Should Indiana Call a Constitutional Convention

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SHOULD INDIANA CALL A CONSTITUTIONAL CONVENTION?*

"Remove not the ancient Landmark, which thy fathers have set." ¹

The present Constitution of the State of Indiana became effective on November 1st, 1851. This instrument has no provision, setting out in detail how a new Constitution may be adopted. In the winter of 1929, there was passed by the Legislature and approved by the Governor an act "to provide for taking the sense of the qualified electors of the State of Indiana on a call for a constitutional convention." ²

It has been held that the General Assembly does not have authority to draft a constitution and submit it to the voters ³ but it is generally conceded that the Legislature may initiate steps to bring about an expression of the public on the subject. Section I, Article I, of the present constitution states:

"We declare that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government." (Italics mine.)

It will be noticed that the language of the Declaration of Independence was rather freely borrowed in drafting this section but it is the last sentence to which your attention is particularly directed. "The people have at all times an indefeasible right to alter and reform their government."

Pursuant to the Act of 1929, you, as voters, will be called upon to answer this question: Are you in favor of convening

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*An address delivered during the political campaign of 1930.
¹ PROVERBS 22:28.
² Acts, 1929, ch. 191, at 621 et seq.
³ Ellingham v. Dye, 178 Ind. 336 (1912).
a constitutional convention in the year 1931? The question might have been more elegantly framed but the exact language which the statute says the ballot shall contain was used.

Before we can discuss the desirability of a convention, it is necessary to attempt to define the word "constitution" and to ascertain if we can agree upon its proper sphere. The word has not always been given the same meaning. For instance, in the eighteenth century, Lord Chesterfield said:

"England is the only monarchy in the world that properly can be said to have a constitution."

A hundred years later DeTocqueville declared that England was the only country which had no constitution at all. Of course, what the learned Frenchman meant was that England had no fundamental law or written instrument creating, organizing and defining the various branches of government, and delegating to them certain powers.

Attempts to define the sphere of a constitution as something distinct from other branches of law have been generally recognized as futile. Perhaps, it would be better to say that it is impossible to get all to agree on what should be incorporated in such a primary document. The reason therefor is obvious. The truth lies in such an infinite complexity—human society—that man's normal powers of reason and observation are confused and overwhelmed.

This should not mean, however, that we should forbear sitting at the feet of the masters, learned men who have demonstrated their ability and have shed their light upon the ages. I refer of course to such men as Hamilton, Jefferson and Madison of Revolutionary times, and to Bryce and Cooley of a later day.

Judge Cooley has said:

"A constitution is sometimes defined as the fundamental law of a state, containing the principles upon which the government is founded, regulating the division of the sovereign powers, and directing to

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4 6 Encyclopaedia Britannica (14th ed.) 314.
what persons each of these powers is to be confided, and the manner in which it is to be exercised. Perhaps an equally complete and accurate definition would be, that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised.5

Many other authorities give us similar definitions, none of which is of any particular value to us here. Professor Morgan of London University maintains that there is no such thing as a "science" of state institutions even in the case of "federalism," which he points out is not a "general concept" at all but resolves itself into the legal study of each particular "empirical type" of federation.6 The Professor goes on to quote Maitland to the effect that political science is very apt to look like sublimated jurisprudence, but it is jurisprudence without jurists, a kind of cloudy exhalation of sociology, ethics, economics, "crowd psychology," with a little ill-digested law to give it a certain density of atmosphere.

We can hardly agree with this indictment. The experience of our states with their written constitutions, together with the extraordinarily complete records of American history, should furnish us a working laboratory from which we may draw fair conclusions concerning the true province of a constitution. It would indeed be sad if a century of constitutional history meant nothing. This does not imply that the theorist may isolate himself in his study and there postulate the ideal government. Plato's Republic, Bacon's New Atlantis, More's Utopia and Campanella's City of the Sun serve their place, but hardly in a constitutional convention.

