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# Is There Independent Life in the Indiana Constitution?

PATRICK BAUDE\*

The last few years have seen an already well documented growth of interest in state constitutional law.<sup>1</sup> There may somewhere be an idealist who believes that this movement is purely the product of a philosophical determination that the complex social and economic realities of an ethnically diverse post-industrial America can best be met by rekindling the eighteenth century's inspiration of state sovereignty in a federal system. Idealists like that seldom write for law journals. The independent development of state constitutional law seems more-or-less frankly to be defended as a temporary safe harbor for liberal constitutional doctrine until the forces that have produced the Rehnquist court blow themselves out. Indeed, one of the most significant events in the recent redevelopment of serious constitutional scholarship directed to the states was this explicit urging by Justice Brennan in 1977: "With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them. . . . With federal scrutiny diminished, state courts must respond by increasing their own."<sup>2</sup>

The United States Supreme Court decision of *Michigan v. Long* in 1983<sup>3</sup> has significantly changed the way the game is played. Until that decision, state constitutional decisions grew in an environment protected by two basic principles.

*One*, from the standpoint of a state supreme court, there is not an overpowering need to separate state constitutional grounds from federal ones. Both documents are binding on the state supreme court and, when they both seem to a state court to lead to the same result, that happy concurrence is merely an unremarkable sign that centrifugal forces are not always tearing at our federalism. Typical illustrations of this tendency would be these two statements from the Court of Appeals of Indiana:

The equal protection provisions of the state and federal constitutions are designed to prevent the distribution of extraordinary benefits or burdens to any one group.<sup>4</sup>

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1. See generally *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985).

2. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

3. 463 U.S. 1032 (citing *Sidle v. Majors*, 264 Ind. 206, 341 N.E.2d 763 (1976)).

4. *O'Brien v. State*, 422 N.E.2d 1266, 1270 (Ind. Ct. App. 1981).

Although this precise question has never been answered in Indiana, it is well settled by the federal cases. Article 1, § 12 of the Indiana Constitution is analogous to the Sixth Amendment of the United States Constitution. Both guarantee a speedy trial.<sup>5</sup>

This state-federal equivalence was so well accepted that the courts involved did not even comment on the fact that the language of the provisions in the two constitutions is dramatically different. The phrase "equal protection" does not in fact appear at all in the Indiana Constitution. And the sixth amendment to the United States Constitution guarantees a speedy "trial" whereas article 1, section 12 of the Indiana Constitution does not use the word trial at all.<sup>6</sup> Beyond the obvious benefits of economizing intellectual effort, these cases probably typify the dominant paradigm of constitutional law today—the idea that the actual form of the constitutional language should be penetrated to discover the underlying substance of justice and human dignity.<sup>7</sup> This way of thinking makes it embarrassing to contemplate the possibility that the drafters of the Indiana Constitution and the framers of the United States Constitution may neither have shared the same view of human dignity nor have tried to encode any eternal truths at all in their words.

Two, because of the adequate state ground doctrine, the United States Supreme Court had few occasions to exercise jurisdiction over homogenized state-federal decisions. Suppose, for example, that a state supreme court strikes down some state statute because it violates both the state and federal constitutions. In the abstract, the state court is the final arbiter of the state constitution and the United States Supreme Court is the final arbiter of the federal. But in a case like the one we are supposing, the United States Supreme Court has no jurisdiction even over the federal issue—since the

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5. *Burress v. State*, 173 Ind. App. 286, 288, 363 N.E.2d 1036, 1038 (1977).

6. The difference in federal and state wording was more than potentially significant in the case quoted above. The issue was whether delay in filing criminal charges might violate the relevant constitutional language. As a matter of federal law, the United States Supreme Court has said not, relying heavily on the exact language of the sixth amendment:

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." *On its face*, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been "accused" in the course of that prosecution.

*United States v. Marion*, 404 U.S. 307, 313 (1971) (emphasis added, brackets and ellipsis in original). Here is the strikingly dissimilar language of the Indiana Constitution's article I, section 12: "Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." The words that compelled the result in *Marion*—"accused," "prosecution," and "trial"—simply are not there. Indeed, describing a delayed indictment as delayed justice is a natural way to use the language of the Indiana Constitution.

