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Has the Indiana Constitution Found Its Epic?

PATRICK BAUDE*

Of course it is an overstatement to compare the Indiana Supreme Court's recent decision in *Price v. State*¹ with *Marbury v. Madison*.² But there are two important similarities. For one thing, the *Price* case is the first Indiana decision to reflect seriously on the purpose and nature of the Indiana Constitution. There are certainly cases in Indiana interpreting the state's constitution,³ but in all these cases, the courts paid little attention to the idea that what they were construing was a state constitution. There were no specific references to the unique function such a document might have, to the particular historical details of Indiana as a state, or to a vision or theory that might underlie the foundation of the state's political and legal institutions. As Robert Cover said, "For every constitution there is an epic . . ." ⁴ Whatever Indiana's constitutional epic was, it had not found expression in the growing number of cases dealing with the meaning of particular clauses. *Price* changes that. The court uses this case to tell a narrative of the Indiana Constitution, linking it to a version of history and articulating a certain philosophy as its foundation.

For a second thing, there is a striking structural similarity with *Marbury*. The reader will remember that Mr. Marbury sued for a writ of mandamus in the Supreme Court and lost because that Court concluded it did not have jurisdiction—a result that could easily have been said to be one of "the principles and usages of law" and therefore outside the scope of the particular section of the 1789 judiciary act whose authority Marbury had invoked. Chief Justice Marshall, however, used the case to introduce a powerful theory of judicial review. In a strange way, the fact that this whole theory is almost *obiter dicta* reinforces its importance: the Court said these things because the justices were waiting to say them, not because they had to. The theory became an act of statecraft rather than just legal footwork necessary to Madison's victory. So also with the *Price* case. Following a raucous party and a face-off with the police, Colleen Price told a police officer "Fuck you" in a loud voice. She was convicted of disorderly conduct and, in the end, the Indiana Supreme Court reversed her conviction because no particular individual was much harmed by her words. This could, in other words, have been a simple statutory case.⁵ Yet the Indiana Supreme Court used the occasion to articulate a major theory of freedom of expression, derived from a theory it also

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

2. *Marbury*, 5 U.S. (1 Cranch) 137 (1803).

3. See Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989); Patrick Baude, *Is There Independent Life in the Indiana Constitution?*, 62 IND. L.J. 263 (1987).

4. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

5. For a brief discussion of several Indiana cases, including the court of appeals' decision in *Price*, see Patrick Baude, *Recent Constitutional Decisions in Indiana*, 26 IND. L. REV. 853, 856-59 (1993).

articulated of the meaning of the Indiana Constitution. As in *Marbury*, the fact that these theories are almost dicta adds to, rather than detracts from, their moment. If I can put the point bluntly, Chief Justice Shepard has worked out a linked network of philosophical and historical ideas. He could have used these thoughts for another interesting law review article or, with the concurrence of a majority, these ideas can become fundamental law. They became law. The real purpose of this brief Article is to call attention to this event and, to continue for one more sentence of plain talk, to convince you to read the opinion.

The serious study of federal constitutional law has always been a study of theory, not of particular provisions. This is the meaning of Chief Justice Marshall's celebrated observation that "it is a constitution we are expounding."⁶ Different theories emphasize different parts of the constitution and different ways of reading it to support the individual theorist's version, but whether the theory is as narrow as Robert Bork's view of intentionalism or as broad as Justice Brennan's search for a shining vision of dignity, it is the theory which animates the individual issue. As Bork put it: "If it does not have such a theory but merely imposes its own value choices, [the] Court violates the postulates of the Madisonian model that alone justifies its power."⁷

