
IN THE
Supreme Court of Indiana

No.

Court of Appeals Cause No. 49A02-0901-CV-00040

LEAGUE OF WOMEN VOTERS OF)	Appeal from the
INDIANA, INC. and)	Marion Superior Court
LEAGUE OF WOMEN VOTERS OF)	Civil Division, 13
INDIANAPOLIS, INC.,)	
Appellants (Plaintiffs below),)	Trial Court Cause No.
)	49D13-0806-PL-027627
v.)	
)	The Honorable
TODD ROKITA, in his official capacity)	S.K. Reid, Judge
as Indiana Secretary of State,)	
Appellee (Defendant below))	

**BRIEF OF PROFESSORS MADISON, LEVINSON, AND ETCHESON
AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS**

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INTEREST OF *AMICI CURIAE*

Dr. James H. Madison is the Thomas and Kathryn Miller Professor in the Department of History at Indiana University. One of his principal areas of scholarly research is Indiana history, and he has written a number of works on that topic, including *The Indiana Way: A State History* (Indiana University Press 1986), *A Lynching in the Heartland: Race and Memory in America* (Palgrave Macmillan 2001), and *Indiana Through Tradition and Change* (Indiana Historical Society 1982).

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Professors Madison, Levinson, and Etcheson have studied Indiana constitutional history as part of their academic research. In this brief, the professors address the history surrounding the ratification of the 1816 and 1851 Indiana constitutions, which supports the court of appeals' holding below.

SUMMARY OF ARGUMENT

This case centers on the proper interpretation of Article I, Section 23 of the Indiana constitution (hereinafter “Section 23”), which guarantees equal “privileges and immunities” to all Indiana citizens. “Interpretation of the Indiana Constitution is controlled by the text itself, illuminated by history and by the purpose and structure of our constitution and the case law surrounding it.” *Price v. State*, 622 N.E.2d 954, 957 (Ind. 1993). Section 23 must not be conflated with the federal Equal Protection Clause. The provision was ratified in 1851, as part of the new constitution that built upon the democratic ideals of Indiana’s founding charter, the constitution of 1816. The history of the Indiana constitution confirms that its framers, both in 1816 and 1851, were motivated principally by a desire to promote the individual rights of citizens, particularly with respect to participation in the decisions of government, and to curb excessive government power, especially that of the legislature. With respect to the former concern, the framers of both constitutions expanded suffrage, and with regard to the latter concern, the framers of the 1851 constitution acted to stem the proliferation of legislation that privileged a select few and “local and special legislation,” through which the state government routinely granted special privileges to certain citizens at the expense of others. Section 23 represents one of several provisions of the 1851 constitution in which the framers attempted to curb the legislature’s power and force it to deal with all citizens on an equal basis.

The instant case thus exists at the confluence of many of the core principles and values that have historically animated the Indiana constitution, including the expansion of individual rights, particularly with respect to political participation, and the need to limit government authority. For this reason, *Amici* submit that the challenged statute merits particularly careful

review for compliance with Article I, Section 23's mandate, and further that the court of appeals' determination that the statute is unconstitutional should be affirmed.

ARGUMENT

I. Section 23's Unique Guarantee of Equality Is Rooted in Indiana's Democratic Frontier History.

Pioneer Indiana was a "society that trumpeted the need for equal rights and equal privileges." Nicole Etcheson, *The Emerging Midwest: Upland Southerners and the Political Culture of the Old Northwest, 1787-1861* 94 (1996) (discussing the societies of Indiana, Illinois, and Ohio).¹ The state of Indiana was "born in conflict, in individualism." Patrick Baude, *Has the Indiana Constitution Found Its Epic?*, 69 Ind. L.J. 849, 853 (1994). A central theme of Indiana's constitutional history has been the fear that the state would use its power to stifle that individualism by privileging some citizens over others. The framers took numerous steps to allay that fear, both by restraining the state's ability to grant privileges only to certain citizens and by encouraging political participation by all eligible citizens.

Section 23 has played an integral role in this history. It guarantees that: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." From its earliest history, Section 23 has been invoked by this Court to scrutinize and strike down laws that unfairly granted "certain citizens privileges not equally belonging to all." *State ex rel. Holt v. Denny*, 118 Ind. 449, 478, 21 N.E. 274, 284 (1889); *Graffy v. City of Rushville*, 107 Ind. 502, 508-09, 8 N.E. 609, 612 (1886); *see also Collins v. Day*, 644 N.E.2d 72, 77 (Ind. 1994) ("Early decisions of this Court interpreting our Constitution ... practiced and acquiesced in for a period of years, have been accorded strong and superseding precedential value,") (internal quotation marks omitted).