7. See generally Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). Noninterpretivism is by no means a tool limited to liberal activism. The (since overruled) dramatic conservative reinterpretation of the eleventh amendment as the font of federalism in *National League of Cities v. Usery*, 426 U.S. 833 (1976) is remarkable for the fact that the language of the eleventh amendment is not even mentioned in the opinion.

statute will be invalid in any event on state law grounds, deciding the federal issue would in effect be only an advisory opinion and one the Supreme Court would therefore not give.<sup>8</sup> This much, of course, is hornbook law; but like all hornbook law it is only good for a hornbook world. The reality, illustrated by the Indiana cases in the previous paragraph, is that state courts have no reason of their own to separate state law from federal as a matter of course. The most frequent case, then, is one in which it is not clear which historical constitution the state court interpreted. The possibility exists, and surely the reality often is, that the state courts were essentially interpreting the United States Constitution and added a citation to the state constitution for reasons more bibliographic than substantive. If so, then the state court has really decided a federal question and the United States Supreme Court does have jurisdiction.

Until 1983, the Supreme Court would not decide a case in this situation of ambiguity. The basis of that doctrine was not clear: there were some suggestions that it was the specific application of a general principle that jurisdiction must be clear<sup>9</sup> but there were also statements that it was no more than an expedient practice.<sup>10</sup> In any event, *Michigan v. Long* substituted the rule that the Supreme Court "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."<sup>11</sup> The practical effect of this new rule is that a state court wishing to exercise final authority in a constitutional case must make explicit its independent reliance on the state document: as a result, Indiana examples like those in the previous paragraph, which would have been difficult or impossible to review before 1983, now fall easily in the United States Supreme Court's jurisdiction.

For those who see all constitutional law as no more than politics by other means, *Michigan v. Long* is an obvious countermove by a newly conservative Supreme Court. First the liberal activists got hold of a few state courts and broke free of the restraints fashioned by the Burger court. So long as the new state-court activism was couched in ambiguous state-federal terms, there was nothing *anybody* could do about it. The Supreme Court was kept out because federal jurisdiction did not clearly appear. The state legislature was powerless because the case was constitutional under at least *some* constitution. Even the state electorate, which could ordinarily amend the state constitution, could be stymied because the decision was in part based on the federal constitution as well as the state's.

Although one should never dismiss completely a political explanation of judicial behavior, I believe this simplified account interferes with understanding the situation. This interference is intensified because the conveni-

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8. See, e.g., *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487, 489 (1965).

9. *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649 (1942).

10. *Department of Mental Hygiene v. Kirchner*, 380 U.S. 194, 200 (1965).

11. 463 U.S. at 1041.

ently politicized account is fortified by two themes in current constitutional commentary.

The first of these themes is the polarization of the debate about sources of constitutional interpretation. One side repeatedly urges us that the only touchstone of legitimacy in constitutional law is the intent of the framers. Usually implicit in this assumption is the idea that the "framers" were of one mind and that this mind can be discovered by essentially antiquarian researches. Since anyone of any sense prefers the writings of James Madison to those of John Bingham for roughly the same reasons anyone of any taste prefers the music of Mozart to that of Wagner, the "framers" are usually assumed to be one collective Enlightenment intellectual. Typical would be Attorney General Meese's call for a "Jurisprudence of Original Intention," with its suggestion of equivalence between state and federal constitutions:

The Bill of Rights came about largely as a result of the demands of the critics of the new Constitution, the unfortunately misnamed Anti-Federalists. They feared, as George Mason of Virginia put it, that in time the national authority would "devour" the states. Since each state had a bill of rights, it was only appropriate that so powerful a national government as that created by the Constitution have one as well. Though Hamilton insisted a Bill of Rights was not necessary and even destructive, and Madison (at least at first) thought a Bill of Rights to be but a "parchment barrier" to political power, the Federalists agreed to add a Bill of Rights.<sup>12</sup>

The other side in the debate urges us to look beyond an impoverished historicism to the philosophical imperatives of the Constitution—imperatives which are then conveniently rephrased in words like "dignity" and "privacy" rather than words liked "equal protection" or "due process." As Justice Brennan puts it:

When one studies the boundary that the text marks out, one gets a sense of the vision of the individual embodied in the Constitution.

As augmented by the Bill of Rights and the Civil War Amendments, this text is a sparkling vision of the supremacy of the human dignity of every individual.<sup>13</sup>

What a churl one would have to be to admit that reading a state constitution gave him a headache rather than a "sparkling vision."

The second theme in current constitutional comment is the idea that the problem of judicial review, that is, of a countermajoritarian decision-maker in a supposed democracy, is the central question in constitutional law.

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12. Meese, *The Attorney General's View of the Supreme Court: Toward a Jurisprudence of Original Intention*, 45 PUB. AD. REV. 701, 703 (1985). For a comprehensive scholarly review, reaching the conclusion that "[t]he effect of state precedents upon the formulation of the federal Bill of Rights is difficult to measure," see Dumbauld, *State Precedents for the Bill of Rights*, 7 J. PUB. L. 323 (1958).