A collection of American state charters and constitutions fills some ten thick volumes and this would indicate rather frequent constitutional changes. It is true that the average life of a state constitution is about thirty years. The reason for this can readily be found in an examination of the various state documents. In drafting most constitutions, the framers have had a confused idea of their task. Too much has been incorporated in the main law. No constitution can be long lived unless it be devoted solely to the fundamental

5 COOLEY, CONSTITUTIONAL LIMITATIONS (6th ed.) 4.
6 6 ENCYCLOPEDIA BRITANNICA (14th ed.) 316.
principles of government, and that constitution which contains much which is the subject for statutory enactment must fall by its own weight and gradually become useless. Can Indiana draft a better constitution than it has? History points against a favorable answer.

What should a constitution contain? One scholar has said, “Written constitutions are simply more or less successful generalizations of political experience. Their tone of authority does not at all alter the historical realities and imperative practical conditions of government. They determine forms, utter distinct purposes, set forth the powers of the state in definite hierarchy; but they do not make the forms they originate workable or the purposes they utter feasible. All that must depend upon the men who become governors and upon the people over whom they are set in authority. Laws can have no other life than that which is given them by the “men who administer and the men who obey them. Constitutional law affords no exception to the rule.”

We have only to consider the 15th and 18th Amendments of the Federal Constitution to recognize the truth of these remarks, the value of which, however, is negative. What we must not put into a model constitution does not tell us what we shall insert. Here, political scientists, Maitland to the contrary notwithstanding, in addition to historical experience can come to our aid.

Judge Cooley, in his famous work on Constitutional Limitations, quotes Hurlburt as follows:

“This, then, is the office of a written constitution: To delegate to various public functionaries such of the powers of government as the people do not intend to exercise for themselves; to classify these powers, according to their nature, and to commit them to separate agents; to provide for the choice of these agents by the people; to ascertain, limit and define the extent of the authority thus delegated; and to reserve to the people their sovereignty over all things not expressly committed to their representatives.”

7 3 Wilson's Works 122.
Professor Burgess, an outstanding authority on constitutional government, said that a complete constitution consists of three fundamental parts. The first is the organization of the state for the accomplishment of future changes in the constitution, that is, the amending power; the second is devoted to the concept of liberty; the third to the business of government. It is in drafting the governmental part of the constitution that the makers usually go astray. They confuse propriety with power; confound their duties with those of the assembly.

We all must admit that if there be included in the fundamental law any provisions other than a declaration of primary truths and a bare framework of government, a change of time will demand a change of law. And on every occasion when a state has drafted a constitution, the tendency has been to make the document more prolix and more cumbersome. This has been an absolutely universal rule. Virginia, for instance, put its first constitution, that of 1776, into four closely printed pages, that is, into about 3200 words. In 1830 it needed seven pages; in 1850, eighteen pages; in 1870, twenty-two pages or 17,000 words. Texas doubled the length of its constitution from sixteen quarto pages in 1845, to thirty-four in 1876. Pennsylvania was content in 1776 with a document of eight pages, which for those times was a long one; in 1873 it required twenty-three. The constitution of Illinois filled ten pages in 1818; in 1870 it had swollen to 25. If you wish extremes, consider the constitution of New Hampshire of 1776 which contained about 600 words, not including the preamble, and that of Oklahoma of 1907 which has more than 50,000 words.

This will not permit an analysis of the various state constitutions in order to demonstrate the numerous subject matters which have been incorporated in the primary law with each succeeding convention. One thing is certain: When a constitution contains from twenty-five to fifty thousand words, as nearly every recent one does, much more is contained therein than mere fundamental principles.

