaningful reference to property wealth, were not grounded on objectively verifiable data, resulted in significant deviations from substantial uniformity and equality across property classifications, and thus violated Article X, section 1.<sup>342</sup>

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<sup>338</sup> *Id.*

<sup>339</sup> 702 N.E.2d 1034 (Ind. 1998). Justice Dickson wrote for the majority, with Chief Justice Shepard and Justice Selby concurring. Justice Sullivan concurred and dissented. Justice Boehm did not participate.

<sup>340</sup> *Id.* at 1040.

<sup>341</sup> *Id.* at 1037-38 (construing IND. CODE § 6-1.1-31-6(c) (2002)).

<sup>342</sup> *Id.* at 1043.

## V. CONCLUSION

The framers and ratifiers of the 1851 Indiana Constitution conceived of equality as a fundamental value, and that value pervades the document that was and is the Indiana Constitution. In its recent decisions, the Indiana Supreme Court has refocused upon this value, demonstrating the fundamental nature of equality and the importance of carefully reviewing governmental action to determine whether this value is advanced or jeopardized. Then, as now, the government sometimes acts inconsistently with the value of equality, and in such instances, the political and legal institutions established by the Indiana Constitution must stand ready to remedy the wrong and to address the unequal treatment.

In the modern regulatory state, in which criminal laws, civil statutes, and regulations touch nearly every aspect of one's private and public life, the threat of unequal treatment is heightened, not lessened. Although today the government may less commonly engage in unequal treatment based upon invidious classifications such as race, gender, or religion, the government may engage in unequal treatment based upon non-invidious classifications. In an attempt to limit the liability of certain persons or entities or to protect or promote certain commercial or economic interests, the legislature may, sometimes perhaps unwittingly, arbitrarily create classes of persons or entities to receive benefits or suffer additional burdens. In an attempt to get tough on crime, to ensure that certain offenders never victimize again, or to limit judicial discretion, the legislature may establish a statutory scheme that results in unequal treatment in the criminal context. Unequal treatment may also manifest itself in the government's exercise of its general police powers, its selective enforcement of its laws, or its targeting of disfavored conduct.

Regardless of how laudable the goal or sound the policy basis, an always present threat remains that the government will adopt a means that results in unequal treatment. However, the judicial branch alone does not bear the responsibility of ensuring that the government does not act in a manner that compromises the value of equality. The political branches and local governments must also accept their responsibilities to take steps that promote the value of equality and to ensure that government treatment of individuals and classes of individuals is even-handed. As each of these branches assume their responsibilities to promote and preserve the fundamental value of equality recognized by the framers and ratifiers of the 1851 Constitution, the citizens of Indiana

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will see that the framers' "old idea" has significant meaning and important applications in their new and ever-changing world.