13. Brennan, *The Constitution of the United States: Contemporary Ratification*, 43 NAT'L LAWS GUILD PRAC. 1, 9 (1986).

Because Supreme Court justices are appointed for life, because the process of overturning Supreme Court decisions through amending the federal constitution is long and difficult, because Supreme Court decisions bind the whole nation, because the questions decided by the Supreme Court are at the core of our identity as a people—in short, because the Supreme Court “Writes in Stone,” the judges in a constitutional case must think in a different and more profound way than in an antitrust case. As Learned Hand put it:

[f]or in such matters everything turns upon the spirit in which he approaches the question before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supple institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism . . . .<sup>14</sup>

These two ways of thinking, coupled with the easy politicization of the subject, have made it easy to overlook what might actually happen in state constitutional law. First, the men who wrote the Indiana Constitution, and the men and women who have amended it over the years, were not Enlightenment intellectuals. If we were of the original intent school of interpretation, we would have little way of getting to know our prey. Virtually everything we know about them, and a little bit more, was summed up by the *Indianapolis Journal* when it said before the event in 1850:

From the character of the delegates elected, and the spirit which seems to animate them, we feel justified in predicting that they will assume those duties with a determination to act in such manner as will secure to the people of the State a Constitution under which all their rights will be amply protected and their prosperity and happiness insured as far as it is possible to do so.<sup>15</sup>

If we were of the grandly philosophical school, we could try to puzzle out a view of human dignity encompassing specific provisions in the Indiana Constitution of 1851 like article 13, section 1—“No negro or mulatto shall come into, or settle in, the State, after the adoption of this constitution”—or article 12, section 6—“No person conscientiously opposed to bearing arms, shall be compelled to do militia duty; but such person shall pay an equivalent for exemption . . . .”<sup>16</sup> If we decided not to think about the Indiana Constitution and decided instead to meditate on the paradox of judicial review in a democracy, our federal meditations would be inappropriate: Indiana Supreme Court justices are not appointed for life (indeed,

14. Hand, *Sources of Tolerance*, 79 U. PA. L. REV. 1, 12-13 (1930).

15. Quoted in I. KETTLEBOROUGH, *CONSTITUTION MAKING IN INDIANA* lxxxiii (1916).

16. IND. CONST. art. 13, § 1 (1851, repealed 1881); art. 12, § 6 (1851, amended 1974).

until recently, they were elected like any other political office-holder) and, at least since 1935,<sup>17</sup> they have not written in stone.

The problem with the politicized view of state constitutional law is that nobody expects the Indiana Supreme Court to lead a liberal bandwagon (or even to join one). Nobody expects, therefore, the Indiana Supreme Court to find constitutional rights the federal courts do not force upon it. The typical law journal article contains a multipage footnote or two, listing a menu of states who have gone beyond minimum federal guarantees: New Jersey,<sup>18</sup> Michigan,<sup>19</sup> and California<sup>20</sup> are prominent entries; Indiana is not.<sup>21</sup> When Indiana is mentioned, it is almost always for distant history<sup>22</sup> or for the fact that the conservative doctrine of substantive due process survived in Indiana long beyond its repudiation by Franklin Roosevelt's justices.<sup>23</sup>

In fact, there are both old and new examples in Indiana of decisions giving independent scope to the state constitution. Thirty-eight years before *Mapp v. Ohio*<sup>24</sup> required it, the Indiana Supreme Court held that the state constitution dictated the exclusion of illegally seized evidence.<sup>25</sup> Twelve years before the United States Supreme Court held that the federal constitution prohibited, on a case-by-case basis, some surgical intrusions beneath the skin,<sup>26</sup> the Indiana Supreme Court held that the state constitution prohibited "an operation performed upon the defendant to secure evidence."<sup>27</sup> The Indiana Supreme Court made plain that its decision was based on state law:

The [United States Supreme] Court was careful to leave open to the states the power to fix the parameters of permissible police investigative

17. Until 1935, the Indiana Constitution had been difficult to amend. *In re Todd*, 208 Ind. 168, 193 N.E. 865 (1935) reinterpreted the amending clause to make it easier.

18. In addition to the article cited *supra* note 3, by former New Jersey Supreme Court Justice William J. Brennan, Jr., see an article by a current judge of that court, Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977 (1985).