1 Burgess, Political Science and Constitutional Law, 138.
It may be answered that a constitution is the handiwork of
the people, and that the people being sovereign may do what
they will. That is hardly true. The careful Bryce said, "A
state Constitution is really nothing but a law made directly
by the people voting at the polls upon a draft submitted to
them." But is it a law made by the people? The people
themselves are passive, waiting to have things put to them,
unable themselves to suggest anything, because without or-
gans of utterance or suggestion. They do not choose poli-
cies or frame constitutional provisions.

"It is easy, as it is also impressive, to believe that a written
constitution proceeds from the people, and constitutes their
sovereign behest concerning government. But of course it
does not. It proceeds always either from some ordinary or
from some extraordinary organ of the state; its provisions
are the fruit of the debated determinations of a comparative-
ly small deliberative body . . . . It is accepted as a whole
and without discrimination by the diffused, undeliberative
body of voters." If Indiana calls a convention, one hun-
dred members will comprise that assembly, and you may
rest assured, that in any proposed document there will be
found section after section and article after article of matter,
not constitutional but statutory in nature, not tried and
proven but radical and ill-advised, not structural but decora-
tive, if you will. Many provisions will voice the novel
schemes of a few dominating members of the convention.
This may be a prophecy, but if it is, it is the kind of prophecy
that Patrick Henry uttered when he said, "I know of no.
way to judge the future, save by the past." And the people,
the people will, must, vote upon the entire instrument, yes
or no. if the convention so decides.

The United States present the most unique governmental
phenomenon in the world. In no other country do we find
political theory marching so closely by the side of political
fact. Nations generally act first and interpret or explain
their actions afterwards. Founders of great states have

10 3 Wilson's Works 75.
11 Acts 1929, § 18, 629.
usually been soldiers, not philosophers. History does not record another Jefferson and Franklin cooperating with and expounding the actions of another Washington and Greene.

It is almost impossible to believe that there existed a Congress calmly explaining the purposes of a new nation and expounding a new philosophy of government at the same time a ragged army was struggling to create that nation. Of course, there had been such scholars as Bellarmine and Montesquieu, Locke and Hobbes to discuss civic rights and duties, citizens and kings, but there was no execution of their plans, and any attempt to have put their theories into practice would undoubtedly have ended in failure.

The scheme of the American Federation is altogether without precedent. The idea of a dual government has been little understood by foreigners and is usually not quite clear to the average American. Probably everyone here is a citizen of two states, of Indiana and of the United States. This fact is likely to be overlooked, but it is quite important to keep in mind in considering a Constitution. Sovereignty may ultimately rest in the people, but the American people have delegated theirs to two agencies. The Federal government is supreme in its sphere but withal, including the 14th Amendment, it is still a very limited sphere. The 10th Amendment of the Federal Constitution acknowledges that

"The powers not delegated to the United States, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In 1787, many distinguished statesmen thought that the chief purpose of the Federal Constitution was to create a central bureau for the States in handling foreign affairs. The Federal government, with certain very limited exceptions, has nothing to say to the state concerning:

I Its constitution;
II Its legislature;
III Its system of local government in counties, cities, townships and school districts;
IV Its system of state and local taxation;
V Its debts which it may (and sometimes does) repudiate at leisure;

VI Its body of private law, including the whole law of real and personal property, of contracts, of torts, and of domestic relations;

VII Its courts from which no appeal lies (except in cases touching Federal legislation or the Federal Constitution) to any Federal court;

VIII Its system of procedure, civil and criminal;

IX Its citizenship.

A state commands the allegiance of its citizens and may punish them for treason against it. Section XXVIII, Article 1, of the Indiana Constitution provides that "Treasur against the State shall consist only in levying war against it, and giving aid to its enemies," and Section 29 discusses conviction for treason. The General Assembly as late as 1905 enacted a law against treason and provided punishment by death or life imprisonment upon conviction. A state cannot be sued save by another state. The rights of a state include every right or power of a government except: (1) The right to secede from the Union; (2) the powers which the Federal Constitution withholds from the state; and (3) the powers which the Federal Constitution expressly confers on the central government. In some instances the powers conferred on the Federal government may be exercised by the states concurrently with or in default of action by the former.