The study of state constitutional law has not usually involved these deep questions of legitimacy and purpose. A recent and influential article has suggested that the new vitality of state constitutional decision is fundamentally flawed, even almost illegitimate, because there is no overarching set of principles.⁸ If there are no principles, then the individual decisions may become ad hoc, temporary political preferences of the men and women who happen to sit on the bench. To solve this problem, state courts and most commentators seem simply to borrow the tenets of federal constitutional theory. All these federal theories, at least since *Marbury*, have two points of agreement among themselves. First is the idea that the founders had some sort of epiphany: the idea that what happened in Philadelphia was a moment of transcendent foresight and wisdom. Activists and conservatives differ about what that wisdom was: Justice Scalia conceives the wisdom as detailed and therefore written in detailed language which was meant to be honored as written; Justice Brennan sees the wisdom as a few underlying ideas whose details have been handed down for adaptation from time to time. But neither suggest that the framers were a group of chumps who cobbled together some political compromises so they could get home before the crops rotted. Second is the idea that an independent judiciary is an essential part of the overall plan

6. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

7. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971).

8. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992). *But see* David Schuman, *Correspondence: A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274 (1992). *See generally* Roundtable on James Gardner's *Failed Discourse of State Constitutionalism*, 24 RUTGERS L.J. (forthcoming 1994).

for the long-term survival of the scheme. Conservatives and activists will differ about which values have been placed above the reach of ordinary politics and the demagogues of the hour. But they will agree that the whole reason for a constitution is to make sure that some values are put out of easy reach and that the way to accomplish that is through the special role for the courts, especially the United States Supreme Court. As a result, almost every unresolved question of constitutional law becomes a struggle over what it is right for courts to do, not over what the clause in question would mean if it were in a contract.

The problem is that these two cornerstones are not generally accepted as true in state governments. Every educated American can discuss, or will at least pretend to be able to discuss, Madison and Hamilton. We have some shared sense that these men were great and important. We can picture their clothes and their ideas. I doubt very much that there are a dozen people in Indiana who could name two people who wrote either the constitution of 1816 or 1851. As a result, we are little inclined to attribute to them some great vision for our time. By the same token, we have not accepted the idea of an independent judiciary. For most of the state's history, judges of the supreme court were elected on a party basis. Even now, the state's justices do not hold lifetime tenure. It would be unreasonable to expect these men⁹ to set themselves on a high ground above the daily politics of the state.

It is some of these shortcomings that the court's opinion in *Price* remedies. The court begins its constitutional analysis with this unexceptionable formula: "Interpretation of the Indiana Constitution is controlled by the text itself, illuminated by history and by the purpose and structure of our constitution and the case law surrounding it."¹⁰ The text itself is given center stage in the formula but the theoretically supporting roles of history and of purpose and structure dominate the production. In the opinion, the supreme court begins with the text of article I, section 9:

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.

Elsewhere in this Journal, Professor Conkle explores the free speech theory that the court develops from this language. For present purposes, the court seems to find one easy principle from the text itself.

The easy textual issue is this: the state constitution's clause uses the phrase "on any subject whatever." The State had argued that *Price*'s utterances were not within the protection of section 9 at all. The court rejects that argument because of the "any subject" wording. This way of talking seems to reject—although extremely obliquely—the federal constitutional principle that fighting words (like obscenity) are "outside" the constitution.¹¹ There may

9. Yes, the gendered noun is deliberate and accurate.

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

11. See Baude, *supra* note 5, at 855-56.

be a more profound methodological principle here: the court might be invoking an epic of its founders as different from the country as a whole.¹² The practical significance is not large, however. Even if the Indiana Supreme Court were to hold that obscenity is within the outer limits of article I, section 9, the ultimate rationale of *Price*, as Professor Conkle explains, would give minimal protection to obscenity because its "core" value is far removed from political speech.