19. Hence *Michigan v. Long*, of course. See *supra*, text accompanying note 3.

20. The California voters, however, have undone some of that state supreme court's efforts to expand the rights of the accused in a criminal case. See generally Wilkes, *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223 (1984).

21. See, e.g., Hancock, *State Court Activism and Searches Incident to Arrest*, 68 VA. L. REV. 1085, 1110-12 (1982); Note, *Expanding Criminal Procedural Rights Under State Constitutions*, 33 WASH. & LEE L. REV. 909 (1976); Comment, *Rediscovering State Constitutions for Individual Rights Protection*, 37 BAYLOR L. REV. 463, 504-06 (1985). This footnote is like spelling the word "Mississippi"—it is easy to do but hard to know when to stop. In any case, there are many more articles purporting to survey states which have gone beyond federal standards but not referring to Indiana.

22. See the thorough study thirteen years ago in *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 331-32 (1973).

23. See Paulsen, "Natural Rights"—A Constitutional Doctrine in Indiana, 25 IND. L.J. 123 (1950).

24. 367 U.S. 643 (1961).

25. *Flum v. State*, 193 Ind. 585, 590, 141 N.E. 353, 354-55 (1923).

26. *Winston v. Lee*, 470 U.S. 753 (1985).

27. *Adams v. State*, 260 Ind. 663, 669, 299 N.E.2d 834, 838 (1973).

conduct. Thus, in our view, we are free, within the limits of the applicable constitutional provisions, to determine the permissible scope of searches and seizures of the kind here before us.<sup>28</sup>

On the other hand, the Indiana Supreme Court also made plain that the state law was not completely independent when it also announced that "*Rochin* [*v. California*, 342 U.S. 165 (1952)] will be our guide."<sup>29</sup> This is exactly the sort of federal-state linking which the United States Supreme Court could not reach before *Michigan v. Long*, so the predictable response of that Court was to deny certiorari, "it appearing that the judgment below rests upon an adequate state ground."<sup>30</sup>

Six years ago, the Indiana Supreme Court again deliberately extended the reach of Indiana law beyond the reach of the fourth amendment to the federal constitution. As a matter of federal law, a suspect has no right to be informed of the right to counsel as a condition to his or her valid consent to a search. If the defendant is in custody, a confession made without such a warning would be inadmissible<sup>31</sup>. The consent to search, however, might still be effective if judged to be voluntary in the totality of circumstances.<sup>32</sup> In Indiana, however, a suspect's consent to search given in custody is not valid unless he or she was specifically advised of the right to counsel. The Indiana Supreme Court made plain its willingness to reach this result as a matter of independent state law:

As can be seen, it is not based solely upon the Fourth, Sixth, and Fourteenth Amendments to the United States Constitution as was *Schneckloth*. Under Indiana law, to confer a right by law is also to confer everything necessary for its protection, although no specific mention of added measures is made.<sup>33</sup>

These two Indiana constitutional search-and-seizure decisions seem to have a common thread. The federal decisions on this subject are increasingly written in the language of "case-by-case" or "totality of the circumstances" or the like. These decisions produce little guidance for police, prosecutors, magistrates, or lower court judges. It would not be surprising if a state court, concerned with immediate problems of administration and eager to avoid the unsettling effect of refining the nuances of criminal procedure over a period of a year, should strongly prefer easy-to-understand-and-apply rules like "*no surgical operations for evidence*" or "*always advise custodial suspects of the right to counsel.*" Such clarity has often been urged on the

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28. *Id.* at 666, 299 N.E.2d at 836.

29. *Id.*

30. *Indiana v. Adams*, 415 U.S. 935 (1974).

31. *Miranda v. Arizona*, 384 U.S. 436 (1966).

32. With respect to this exact problem, see *Smith v. Wainwright*, 581 F.2d 1149 (5th Cir. 1978); see generally *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

33. *Sims v. State*, 413 N.E.2d 556, 560 (Ind. 1980) (citing *Bachelor v. State*, 189 Ind. 69, 125 N.E. 773 (1920)).