James Bryce has said on this subject:

"An American may, through a long life, never be reminded of the Federal Government, except when he votes at presidential and congressional elections, lodges a complaint against the Post Office, and opens his trunks for a customs officer, on the pier at New York when he returns from a tour in Europe. His direct taxes are paid to officials acting under state laws. The state, or a local authority constituted by state statutes, registers his birth, appoints his guardian, pays for his schooling, gives him a share in the estate of his
father deceased, licenses him when he enters a trade (if it be one needing a license), marries him, divorces him, entertains civil actions against him. . . . hangs him for murder. The police that guard his house, the local boards which look after the poor, control highways, impose water rates, manage schools—all these derive their legal powers from his state alone.”  

12 Of course, the 18th Amendment was not adopted and the possibilities of the 14th Amendment were not fully realized at the time Bryce lived, but his statement is still true in the main. Professor Jameson of Johns Hopkins in the late eighties observed that nearly all the great questions that agitated England during the preceding sixty years would, had they arisen in America, have fallen within the sphere of state legislation.

This comparison of the state to the federal government has been made to emphasize the importance of the state as a unit of sovereignty and to demonstrate the relation between the state and the Union. The states are more important than the Union. In fact, the Union presupposes the existence of the states. If the Union were to be dissolved tomorrow, the State of Indiana would exist much the same as it does today. There would only revert to it those powers which have been surrendered by the Federal Constitution.

The State of Indiana is a natural growth. Its citizens are sovereign. Its legislature exercises all the rights of sovereign delegates which have not been restricted. On the other hand, the Federal government is an artificial creation. Congress can only act under the grant of power conferred by the instrument which created it. The famous Vermont jurist, Chief Justice Redfield, in the case of Thorpe v. Railroad, 12 said:

“IT has never been questioned . . . . that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organizations of the American States. We can-

12 1 AMER. COM. (2nd ed.) 411-12.
13 27 VT. 140, 142 (1854).
not comprehend how, upon principle, it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several state legislatures, saving only such restrictions as are imposed by the Constitution of the United States or of the particular State in question."

We all grant that it would take an unspeakable crisis to stir up a serious discussion of a federal constitutional convention. All recognize that in many ways the document of 1787 is obsolete, that many of its provisions are disregarded and that others are of no particular value. If a movement for a federal constitutional convention should be started, we are quite certain that one of the chief arguments against it would be the age and veneration of the document. The customs, habits and traditions of the people for the last 150 years could not and should not be unrooted under any circumstances overnight.

Yet, if this be true of the Federal constitution, why should it not be true of a state constitution? The habits and traditions of four million people should not more readily be changed than those of one hundred million. When Jefferson, in the Declaration of Independence, wrote, "Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes," he was merely uttering a truism. We presume that there is no axiom more obvious than the danger of trifling with law, and especially the fundamental law of a constitution.

The spirit of the common law which is the law of our State and which is inextricably interwoven with our constitution, grows out of centuries of existence. Within the last hundred years, two schools of thought have grown up on the theory of laws—that of Savigny and that of Thibaut. Savigny believed that all law was rooted in old habit, and that legislation could modify law successfully and beneficially only by consenting to the secondary role of supplementing, formulating, or at most, guiding custom. Law, he maintained, did not often grow into a logical system, but was the product of daily accretions of habit and sluggish formations of thought which followed no system of philosophy. Thibaut, on the
other hand, believed it to be the legitimate function of the jurist to make piecemeal law up into organic wholes, rendering it clear where it had been obscure, correcting its inconsistencies, trimming away its irregularities, reducing the number of its exceptional provisions, discovering and filling in its gaps, running it through with threads of system, giving it elegance of style and completeness of method. The logical mind is at once attracted to Thibaut’s scheme, but the practical mind instantly realizes that Savigny’s theory is the correct exposition of our common law. Custom and tradition pay no attention to the strength of a syllogism or the alliteration of a phrase. All this is said in defense of the longevity of a constitution. If a constitution substantially expresses the will of a people and the people have long prospered under its protection, immaterial faults are not grounds for change.

