Recent Constitutional Decisions in Indiana

PATRICK BAUDE*

Much has been written lately, in these law review pages[1] and elsewhere,[2] about the emergence of a new world order in American constitutional law. Although the grip of twelve years of conservative national politics has led the United States Supreme Court to abandon the expansive constitutional jurisprudence that marked the Warren and even Burger periods, state courts have shown a counterbalancing willingness to assume a more active role in protecting individual interests against governmental power. The introduction to last year's survey of constitutional developments noted that, "As the United States Supreme Court continues to narrow the scope of the federal constitution, there has been a movement across the country to explore state constitutions as a largely untapped source for the protection of individual liberty."[3] To make sure that future lawyers in this state will not miss the new order, the Indiana Supreme Court has now added Indiana constitutional law to the required bar examination subjects.

There is, in other words, no shortage of rhetorical commitment. The striking fact is, however, that in 1992 no Indiana appellate court found any state statute to be unconstitutional. The only Indiana statute invalidated on constitutional grounds was struck down by the United States Court of Appeals for the Seventh Circuit.[4] This is not to say that reliance on the Indiana Constitution is pointless or a sham. Certainly

---

* Professor of Law, Indiana University—Bloomington. A.B., 1964, University of Kansas; J.D., 1966, University of Kansas; LL.M., 1968, Harvard. Thanks to Marshall Derks for his help with research.

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

2. *See generally* Patrick Baude, *Is There Independent Life in the Indiana Constitution?*, 62 IND. L.J. 263 (1987); Symposium, *Emerging Issues in State Constitutional Law*, 65 TEMPLE L. REV. 1119 (1992).

3. Rosalie Berger Levinson, *State and Federal Constitutional Law Developments Affecting Indiana Law*, 25 IND. L. REV. 1129, 1129 (1992).

4. Government Suppliers Consol. Servs., Inc. v. Bayh, 975 F.2d 1267 (7th Cir. 1992), *cert. denied*, 113 U.S. 977 (1993). Following two recent Supreme Court decisions, the court of appeals found unconstitutional several Indiana statutes having the effect of restricting the importation of trash. What was mainly remarkable about the court's opinion was the ease with which it concluded that the legislation rested upon an impermissible protectionist motive, despite the absence of such factual findings in the record. *See* Comment, *Environmental Provincialism, the Commerce Clause, and Hazardous Waste: The High Court Hazards a Guess*, 27 WAKE FOREST L. REV. 949 (1992). The author was involved in drafting some parts of the legislation considered in *Government Suppliers.*

in some years the Indiana Supreme Court has found a state statute in violation of the state constitution.[5] During the past year, the state courts have used state constitutional principles to justify both individual interpretations of statutes and other decisions in particular cases. In *Campbell v. Criterion Group*,[6] for example, the Indiana Supreme Court held that an indigent civil appellant was entitled to a free transcript for appeal, based in part on the language of Article 7, Section 6, of the state constitution, which guarantees "an absolute right to one appeal."[7] But the constitution was in the end used as a way of shaping and directing the common law and the court's own supervisory power. Similarly, the state courts last year used the state constitutional principle of proportionality recognized in *Clark v. State*[8] to upset two criminal sentences.[9]

The larger point is that important developments in constitutional law are often, especially at first, more shifts in rhetoric than in power. *Marbury v. Madison*,[10] after all, was mainly a rhetorical exercise in the beginning. The Court could have more easily reached the result by statutory construction, and the actual power it asserted was in fact not used for half a century.[11] Of course, much of the rhetoric of constitutional law is empty. Rising from my Lexis terminal preparing this Article, I began to wonder if any parent who did not get custody of his or her child had failed to argue that the constitution gives parents a right to live with their children;[12] if anybody who did not get all of the pieces of paper that he or she expected had neglected to argue that the due process clause requires notice;[13] or if anybody who had a little trouble figuring out a statute overlooked the void-for-vagueness argument.[14] The courts' decisions in these "constitutional law as a last resort" cases read like the words of patient parents and need no particular exploration.