¹ However, at this time, only adult white men comprised the voting class – *i.e.*, those who could be eligible to vote. *See infra* note 2 for a more complete discussion of this issue.

Section 23 “is often, but erroneously, cast as something like the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. But the difference is striking.” Patrick Baude, *Indiana’s Constitution in a Nation of Constitutions*, in *The History of Indiana Law* 24-25 (Bodenhamer & Shepard eds., 2006). As this Court explained in *Collins*, the two provisions not only have “striking textual differences” between them, but also fundamentally divergent historical roots. 644 N.E.2d at 74-75. The Equal Protection Clause, as the constitutional culmination of the Civil War era, enshrines a basic suspicion of certain historically pernicious classifications, especially those based on race, while affording other classifications a strong presumption of constitutionality. In contrast, Section 23 was produced by the great leveling, democratic tide of Jeffersonian and Jacksonian politics, coupled with the pioneer ethic of individualism and mistrust for government power. *See infra* Parts II, III. Section 23 is *not* a state equivalent of the federal Equal Protection Clause, and the Equal Protection Clause’s analytical framework of strict, intermediate, and rational basis scrutiny does *not* apply to analysis under Section 23.

Rather, Section 23 represents a comprehensive commitment to equality before the law amongst all citizens. Such is the guarantee that this Court must vindicate here.

II. Since Statehood, Political Equality Among Citizens Has Been a Core Constitutional Value.

To fully understand the limitations that Section 23 places on the government of Indiana, it is necessary to first examine the precursor to the 1851 constitution, the constitution of 1816, and the aftermath of its ratification.

Indiana’s first constitutional convention in 1816 took place amidst a conflict between a territorial elite—southern planters—and the ““common citizen,”” the comparatively poorer pioneers. *Price*, 622 N.E.2d at 961 (quoting John D. Barnhart, *Valley of Democracy* 195

(1953)); Baude, *Epic*, 69 Ind. L.J. at 853. Prior to statehood, southern planters dominated the territorial government. Michael DeBoer, *Equality as a Fundamental Value in the Indiana Constitution*, 38 Val. U. L. Rev. 489, 508 (2004). These elites generally believed that only certain citizens, usually not all pioneers, were worthy to participate politically. *Price*, 622 N.E.2d at 961-62. Ordinary citizens, however, had a different view: “Their experience on the frontier taught pioneers the importance of Jeffersonian individualism and republican liberty. They believed fervently in individual rights and freedoms, especially when threatened by government at a distance.” James H. Madison, *The Indiana Way: A State History* 141 (1986). During the 1816 convention, the pioneers rejected the aristocratic model of government, agitating for greater popular participation and holding that ““even the poorest had a right to a voice in the determination of the policies which affected his life as well as the career of the richest.”” DeBoer, 38 Val. U. L. Rev. at 508 (quoting Barnhart, at 195).

The pioneers won. Baude, *Epic*, 69 Ind. L.J. at 853. Concerned that the elites would fashion a non-majoritarian government, the pioneers adopted measures that would “guarantee popular participation and protect scrutiny of public affairs.” *Price*, 622 N.E.2d at 962; DeBoer, 38 Val. U. L. Rev. at 509. For example, “the constitution of 1816 explicitly protected the right to ‘examine the proceedings of the legislature, or any branch of the government.’” Baude, *Epic*, 69 Ind. L.J. at 853 (quoting Ind. Const. art. I, § 9, cl. 1 (amended 1851)). Over significant opposition, the constitution also allowed voting by secret ballot. William P. McLauchlan, *The Indiana State Constitution: A Reference Guide* 4 (1996). And it expanded suffrage and took a liberal position—for the time—on public education, for the express purpose of fostering a more informed citizenry in the interests of self-government. *Id.* at 3. Finally, the constitution contained an expansive bill of rights. In marked contrast to the federal Bill of Rights, the

framers signaled the importance of Indiana's bill of rights by placing it at the beginning of the Indiana constitution, rather than at the end. *Id.*

The drive to facilitate political participation by those entitled to participate continued between constitutional conventions as well. Notably, in 1821 the legislature passed an act to create a state highway system, which had, in part, the remarkable purpose of increasing citizens' abilities to participate in the political process: "The law's purpose was both democratic and economic. Roads were necessary to allow all citizens the opportunity to participate in state government" David J. Bodenhamer & Hon. Randall T. Shepard, *The Narratives and Counternarratives of Indiana Legal History*, in *The History of Indiana Law* 7 (Bodenhamer & Shepard eds., 2006). Indiana's commitment to providing citizens with equal access to political participation would only increase in the coming years.