There remains a hard question about the text. The word "abuse" marks the limit of the free speech right. The problem is the ambiguity inherent in the word, an ambiguity which comes ultimately from the ambiguity of the Latin root "ab," which means, roughly, "away." To "use something away" might mean either to use it away as in "use it up," and, by extension, using it too hard or in the wrong manner: one abuses a horse by riding it too fast or too far. But "ab" also means "in the wrong direction" and hence, by extension, abuse means for the wrong purpose rather than in the wrong way: it is drug abuse to take cocaine for fun rather than for the relief of eye pain, even if you do not snort it in the wrong way. This ambiguity of abuse is central to the issue in *Price*. Ms. Price was speaking to a police officer about her impending arrest when she said, very loudly, "F—— you. I haven't done anything."¹³

If abusing free speech means "in the wrong manner," then the relevant factor is that she was very loud and, indeed, very rude. The principle would be that speech is "abused" by its manner. To the dissenting Justices, Dickson and Givan, this is enough. They reach this conclusion by giving the word "abuse" what they call its ordinary meaning. One of the more amusing arguments between the dissenters and the majority is the battle of the dictionaries. Justice Dickson writes that the question of what "abuse" means is measured by what the ordinary voters, who *ratified* the constitution, thought. So he consults the 1856 Webster, a dictionary of ordinary language. The majority, however, argues mainly from what the *drafters* meant, and so relies on nineteenth century *legal* dictionaries. The legal dictionaries support this definition: "Abuse is the use of a thing in a manner injurious to the order or arrangement from which it derives its function."¹⁴ Applying this concept, the fundamental question was what function Price's speech had: if its "function" was to correct or protest the manifest (to her) injustice of her arrest, then her speech was not an "abuse."

12. A clearer example of this self-differentiation appears in a recent Oregon decision. Oregon's constitution contains a free speech provision similar to Indiana's, and the Oregon Supreme Court, relying in part on the same "any subject" language, has held that obscenity is not completely outside the constitution. *State v. Henry*, 732 P.2d 9 (Or. 1987). In doing so, the Oregon court specifically invoked a view of the founders as "rugged and robust." One gets an image of woodsmen quite unlike the gentlemen of the Enlightenment who wrote the federal constitution. This is one of the best examples of a state court invoking a distinct epic of its founders as compared to the country as a whole. The court's treatment of this phrase may foretell a similar holding in Indiana with respect to obscenity, even though the Indiana Court of Appeals has explicitly rejected the Oregon precedent. *Fordyce v. State*, 569 N.E.2d 357, 359-62 (Ind. App. 1991). The Indiana Supreme Court briefly mentions an earlier Oregon case and the *Fordyce* opinion in a footnote to *Price*. *Price*, 622 N.E.2d at 961 n.9.

13. *Price*, 622 N.E.2d at 957 (alteration in original).

14. *Id.* at 958.

The majority's more complex meaning of "abuse" then opens the way for its discussion of the "order or arrangement" of the Indiana Constitution, for the "epic."¹⁵ The epic is made up of two parts.

The Illumination of History

So, how did the Indiana Constitution come to be written? Here is Chief Justice Shepard's telling of the story. Indiana's major struggle was in the pre-statehood period. The territorial elite, southern planters, were pitted against the frontiersmen. The planters, among other elitist notions, held the "common citizen" unworthy to criticize the officials. The frontiersmen won, establishing a popular democracy to counter reactionary elements. Thus, the constitution of 1816 explicitly protected the right to "examine the proceedings of the legislature, or any branch of the government."¹⁶ The next thirty-five years brought a need for some constitutional tinkering, but the constitution of 1851 completed the agenda of 1816 rather than departing from it. The core value, then, of free speech is the right of "frontiersmen"—rough and robust folk—to examine the government. The purpose of the constitution is not the measured debate of planters but the rougher cry of the outsider.