---

5. *See, e.g.*, Brady v. State, 575 N.E.2d 981 (Ind. 1991).

6. 605 N.E.2d 150 (Ind. 1992).

7. *Id.* at 158.

8. 561 N.E.2d 759 (Ind. 1990); *see also*, Best v. State, 566 N.E.2d 1027 (Ind. 1991).

9. Saunders v. State, 584 N.E.2d 1087 (Ind. 1992); Wilson v. State, 583 N.E.2d 742 (Ind. 1992).

10. 5 U.S. (1 Cranch) 137 (1803).

11. That is, no federal statute was invalidated by the Supreme Court until Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

12. *E.g.*, *In re* A.M. and E.M., 596 N.E.2d 236 (Ind. Ct. App. 1992); Lamb v. Wenning, 591 N.E.2d 1031 (Ind. Ct. App. 1992).

13. *E.g.*, Elizondo v. Read, 588 N.E.2d 501 (Ind. 1992); Bratton v. MGK, Inc., 587 N.E.2d 134 (Ind. Ct. App. 1992).

14. *E.g.*, Garrod v. Garrod, 590 N.E.2d 163 (Ind. Ct. App. 1992); State v. Springer, 585 N.E.2d 27 (Ind. Ct. App. 1992).

There were, however, three lines of cases that do reveal some significant points.

I. Fighting Words

In traditional free speech analysis, the United States Supreme Court has upheld two different sorts of governmental regulations of speech. First, the Court has simply placed some kinds of speech beyond the bounds of the First Amendment to the United States Constitution. In an earlier generation, these excluded categories were defamation, commercial speech, obscenity, and fighting words. Since the 1960s, both defamation and commercial speech have been brought within the protection of the First Amendment to the Federal Constitution. Obscenity, on the other hand, has been firmly placed outside the protection of the First Amendment, and also outside the protection of Article 9, Section 1 of the Indiana Constitution.[15] It is unclear whether fighting words will remain completely unprotected or whether they will come to be given a context-sensitive status like that of defamation. Second, even if speech is "within" the bounds of protected expression, the government can regulate it in ways that stop short of total prohibition. So, if fighting words are in the first category, there is a constitutional open season on those who use them. If they are in the second category, their regulation must be measured by some constitutional standard, something like reasonableness and content-neutrality, variously phrased. Since one of the hottest political and philosophical issues of free speech today is "hate speech" — insults and taunts driven by racial or similar animus — and since the categories of fighting words and hate speech often overlap, the courts have often revisited this subject.

In *R.A.V. v. City of St. Paul*,[16] an important case from Minnesota, the United States Supreme Court discussed the issue of fighting words without resolving some of the questions which Indiana's courts will now have to face. In *R.A.V.*, a St. Paul city ordinance banned symbols which aroused "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[17] The entire Court agreed that the law was unconstitutional. Four Justices would have limited their holding to the observation that this ordinance prohibited more than fighting words: fighting words are, roughly, "face-to-face insults meant to and likely to provoke fisticuffs."[18] Because the ordinance clearly

---

15. Fordyce v. State, 569 N.E.2d 357, 359-62 (Ind. Ct. App. 1991).

16. 112 S. Ct. 2538 (1992).

17. *Id.* at 2541.

18. Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul,* 106 Harv. L. Rev. 124, 127 n.23 (1992). Actually, the word "fisticuffs" does seem to convey the quaintly dated concept of the idea. An AK-47 seems more likely on a contemporary street.

prohibited symbols leading to "resentment" rather than just violence, to psychic pain as well as suffering, it could not be upheld under the "fighting words" doctrine. If the Court had stopped with these four Justices, there would have been no reason to rethink the doctrine. As it had done on every other occasion in the last fifty years, the Court would have asserted that there was such an abstract possibility as "fighting words," but that these particular words did not fall within that theoretical clarity. Yet five other Justices *were* prepared to assume that the ordinance was limited to fighting words. Under the previous understanding of the fighting words doctrine, that should have meant that they were, like obscenity, unprotected — end of case. But these Justices, in a majority opinion by Justice Scalia, held that fighting words could constitutionally be prohibited only if the prohibition were neutral with respect to content.[19] Under the St. Paul ordinance, for example, calling someone a "fascist running dog" would not be an offense, but calling him a "Christian son of a bitch" would be likely to provoke resentment "on the basis of religion"[20] and perhaps gender. Accordingly, for the majority, the proscription of fighting words was not content-neutral and therefore unconstitutional.[21] However exactly we might phrase this conclusion, there seems to be no denying that fighting words currently are not completely beyond the First Amendment's pale.