In attempting to remedy trifling defects, we may create a situation where irreparable harm will be done.

If Indiana adopts a new constitution, what is lost? For one thing, there is lost the confidence and veneration of the primary law that has endured for 80 years. There is lost the bulwark of the tradition and custom of a people. But there is lost far more in the knowledge of a settled and interpreted law. To be more specific, let us take a few illustrations.

Section 21, Article I, of the present constitution provides, among other things, that “no man’s property shall be taken without just compensation; nor, except in case of the state, without just compensation first assessed and tendered.” Now, who is included in the word “state” as used in this section? Is a city, a township, or a county, given powers of eminent domain, to be considered as the “state” on the question of whether compensation must be first assessed and tendered? After many years and much litigation, the Supreme Court has construed the meaning of the word “state” with reference to this particular section.

Section 20 of the same article provides that “in all civil

14 3 Wilson’s Works 58.
cases, the right of trial by jury shall remain inviolate." What is a civil case? There are probably not less than 100 decisions of the Supreme Court construing the application of this section in relation to various legal actions.

Section 1, Article XIII, deals with the limitation of municipal indebtedness. Numerous ways and means have been devised by astute common councils in an effort to circumvent this provision. Probably fifty cases deal with the construction of this section. Does it apply to bonds? To street improvement obligations? To property purchased by a city subject to a mortgage which the city does not expressly assume and agree to pay? What is a city? A school city? Countless questions which formerly worried lawyers about the meaning of this section have now all been definitely and authoritatively answered by our courts.

Take Section 21, Article IV, which is as follows: "No act shall ever be revised or amended by mere reference to its title; but the act revised or section amended shall be set forth or published at full length." What does this mean? Does it mean that the section to be amended shall be set forth in full in its original form; or does it mean that the section only as amended shall be set forth? Our Supreme Court first held in 1854 15 one way, and then in 1867 16 reversed itself. For thirteen years there was considerable doubt about the validity of many laws on account of the construction of this section. But the matter has now been clearly settled for sixty years.

These are not exceptional illustrations. They have been chosen at random. During the last 80 years practically every clause of our constitution has been elucidated upon by our courts. He who runs may read, and there is little doubt about the meaning of the instrument of 1851. It is impossible to estimate the value of this construction and interpretation. Untold millions have been spent in litigation, and the finest legal minds of our state during four generations

15 Langdon v. Applegate, 5 Ind. 327 (1854).
16 Greencastle Turnpike Co. v. State, 28 Ind. 382 (1867).
have devoted their efforts to this work. If our present constitution is scrapped, the value of these judicial decisions will be for the most part lost.

Our present constitution contains a proper declaration of the principles of government. It was drafted in a day when men yet remembered the Second War for Independence; when Adams and Jefferson were hardly dead a score of years; when a proper concept of a constitution still flourished. The bill of rights, a correct apportionment of powers to the three divisions of government, a proper system of checks and balances, few but salutary restrictions on the legislature—these are all concisely set out in our main law. Of course, there are defects present. What has man ever done that was perfect? But the defects are negligible by comparison, and they have apparently worked no hardship upon the citizens. There are some few provisions that might well have been omitted. But should the barn be burned down to destroy the rats?

Governor Marshall said in 1912:

"The people are bound down under a fundamental law which they have no means of amending by so much as a punctuation mark."

Thomas R. Marshall was a great man, and his words are entitled to much weight. Professor Burgess writes that the amending power is

"the most important part of a constitution. Upon its existence and truthfulness, i.e., its correspondence with real and natural conditions, depends the question as to whether the state shall develop with peaceable continuity or shall suffer alterations of stagnation, retrogression, and revolution. A constitution which may be imperfect and erroneous in its other parts, can be easily supplemented, if only the state be truthfully organized in the constitution; but if this be not accomplished, error will accumulate until nothing short of revolution can save the life of the state."