III. The Framers of the 1851 Constitution Intended to Further Promote Equality by Removing Barriers to Participation and Mandating Equal Treatment of Citizens.

The ethic "of individualism and . . . distrust of governmental power" that dominated the 1816 constitutional convention continued, and even grew, with the rise of Jacksonian politics in Indiana leading into the 1851 convention. Bodenhamer & Shepard, *supra*, at 9. Jackson himself won large majorities in Indiana in every presidential election in which he ran. DeBoer, 38 Val. U. L. Rev. at 516. By the 1840s, Jackson's Democrats had ousted the pro-centralization Whigs and dominated every level of Indiana politics. They achieved this domination largely by invoking principles of "democracy, individual rights, and limited government," *id.*, successor values to the anti-aristocratic, democratic ideals of Jeffersonian republicanism that had shaped Indiana's 1816 constitution. *See id.* at 502-04. "The 1851 Constitution reflects this populism and a prevailing sympathy for Jacksonian democracy." Hon. Brent E. Dickson, *Indiana's Constitutional Past*, Address Commemorating Indiana's 180th Anniversary of Statehood at the

Indiana State Library and Historical Building (Dec. 8, 1996) (transcript available at <http://www.in.gov/history/2609.htm>); McLauchlan, *supra*, at 11 (“[T]he constitution was Jacksonian, moving to democratize many aspects of government.”). The 1851 constitution was, in a very real sense, the culmination of “the agenda set in 1816.” *Price*, 622 N.E.2d at 961-62; Baude, *Epic*, 69 Ind. L.J. at 853.

A. *The Expansion of Suffrage*

For the Jacksonian Democrats who largely wrote the 1851 constitution, the “signal role of government . . . was to remove barriers that prevented men from competing as equals in the political arena and economic marketplace.” Bodenhamer & Shepard, *supra*, at 8. Thus, the 1851 constitution’s focus on individualism and individual rights is especially pronounced with regard to suffrage. Motivated by the core fear that anti-democratic elites would take control of the machinery of government, the framers took strong steps to develop an electoral structure that would not privilege one subset of political society over another.

The 1851 constitution entrenched a long series of changes designed to safeguard political equality. In 1787, “the body of citizens who possessed full political rights . . . consisted of the free white male inhabitants 21 years of age or upward who owned 50 acres of land in the district and who had been citizens of one of the States and were at the time residents of the district, or who had resided for two years in the district.”¹ Charles Kettleborough, *Constitution Making in Indiana* xcii (1916). As adopted in 1851, Article II, Section 2 of the constitution reduced the in-state residency requirement to six months, allowed non-citizens to vote if they had “resided in the United States one year” and “declared [the] intention to become a citizen of the United States,” and eliminated the property requirement entirely. *See id.* at ccxxvii. This expansion of the electorate reflected a profound, and in some ways unique, commitment to open access to the ballot box: “while the delegates relied heavily on the constitutions of the Ohio Valley and

southeastern states, *they generally borrowed only those features which promoted political inclusion*, eschewing the elitist provisions favored by territorial federalists, such as tax requirements for voting, property qualifications for officeholders, unequal apportionment of representation and protection of slavery.” *Price*, 622 N.E.2d at 962 n.10 (emphasis added); John D. Barnhart & Donald F. Carmony, *Indiana's Century Old Constitution* 5 (1951) (noting the general desire to “broaden[] the franchise to give all adult white male inhabitants the right to vote for the officers who passed the laws, authorized the taxes, and administered the government” and the “general opinion that the common man should be given equal representation and participation in his government”).²

A compelling example of the constitution’s commitment on equal suffrage is its treatment of newcomers to the state. The framers rejected calls for an extended “probationary process” before immigrants—whether from other states or foreign countries—gained the right vote. *See* 1 Kettleborough, *supra*, at xcvi. Maintaining the old two-year residency requirement was not seriously considered, and the legislature overwhelmingly rejected a one-year residency requirement—which had been adopted in Wisconsin and Illinois—by a vote of 90 to 14 in favor