In Indiana, the typical fighting words cases have involved language directed at police officers. The reasons why this scenario is so common are not hard to imagine. Prudence alone would suggest that someone bent on vituperation should not seek out police officers to ventilate his vocabulary of insults. Many people who are taunted and abused simply look away. Police officers are trained (and perhaps even predisposed) otherwise. A typical case in the Survey period is *Robinson v. State.*[22] Officer Mills went to investigate Robinson's activities in a parking lot. Robinson told Mills to "get the fuck away," called him a "lying motherfucker," and categorized the investigation as "bullshit."[23] Judge Buchanan found these words to be fighting words because:

> [t]hey skirt the depths of degradation despite the fact they may be tolerated or in common usage by a certain element of our society. Unfortunately, there is an element of our society that regularly engages in criminal conduct, hardly an excuse for others

---

19. *R.A.V.*, 112 S. Ct. at 2547.
20. *Id.* at 2548.
21. *Id.*
22. 588 N.E.2d 533 (Ind. Ct. App. 1992).
23. *Id.* at 534.

> to do likewise. This does not justify tolerance of such depravity by a police officer or any other citizen.[24]

Judge Shields dissented, relying in part on an exegesis of the word "motherfucker."[25] She observed that a contemporary dictionary definition of the word renders it as "a mean, despicable or vicious person."[26] She pointed out that the court of appeals had previously found the epithet "asshole" to be protected by the First Amendment,[27] and that that word's dictionary definition (as an epithet) was "a stupid, mean, or contemptible person."[28] Because the meaning of the terms was so close, it followed to Judge Shields that the term "motherfucker" could not be excised from the vocabulary that citizens might use in discussions with government officials.[29] One of the deeper problems with the fighting words doctrine certainly is the difficulty of dealing with these matters of degree. To Judge Shields, the critical point was not the coarseness of Robinson's language, but rather his intent. He had not intended to provoke a fight. However rudely, he was asking Officer Mills to leave, not to fight. Judge Shields' position is consistent with the logic of the fighting words doctrine. Even a very polite phrase, such as, "Excuse me, you'd better draw your knife as I intend to cut your ear off," could start a fight more readily than Robinson's "Get the fuck away," which provides explicit directions on how a confrontation could be avoided.

Gamble v. State[30] is a similar case. When Mr. Gamble was arrested, he screamed, among other things, that he was going to "kill that f__ g pig"[31] when he got out of jail. The court of appeals affirmed his conviction.[32] Here Judge Shields concurred in result, without explanation.[33] Her concurrence follows from the logic of her earlier concurrence in *Robinson*. Gamble's words were not merely foul, they also threatened violence. Both *Gamble* and *Robinson* rely, in large part, on a background of Indiana cases expressing the view that police officers need not be required to tolerate severe insult as a condition of their conversations

---

24. *Id.* at 535.
25. *Id.* at 536-37.
26. *Id.* at 536.
27. *Id. See* Cavazos v. State, 455 N.E.2d 618 (Ind. Ct. App. 1983).
28. *Id.*
29. *Id.*
30. 591 N.E.2d 142 (Ind. Ct. App. 1992).
31. *Id.* at 144. The delicacy in spelling the "F"-word appears to be on the part of the court reporter at the trial, not a heightened standard of censorship in the court of appeals.
32. *Id.*
33. *Id.* at 146.

with citizens. A recent case in which the police arrested the defendant for her language to police officers after they had responded to her call for help in a domestic disturbance illustrates a typical statement of that position:

> While not every abusive epithet directed toward a police officer would justify a conviction for disorderly conduct, we find no sound reason to subject police officers to the abuse suffered . . . here [she called them each a "son-of-a-bitch" and a "fucker"], which we find to be beyond that which any person might reasonably be expected to endure.[34]

If these were the only cases in the last year, they would seem to set Indiana on a collision course with the United States Supreme Court's new hostility to the fighting words doctrine. First, the language in these cases is not all that terrible. Of course, these are questions of taste and degree, and I don't mean to suggest that I find it an attractive vision to live in a world in which people constantly shout out epithets that require appellate judges to write little essays comparing "asshole" with "motherfucker." Still, the essence of the fighting words doctrine is fighting, not taste and wit. Show me a man who goes ballistic every time that he hears the F-word, and I will show you a case of terminal exhaustion. Second, the rationale of the fighting words doctrine is that society can intervene to stop the fight by stopping the insult. But society can also train its police officers to pity the limited vocabulary of the citizens with whom they deal rather than beating up those citizens. Show me a municipality that hires officers who beat people up when they get insulted, and I'll show you what a high insurance premium looks like—and some cops who are unwelcome at the F.O.P.'s weekly card game. But third, and most significantly, these cases seem to suggest, although they do not say so outright, that some degree of circumspection is required when discussing one's situation with a police officer. Now as common sense, that is extremely advisable. A good rule to live by is never to call an armed man a motherfucker. As a legal principle, however, it seems close to the edge of *R.A.V.*

A third case from the court of appeals, *Price v. State*,[35] takes a completely different approach, explicitly rejecting *Robinson* and *Gamble*. In an opinion of great depth and scholarship, Judge Sullivan surveyed cases from around the country, the commentary to the Model Penal Code (after which the Indiana disorderly conduct statute is patterned), and the legislative history of the Indiana statute, concluding:

---

34. Brittain v. State, 565 N.E.2d 757, 761 (Ind. Ct. App. 1991).
35. 600 N.E.2d 103 (Ind. Ct. App. 1992).

> Without reservation we agree that law enforcement officers should not be subjected to undue verbal abuse. However, it is also true that the training of a police officer includes an emphasis upon objectivity, calm and self-control. Police are trained to be a part of the solution to a particular disruptive problem rather than a contributing factor to the problem. . . . In any event, the disorderly conduct statute was never intended to prevent mere protests against police officers, and could not be construed to do so.[36]

The court upheld the defendant's conviction, not out of sensitivity to the working conditions of police officers, but because the evidence showed that she had intended to cause a loud disturbance.[37] The defendant specifically argued that the Indiana statute had been applied unconstitutionally because it was used mainly to arrest those who protested to the police. It seems clear that this argument is theoretically valid under *R.A.V.* Before the Supreme Court's decision in that case, it might have been said that, since fighting words were outside the First Amendment, the state could punish their use in any subcategory it chose, such as fighting words that aroused resentment on the basis of law enforcement status. After *R.A.V.*, such a prohibition would be unconstitutional because it is not content-neutral. Judge Sullivan's opinion rejected the defendant's argument on the factual ground that there was no "cognizable evidence in this case to support that assertion."[38] In another section of its opinion, discussed below, the court concluded that the Indiana constitutional guarantees of free expression also exempt fighting words.

II. Rational Basis

In the structure of modern constitutional law, almost every area seems to be governed by a two-tiered test, even though the term "tier" is primarily used for equal protection analysis. Thus, a content-specific regulation of speech must be justified by some governmental interest on the order of preventing an imminent and substantial harm, a governmental invasion of privacy must be justified by a compelling interest, a warrantless search must be justified by exigent circumstances, discrimination against a suspect class must be necessary as a means to a compelling interest, and so on. On the other hand, less suspect intrusions need only

---

36. *Id.* at 112. Judge Hoffman joined in Judge Sullivan's opinion, and Judge Shields, who had dissented in *Robinson*, concurred separately expressing some reservations about the interpretation of the disorderly conduct statute.