Chief Justice Shepard's account places much reliance on the work of respected historians, especially John Barnhart. It might be possible to tell the story somewhat differently. Shepard, following Barnhart (and Donald Carmony), finds a major discontinuity from the Northwest Ordinance to statehood, emphasizing the struggle in those thirty-nine years. This makes it possible to avoid putting the stamp of the Enlightenment (which can justly claim the Northwest Ordinance) on the Indiana Constitution. The next thirty-five years, between the two constitutions, becomes a period of consensus and continuity: "[T]he threat to popular, republican government in Indiana had largely evaporated."¹⁷ One could tell the story differently, emphasizing the disagreements after 1816 and minimizing the period before 1816.¹⁸

Probably it is enough for present purposes to note that the court's story is the one historians tell. Two things about the court's story are significant. First, the story, although familiar as history, is now made law. The central motif of Indiana's legal foundation is not order but strife. The state was founded, not for the common good, or the general welfare, or out of a sense of community. It was born in conflict, in individualism. It would seem to follow that the constitution's key values are not civility, equality, tranquility,

15. Given their definition of "abuse," the dissenters have no reason to explore the larger contexts of the constitution. Since the text is clear, the inquiry need go no further. In a sense, therefore, they do not reject the majority's epic; they simply find it unnecessary: "[T]here appears to be no need for the majority to devise its 'core constitutional value' analysis." *Id.* at 969 (emphasis added).

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

17. *Price*, 622 N.E.2d at 962.

18. And obviously, for some purposes, the story would be far different if it included a full account of the Native American.

or order, but liberty, opportunity, vigor, and privacy. This might tell one a lot about modern issues like school dress codes or the right to die.

Second, perhaps the most important point is that the story the court tells is the story of *Indiana*, not the story of a generic American state. Some state theorists argue that the important inquiry is about federalism generally. The states exist today, in some way, in the interstices of an historically dominant federal power. The population is mobile. The story we might tell is about the need for communities smaller than the nation as a whole, about the search for meaning and continuity in life. The significant fact about Indiana is not its unique history. No one, after all, is alive in Indiana who remembers the days of 1816. The relevant stories of Hoosiers and therefore our state's constitution are the stories of our own lives, of our search for community, of our identities, our races, our religions, and our need to belong to a state which can promote order and protect us. These stories might well emphasize the need for symbols and order, for common cause.

In America, the commonalities of the states have more weight, even for each state, than the distant and particular details of a geographical region. The court in *Price* does note that the form of article I, section 9, is "[c]ommon in state constitutions,"¹⁹ but it makes no effort to harmonize its interpretation with those of other states.

The court does not suggest that the values underlying the constitution are absolute. Having identified the direction of the constitution, it is still important to measure the limits. For that question, the court generalizes from these history lessons to a political philosophy.

Purpose and Structure

We know now what people wanted from life in Indiana. What did they want from the government? To answer this question, the court turns to a discussion of natural rights. The court asserts that its view of natural rights is not rooted "in the shifting sands of philosophical inquiry"²⁰ but derived from the language of the constitution, expressed or implied, and from what "the founding generation considered . . . fundamental."²¹ Consistent with its historical vision of individualism and conflict, the court could hardly declare that the purpose of government was to shape individual wishes into a harmoniously transcendent community. Inevitably, the court finds at the core of article I, section 9, an "arrangement calculated to correlate the enjoyment of individual rights and the exercise of state power such that the latter facilitates the former."²² The purpose of the community, hence the police power, is to enhance individual liberty. If Ms. Price's loudness had interfered with the rights of identified people, the state could restrict her speech. These

19. *Price*, 622 N.E.2d at 958.

20. *Id.* at 959 n.4.

21. *Id.*

22. *Id.* at 959.

may not be the "shifting sands of philosophical inquiry" but they certainly are ideas with which John Stuart Mill would be comfortable.

The editors of this journal have graciously allowed Professor Conkle and me to publish these brief Articles with great speed, in exchange for hard promises of brevity. No brief note could provide a fair critique or defense of the theory of individualism. Indeed, future decisions of the court may not carry that theory to great lengths. Certainly the court's balanced language and recognition of the police power as a principle of collective action provide many stopping points. What is important is to note the range and power of the court's opinion and that constitutional analysis in Indiana has reached a new and welcome level.