These also are strong words and with them in mind let us look into the amending provisions of our constitution. Section 1, Article XVI provides:

"Any amendment or amendments to this constitution may be proposed in either branch of the general assembly; and if the same shall
be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals, and referred to the general assembly to be chosen at the next general election; and if, in the general assembly so next chosen, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the general assembly to submit such amendment or amendments to the electors of the state; and if a majority of said electors shall ratify the same, such amendment or amendments shall become a part of this constitution."

There have been eleven amendments of our constitution. The first involving the Wabash and Erie Canal was passed in 1873. The next nine dealing variously with the right of suffrage, time of elections, courts, and limitation on municipal indebtedness were adopted in 1881. The last conferring suffrage on women became effective in 1921. So, it would seem that our constitution can be amended and that it has been whenever the people desired.

As to whether the amending clause is flexible enough presents another question. The Supreme Court has held that in order for a proposed amendment to be adopted, a majority of the voters who vote at the election when such amendment is submitted must vote in favor of the ratification of the amendment.¹⁷ This requirement does not seem unreasonable. No one wants a constitution amended by a corporal's guard. If one-half of the electors voting for the secretary of state are not interested in changing the fundamental law, or if, as usually happens, a substantial portion of the voters neglect to vote on amendments at all, it is an unmistakable sign that popular feeling does not demand a change. The citizen may be an "undeliberative" creature but he usually knows and gets what he wants, for as Herbert Spencer has declared, "the feeling of the community is the sole source of political power." Undoubtedly, Governor Marshall was chagrined when the people did not follow him on constitutional reform but that was hardly warrant for his stating that the constitution could not be amended by a

¹⁷ In re Boswell. 100 N. E. 833 (Ind. 1913).
comma. Incidentally, the people in 1921 demonstrated that they could discriminate in the matter of choosing amendments. In that year there were thirteen proposed amendments submitted to the electorate. All were discussed and publicized. One passed.

It is submitted, however, that if it be assumed that the present method of amending our fundamental law is obsolete and impractical, the same can be corrected by revising the amending clause. The answer may be given that the people cannot be fairly heard. That, of course, is debatable. It may be observed that what has been done once can be repeated and certainly with the present ease of disseminating intelligence, the voters can be apprised of any evil and correct the same.

Maybe it would here be well to mention a few of the amendments proposed and rejected in the past. As we consider them from the perspective of time, we may become more appreciative of the rigidity of the amending process of our constitution.

In 1857, an amendment was proposed providing for annual unlimited sessions of the legislature. A similar amendment was proposed in 1861. In this latter year, the expediency of reducing the number of senators to fifteen and of representatives to thirty was inquired into. The question of annual sessions was again brought up in 1865. In 1871, the legislature passed a resolution so to amend the constitution as to authorize the assembly to prescribe reasonable maximum freight and passenger rates and to prohibit discrimination between competing lines. 1873 saw the bugbear of legislative periods active again. In 1881, it was proposed to reduce the assembly to 60 representatives and 30 senators. In the same year and again in 1885, the change of legislative sessions was agitated. Unlimited sessions were urged in 1895. Voting machines were to be incorporated in the fundamental law in 1895. Municipal corporations were to be authorized to own and operate utilities by a proposed amendment of 1899. An initiative and referendum amendment was brought up in 1897 and again in 1899. Consolida-
The question of Workmen's Compensation was brought up in 1911.

Women's suffrage, prohibition, qualifications to practice law, and diverse ideas of school systems have been the most perennial subjects of constitutional reform. The suffrage amendment has been the only one to pass. The various proposals mentioned above have been taken from Kettleborough's work, Constitution Making in Indiana. The book was published in 1916 and down to that year, Mr. Kettleborough had accumulated 692 pages of official resolutions and records of various attempts at amendment.