37. *Id.* at 115.

38. *Id.*

meet a lower standard of justification, usually expressed with the word "reasonable." So a regulation of the time, place, and manner of speech (rather than of its content) need only be reasonable, or a nonsuspect distinction between two classes (say, acquitted defendants and defendants against whom the prosecutor dropped charges[39]) need rest only on a rational basis. There are two ways to increase the constitutional protection of an activity or class. One is to classify the activity as a constitutional "right" or to recognize the class as "suspect." There were no developments of this kind in Indiana during the Survey period. Certainly there were cases involving explicit constitutional rights[40] or suspect classes,[41] but none of them broke new ground. The second way to extend constitutional protection is to subtly shift the application of the reasonableness test. Here, the situation is less clear.

It is familiar ground that a statute will be upheld as "rational" on a fairly flimsy showing that a sane person might have believed that the statute could somehow be sensible. Thus, the United States Supreme Court has held that New Orleans may prefer existing sandwich vendors to new competitors on the ground that the existing vendors might contribute historical flavor to the neighborhood,[42] or that Oklahoma may prohibit opticians from putting duplicate lenses in old eye-glass frames because of some imagined health hazard.[43] Yet careful observers have often noted that courts sometimes use the same test to strike down statutes which seem no more implausible than these examples.[44] By the same token, one of the ways in which state courts might acquire a

---

39. Kleiman v. State, 590 N.E.2d 660 (Ind. Ct. App. 1992).

40. *E.g.*, Henrichs v. Pivarnik, 588 N.E.2d 537 (Ind. Ct. App. 1992) (illustrating what a public figure must show to overcome the burden of proving actual malice); Albro v. Indianapolis Educ. Ass'n, 585 N.E.2d 666 (Ind. Ct. App. 1992) and Fort Wayne Educ. Ass'n v. Aldrich, 585 N.E.2d 6 (Ind. Ct. App. 1992) (illuminating discussions by Judges Shields and Staton, respectively, of how a union should calculate its fees to avoid impinging on members' rights not to support political causes other than their own).

41. *E.g.*, Morse v. State, 593 N.E.2d 194, 196 (Ind. 1992) (holding that defendant failed to make out a prima facie case of purposeful discrimination where prosecutor peremptorily struck only African-American venireman but there was no other evidence of discriminatory intent); Nicks v. State, 598 N.E.2d 520 (Ind. 1992) (finding that prosecutor rebutted prima facie case of discriminatory use of peremptory challenges, assuming for the sake of the argument both that there was a prima facie case of racial discrimination and that the same standard applied to gender discrimination); Parents of M.L.V. v. Wilkens, 598 N.E.2d 1054 (Ind. 1992) (upholding different treatment of mothers and putative fathers in adoption proceedings).

42. New Orleans v. Dukes, 427 U.S. 297 (1976).

43. Williamson v. Lee Optical, 348 U.S. 483 (1955).

44. *See generally* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

distinctive voice in constitutional law is by applying this higher standard of rationality to some subset of issues.[45]

Certainly there are many typical Indiana cases during the survey period that illustrate the deference implicit in the usual application of the rational basis test. In *Kleiman v. State*,[46] for example, an acquitted defendant challenged the Indiana statute that permits arrested persons to seek expungement of their records if the charges are dropped in some circumstances, but which never permits expungement for a defendant who was tried and acquitted. The court held that there was a rational basis for this distinction because there must have been probable cause to try the defendant who was acquitted.[47] In *Babcock v. Lafayette Home Hospital*,[48] the court upheld the shorter statute of limitations applying to medical malpractice claims against an equal protection challenge.[49] As the court put it, in the traditional and familiar application, "[a]lthough IC 16-9.5-3-1 may provide harsh results in some instances, the distinction it draws bears a rational relationship to legitimate state interests."[50]