United States Supreme Court itself, although with little success to date.<sup>34</sup> Earlier Indiana constitutional decisions going beyond minimal federal requirements could also be explained in the light of impatience with ceaseless distinctions and new exceptions.<sup>35</sup> This state constitutional preference for clarity might well lead the Indiana Supreme Court to reject the current pressures to admit illegally seized evidence if a law enforcement official did not mean to break the law:<sup>36</sup> certainly a "good faith" exemption to the Indiana Constitution is not easy to square with the doctrine that "[u]nder Indiana law, to confer a right by law, is also to confer everything necessary for its protection . . . ."<sup>37</sup>

Outside the area of criminal procedure, there are no recent instances in which the Indiana Supreme Court has taken the state constitution beyond the federal minimum. There are of course special situations in which the state constitution protects rights not mentioned in the federal, such as freedom from imprisonment for debt.<sup>38</sup> By far the strangest cases have been those decided under the equal privileges clause of the state constitution. Article 1, section 23, provides 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."<sup>39</sup> This provision, which was originally held not to apply to blacks,<sup>40</sup> was once described by the Indiana Supreme Court as the "antithesis" of the equal protection clause of the fourteenth amendment to the United States Constitution.<sup>41</sup> Certainly there are substantial differences between prohibiting special favors for the most favored (equal privileges) and requiring minimum protection for the least favored (equal protection). Certainly there are powerful historical dissonances between the fourteenth amendment, which ratified the rights of blacks, and the Indiana Constitution, which outlawed them.<sup>42</sup> But without

34. See Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985); Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329 (1973).

35. Thus the Indiana Supreme Court early recognized a right to both counsel and jury trial in misdemeanor cases. *Bolkovac v. State*, 229 Ind. 294, 98 N.E.2d 250 (1951); *State ex rel. Rose v. Hoffman*, 227 Ind. 256, 85 N.E.2d 486 (1949). So also the Indiana Supreme Court early recognized a right to counsel in pretrial proceedings, *Batchelor v. State*, 189 Ind. 69, 125 N.E. 773 (1920) and in juvenile cases, *Speight v. State*, 239 Ind. 157, 155 N.E.2d 752 (1959).

36. Cf. IND. CODE 35-37-4-5 (1983). The typical discussion of the validity of this statute has been grounded solely on federal law. See, e.g., Johnson, *Criminal Law and Procedure*, 17 IND. L. REV. 115, 129 (1984): ("An analysis of the constitutionality of the Indiana statute would be more informed by awaiting these [United States Supreme Court] decisions.")

37. *Sims*, 413 N.E.2d at 560. *But see* *Blalock v. State*, 483 N.E.2d 439, 444 (Ind. 1985), in which the court, in dictum, embraces the federal good faith exception without reservation.

38. *State ex rel. Wilson v. Monroe Superior Court IV*, 444 N.E.2d 1178 (Ind. 1983).

39. The legislative voyage of this provision, from the Virginia constitution to Indiana's, from which it was subsequently copied by Oregon, is traced in Linde, *Without Due Process: Unconstitutional Law in Oregon*, 49 ORE. L. REV. 125, 140, 141 & n.5, 142-43 (1970).

40. *Cory v. Carter*, 48 Ind. 327, 341 (1874).

41. *Hammer v. State*, 173 Ind. 199, 206, 89 N.E. 850, 852 (1909).

42. In addition to article 13, section 1, which is quoted *supra* text accompanying note 16, consider the following (now repealed, of course) sections of that article:

Section 2. All contracts made with any negro or mulatto coming into the State

missing a beat, the Indiana courts now write as though the equal protection clause and the equal privileges clause mean exactly the same thing: "It is well established that the rights intended to be protected under both constitutional provisions are identical."<sup>43</sup> And indeed, the courts now routinely refer to the "equal protection" clause of the Indiana Constitution.<sup>44</sup> A similar process has stripped article 1, section 12, of some possible independent meaning with respect to the power of the legislature to restrict civil remedies, damage awards, and the like—in other words, to contain the "litigation explosion."<sup>45</sup>

*A concluding postscript.* I have tried to write this essay honestly. That is why my title ends with a question mark. To keep the editors of this journal happy, I would like to announce definitively that there are four lines of Indiana authority which establish a doctrine of construction for the Indiana Constitution or, alternatively, that the Indiana Constitution has been construed so as to keep it totally subservient to the federal. I have found nothing as concrete as either of those choices. It does seem to me, however, that there are some possible lines for future development. It also seems to me that most members of the profession would answer the question in my title "no" as I would have done before I tried to pull the subject together as part of a law school course. "No" is not the answer; I don't know if "yes" is.

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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 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.

IND. CONST. art. 13, §§ 2, 3 (1851, repealed 1881).

43. *Haas v. South Bend Community Corp.*, 259 Ind. 515, 526, 289 N.E.2d 495, 501 (1972).

44. *E.g., O'Brien*, 422 N.E.2d at 1270.

45. See Professor (now Justice) Linde's careful study of a provision of the Oregon Constitution copied from this Indiana provision. Linde, *supra* note 39, at 140-45.