² When the 1851 constitution was adopted, its guarantee of political inclusion extended only to adult white men. *See* Ind. Const. art. II, § 2 (1851) (“every white male citizen of the United States . . . and every white male, of foreign birth . . .”). In ratifying the constitutions, the framers expanded political participation, but in so doing, they only reduced the barriers preventing voting by citizens like those citizens who could already vote—namely other adult white males. They did not expand the types of people who could be considered eligible to vote, *e.g.*, women, African-Americans, or Native Americans. *See, e.g.*, Harry L. Watson, *Liberty and Power: The Politics of Jacksonian America* 13-14 (1990) (noting the “undemocratic” quality of Jacksonian Democracy with respect to both women and slaves); DeBoer, 38 Val. U. L. Rev. at 513-14 & nn.108, 111 (noting that “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” and surveying other secondary sources). In other words, at that time, the pool of possible voters included only adult white males, and the framers worked to expand the number of adult white males who could vote. Now the pool of possible voters is rightfully much wider, and the main thrust of the framers’ intent—to increase political participation by those eligible to vote under the constitution—extends to all adults.

of the relatively short six-month requirement ultimately included in Article II, Section 2. *Id.* at xcvi-xcviii & n.54. Supporters of the short residency requirement reasoned that “it was unfair to tax foreigners at once and deny them the right of suffrage until they had served out” such a probationary period. *Id.* at xcvi. Newcomers had an equal stake in the state’s affairs and so should have an equal say at the ballot box.

The constitution’s protection of immigrant voting rights came over heated popular opposition. In the decades following 1851, legislators proposed at least a dozen suffrage-restricting measures, arguing that “[n]o one should vote who is not a citizen, and no man should be a citizen till his residence has given him some knowledge of our institutions and wants.” *Id.* at c. Those bills were rejected in part because they were viewed as inconsistent with the constitution’s commitment to electoral equality. Even Governor Thomas A. Hendricks, a strong proponent of stricter limits on immigrant voting, believed such limits were “clearly impossible without securing a change in the Constitution.” *Id.* at cxii. Hendricks successfully backed an 1881 constitutional amendment requiring a voter to live in a township for 60 days and a ward or precinct for 30 days before an election in order to vote there, but more stringent proposals to restrict the ability of non-citizens to vote could not gain traction. *Id.* at ccxxvii-ccxxviii. Not until forty years later, in 1921, did the state limit immigrant voting, and that change too required a constitutional amendment. Ron Hayduk, *Democracy for All* 19, 26-27 (2006). The fundamental emphasis on constitutional “features which promoted political inclusion” remained unchanged. *Price*, 622 N.E.2d at 962 n.10.

B. The Curtailment of Privileges

Along with expanding suffrage amongst those considered eligible to vote, the 1851 constitution also curbed the legislature’s power in an attempt to ensure that the state did not privilege certain classes of citizens. In the 1840s, public criticism focused in part on the

“mounting volume of local special legislation,” whereby the legislature interfered in individual matters (e.g., changing individuals’ names, granting divorces, and vacating alleys), enacted special laws for particular towns and counties, and otherwise “regularly made special or local exceptions to the revenue and other laws.” Barnhart & Carmony, *supra*, at 6-7. The Indiana framers believed that it was vital to curb such practices. In 1848, Governor James Whitcomb even declared that “[i]f calling a Convention to amend the Constitution were productive of no other result . . . it would be abundantly justified.” *Id.* at 7.

In their efforts to promote political equality and curtail the legislature’s power to favor some citizens over others, the framers of the 1851 constitution crafted several new constitutional provisions. For example, Article IV banned “local or special laws” in most circumstances. Article X mandated a “uniform and equal rate of assessment and taxation.” And, in Article I, the framers further expanded the already democratic bill of rights from the 1816 constitution, including crafting Section 23. Moreover, Article VI provided for the popular election of judges (who had previously been appointed, as in the federal system, by the governor with the legislature’s advice and consent). Thus, as Justice Dickson has noted, the Indiana constitution “is clearly the result of a robust citizenry very apprehensive about the excesses of government power and very protective of individual liberties.” Dickson, *supra*.

It is in this context that the framers proposed and ratified the Privileges and Immunities Clause, article I, section 23. As the debates regarding the provision make clear, the framers were extremely concerned with the possibility that the state would privilege some citizens over others. *See generally 2 Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana 1850 1393-98 (1850)* (accessible from <http://www.in.gov/history/2608.htm>) (last visited Nov. 5, 2009); Baude, *Indiana’s Constitution*,

supra, at 25 (noting that Section 23 “is aimed at stopping the corruptive practice of favoring the powerful”). Section 23 was added, as one delegate put it, to ensure “that if the Legislature grant to one set of persons a privilege, it shall grant the same privilege to all other persons.” *Collins*, 644 N.E.2d at 77 (quoting Delegate Clark of Tippecanoe). Indeed, the address to the electors regarding the proposed changes to the constitution arising from the 1851 convention singled out Section 23, noting that “[t]his important provision is new.” Address to the Electors of the State (Feb. 8, 1851), *available at* <http://www.in.gov/history/2840.htm> (last visited Nov. 4, 2009). Since its enactment, Section 23 has been integral to the 1851 constitution’s promise of political equality.