But then there is *Indiana High School Athletic Ass'n v. Schafer*.[51] Schafer, a basketball player who became ill during the school year, was allowed to repeat the academic year in accordance with a bona fide academic policy of his school. As a result of a complicated application of an Indiana High School Athletic Association rule, he lost athletic eligibility. The court was prepared to recognize that the rule was rationally related to a legitimate state interest, designed as it was to protect academic work from the erosion of high-pressure athletic competition. On the other hand, the rule was not a particularly intelligent way to resolve Schafer's life because his scholastic delay was the product of illness. In *Sturrup v. Mahan*,[52] the Indiana Supreme Court had struck down high school athletic association rules that were reasonable but "sweep too broadly in their proscription and, hence, violate the Equal Protection Clause."[53] Striking the rule down in *Schafer*, the court of appeals regarded itself bound to follow *Sturrup* even though it did not apprehend either

---

45. *See generally* Monrad G. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 92 (1950).

46. 590 N.E.2d 660 (Ind. Ct. App. 1992).

47. *Id.* at 663.

48. 587 N.E.2d 1320 (Ind. Ct. App. 1992).

49. *Id.* at 1325.

50. *Id.* at 1325-26.

51. 598 N.E.2d 540 (Ind. Ct. App. 1992).

52. 305 N.E.2d 877 (Ind. 1974).

53. *Id.* at 881. If the court meant to limit its holding to the Equal Protection Clause of the Fourteenth Amendment, the decision's principle is not likely to survive review by the United States Supreme Court. The decision could, however, be easily recast as an interpretation of the Indiana constitution. *See infra* note 61.

the rationale or the "constitutional implications" of the decision.[54] A federal district court in the northern district of Indiana has since regarded itself as similarly bound, relying in part on *Schafer*.[55] In effect, then, there is a sub-rule in Indiana: even when there is no identifiable rationale for heightened scrutiny, an overbroad rule can be struck down if it falls within the force field of *Sturrup*. But when does the *Sturrup* overbreadth rule apply? I can think of three rationales: (1) perhaps the IHSAA, although "state action," is not the sort of deliberative governmental body to which the ordinary standard of deference is appropriate; (2) perhaps the fact that those limited by the rules (athletes) have had absolutely no right to participate in their formation or to recall those who made the rules, removes this case from the ordinary argument that an election is the best cure for an irrational law; or (3) this is Indiana and basketball is a constitutional entitlement.[56] In any case, the possible analogy to *Sturrup* remains as a last resort for any rational basis argument.

III. The State Constitution

The courts decided a number of cases specifically interpreting the Indiana Constitution. Most of these were straightforward. The Indiana Supreme Court rejected the argument that the contract clause forbids the legislature from shortening the period of redemption from a tax sale.[57] Applying principles of separation of powers and functions, the court of appeals held that a trial court could not function as the prosecution in a probation revocation proceeding.[58] There were, in addition, a number of cases involving punishment and sentencing, more readily discussed in the context of criminal law than constitutional law.

There were, however, two state constitutional law cases of great interest. First was *State v. Rendleman*.[59] Rendleman collided with a highway patrol car. Under the Indiana Tort Claims Act, the state denied liability in connection with law enforcement. Rendleman argued that the law enforcement immunity violated Article I, Section 12, of the Indiana Constitution of 1851, which provides that "every person, for injury

---

54. 598 N.E.2d at 553.

55. Jordan v. Indiana High Sch. Athletic Ass'n, Inc., No. 92-295, 1993 U.S. Dist. LEXIS 879 (N.D. Ind. Jan. 27, 1993); *see also* Crane v. Indiana High Sch. Athletic Ass'n, 975 F.2d 1315 (7th Cir. 1992) (relying on a pendent state law claim in order to avoid a constitutional challenge to another IHSAA eligibility rule).

56. *But see Crane*, 975 F.2d at 1315, which only involved golf.

57. Metro Holding Co. v. Mitchell, 589 N.E.2d 217 (Ind. 1992). There doesn't seem to be any authority to the contrary in this century.

58. Isaac v. State, 590 N.E.2d 606 (Ind. Ct. App. 1992).

59. 603 N.E.2d 1333 (Ind. 1992).

done to him in his person, property, or reputation, shall have remedy by due course of law." The court analyzed the issue in historical sequence. In 1851, it was clear that there would have been no remedy in the Indiana courts, primarily because of the common law principle of sovereign immunity. In the 1960s, the court began to recognize actions against the sovereign, in effect modifying the common law. Then the legislature, in the Tort Claims Act, overrode the developing common law by creating a specific statutory scheme that immunized law enforcement activities from tort liability. If the events are described in this historical sequence, it seems clear that the constitution does not impose tort liability. But the issues could have been described in logical order rather than historical sequence, thus:

> *Major premise*: The courts should enforce the general principles of law so as to assure remedies for those who suffer what the law generally regards as an injury.
> *Minor premise*: The courts are charged with articulation of what general principles of law are, for otherwise Article I, Section 12, would not constrain the legislature. ("Effectuating this mandate requires that we manage Indiana's common law, not as a frozen mold of ancient ideas, but as a dynamic force which keeps pace with progress."[60])
> *Conclusion*: Unclear, but at least it would not necessarily follow that Rendleman loses without discussion of what the law should be.

The court's analysis, then, seems to reject the possibility of the constitution as a "living document" embracing evolving principles whose specific application depends upon context.

What the *Rendleman* case raises more deeply are questions about the first principles of the state constitution. Federal constitutional law is the product of a continuing dialogue about the nature of authority, the relevance of history, the relevance of enlightened morality, the proper place for a countermajoritarian institution in a democratic system, the interpretation of texts, the role of public policy in fundamental law and many other such debates. The state constitution will have a life of its own only when we sort through the same questions and perhaps answer them differently.

What remains striking about the Indiana courts is that their interpretation of the state constitution seems so narrowly to parallel the federal, even when the language and history of the two documents are so different. There are still, for example, references to the Equal Pro-

---

60. Campbell v. Criterion Group, 605 N.E.2d 150, 156 (Ind. 1992).

tection Clause of the state constitution[61] despite the fact that there isn't one. In many ways, the most dramatic way to see this limiting parallelism is to go back to the problem of fighting words and to the court of appeals' complete and careful opinion in *Price v. State.*[62] Price argued that fighting words were within the protection of Article I, Section 9, of the Indiana Constitution, which provides:

> No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible.

One who just read the language of this provision might well conclude that the Indiana framers meant only to prohibit prior restraints ("for the abuse of that right, every person shall be responsible.") Or that no "subject" matter was outside the pale. One who studied the history of those hardy frontiersmen would probably not find that they especially valued elegant and refined discourse. In construing the Oregon Constitution, written six years after and copied in this and many other particulars from Indiana's, that state's supreme court described its framers as "irreverent" and "rugged and robust."[63] As a result, the Oregon Supreme Court rejected the view that obscenity and fighting words were exempted from the state constitution.[64] Of course the Indiana Court of Appeals has plausible reasons to reject Oregon's interpretation, not the least compelling of which are explicit contrary holdings of the Indiana Supreme Court. But in the end, if state constitutionalism is to be anything more than a few politically motivated deviations from an occasional United States Supreme Court decision that happens to be unpopular with some lower court judges, Indiana needs its own dialogue about what it is as a place, about the history and shape of its institutions.

> But as the Oregon experience demonstrates, once it becomes clear that a state's highest court is serious about the primacy and independence of the state constitution, lawyers and lower courts will begin to participate vigorously in the development of a rich and useful discourse.[65]

---

61. See the very careful analysis by Judge Barteau in *Schafer*, 598 N.E.2d at 554 n.9. *See* Baude, *supra* note 2, at 270-71.

62. 600 N.E.2d 103 (Ind. Ct. App. 1992). *See supra* notes 34-37 and accompanying text.

63. State v. Henry, 732 P.2d 9, 16 (Or. 1987).

64. *Id.* at 17.

65. David Schuman, *Correspondence: A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 276-77 (1992).

The courts have raised the subject in Indiana. Perhaps if we can set aside the habit of allowing the United States Supreme Court to set the agenda, we can carry on the discourse which will constitute our state's political community.