IV. In Light of the History of Section 23, and that of the 1851 Constitution *In Toto*, Any Statute that Privileges Some Eligible Voters Over Others Must Be Subjected to Careful Scrutiny.

Although the debates over ratifying Section 23 primarily concerned privileges related to commercial enterprises, “[l]ongstanding decisions of this Court have expanded the function of Section 23 not only by failing to restrict its application to legislation granting, rather than abridging, privileges or immunities, but also by repeatedly applying Section 23 to matters unconnected with the state’s involvement in commercial enterprise, thereby giving preference to the literal language of Section 23 rather than to the intent of its framers.” *Collins*, 644 N.E.2d at 78 (citing cases); *see also, e.g., Holt*, 118 Ind. at 478, 21 N.E. at 284 (striking down under Section 23 residency and political limitations for certain public officers). Nevertheless, Section 23 can only be understood in the context of the larger values that animate the Indiana constitution. Those values, particularly the Indiana framers’ desire to promote individual freedom and political equality among citizens, require probing review of any classifications that provide differential access to the ballot box.

Privileges associated with the process of voting fall squarely within the expanded class of matters this Court has said are protected by Section 23. While Article II of the Indiana constitution protects fundamental equality in suffrage, it does not specify the procedures a voter must follow to cast a ballot. Yet those procedures inarguably are relevant to whether the right to vote guaranteed on paper translates into the ability to cast a ballot in practice, and even if the constitution does not require a particular set of procedures, it guarantees—through Section 23—procedures that “upon the same terms . . . equally belong to all citizens.”

By requiring some eligible voters to show identification but not others, Public Law 109-2005 contravenes that guarantee. Citizens who happen to reside at a state licensed-care facility where a polling place is located, *see* Ind. Code § 3-11-8-25.1(e), or who happen to qualify to cast an absentee ballot, *see id.* § 3-11-10-1.2, may vote under different identification rules from everyone else. They do not have to produce a current or recently expired Indiana or federal identification containing their name, their photograph, and an expiration date (despite the fact that it is *absentee* voting rather than in-person voting that is generally recognized to carry the greatest fraud risk). *See id.* § 3-5-2-40.5 A citizen who does not fall into one of those two groups and who fails to produce the required photo identification may cast a provisional ballot that will be counted only if the voter makes a second trip to a different location and produces the identification (or in limited circumstances signs an affidavit). *See id.* §§ 3-10-1-7.2, 3-11-8-25.1, 3-11.7-5-2.5. Voters who do not have identification frequently must pay in some cases to obtain the documents required to receive a photo identification from the Bureau of Motor Vehicles. Furthermore, voters in some areas have an even greater burden as the Bureau of Motor Vehicles has closed some offices. This distinction in voting procedure creates a real, and inequitable,

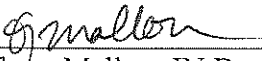
privilege for those who do not have to show identification and a burden on those who do. It thus merits robust review under Section 23.

CONCLUSION

As this Court has noted, “[i]nterpretation of the Indiana Constitution is controlled by the text itself, illuminated by history and by the purpose and structure of our constitution and the case law surrounding it.” *Price*, 622 N.E.2d at 957. Legislative classifications that privilege some eligible voters over others, by making it easier for those in the privileged class to vote, are anathema to the mandates of the 1816 and 1851 constitutions to limit privileges and to expand political participation. Such classifications fly in the face of the special emphasis on electoral equality within a constitution that, as a whole, strongly safeguards the individual from state uses of power to privilege others. Such classifications by the legislature thus deserve particularly robust review by this Court to ensure that the actual inherent characteristics that distinguish the classes delineated by the legislature warrant the differential treatment that the classes receive and to ensure that similarly situated voters have access to the same privileges, or in this case the equal opportunity to vote.

Amici believe that such robust review will lead the Court to conclude here that the challenged classifications cannot stand, and that the holding of the court of appeals should be affirmed.

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As required by Indiana Appellate Rule 44, I verify that this Amicus Brief in Support of Appellants contains no more than 4,200 words.



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