The instances noted demonstrate the failure of the legislature in most instances to appreciate its own jurisdiction. Cities now own utilities; the worker now has the benefit of a Compensation Act; voting machines are not held to violate any constitutional provisions; corporate law may prevent any unjust railroad mergers. All these matters are regulated by statutes and rightly so.

The frequency and duration of the sessions of the assembly—a proper constitutional subject—has not been changed, for which all, and especially the lawyers, should be grateful. Every biennial session of sixty days (including Sundays), writes a volume of approximately 800 pages of new laws. If the legislature should meet annually for an indefinite period at $10 per diem the number of our laws would probably be limited only by the capacity of our printing establishments.

In examining the proposed amendments, the most striking fact is that there does not appear in the records one word even suggesting the feasibility of changing the amending process of the constitution.

In 1925, the Honorable Finis J. Garrett, representative from Tennessee, proposed an amendment to the Federal Constitution, making the matter of changing that august document more difficult than it now is. In one of the outstanding addresses of the last decade, the congressman declared that the Federal Instrument was too easily amended, although there have been only nine changes in the last one
hundred and thirty years, and the startling number of three thousand proposed amendments. Indiana has probably had less than three hundred changes suggested in our eighty years. Most of these proposals have been dealing with matters of transient interest and could have been, and ultimately have been, handled by statutes. Could our Constitution have been too conveniently amended, small groups in convention would have been enacting laws without political responsibility, and at needless expense to the people.

The rights of the individual which are now adequately protected might be jeopardized if the Constitution may be changed at the slightest whim of a militant minority. Plausible but untried theories of government might be readily adopted to our lasting regret. And worst of all, the ephemeral doctrines of a political party, temporarily in power, might be saddled on the people. Of course, whenever the possibility of a constitutional convention is eminent, political leaders announce their abhorrence of the man who would make the matter a party issue. But ours is actually a government by political parties and men in convention do not forget their party affiliations. There has never been a constitutional convention, so far as I know, where the majority of the members did not belong to the then prevailing party. This was true of the convention of 1851 when about two-thirds of the members were democrats of the fervid Jacksonian type. It is surprising that we find in our present constitution little political bias. This fact, however, is no warrant that the next constitution will be so virtuous in that regard.

The cost of a convention should be kept in mind. According to figures which the Hon. Arthur Gilliom has compiled, the bill will be no less than $1,360,000 made up principally of three items. If the question carries it will be necessary to hold a special election of delegates in May, 1931. On the basis of the 1928 election this special election will run about $530,000. If the convention should last six months (the period limited by the Act), the expense thereof will amount to not less that $300,000. Another special election at which
the people will accept or reject the handiwork of the conven-
tion will exceed $500,000. A million dollars is not much
compared to the well-being and progress of the state but the
tax-payers are entitled to clear proof that there is a reason-
able certainty of a fair return on this investment before they
make it.

What are some of the reasons advanced for the calling
of a convention? First, it is said that the problems of the
state are entirely different today than eighty years ago. The
increase and change of population; the decline of the farm
and the growth of the city; the development of the corpora-
tion and the advent of the automobile, airplane and radio;
the countless other changes with the march of time present
matters of government unknown in 1851. If a constitution
declares general truths, these should be as applicable today
as they were eighty years ago. The age of the fundamental
law should be in its favor not against it. The Federal Con-
stitution is one hundred and forty years old.

The problem of taxation, which is a vital problem in every
state, is the most frequent subject of contention in Indiana.
Whether rightly or not, the cost of government is increasing
with tremendous strides. Where the limit will be, no one
knows. The chief faculty of lawmakers seems to be the
ability to spend money. It may be unfair to infer that much
of the public money is spent in a wasteful manner, but it
seems to be the aim of law making bodies to raise and spend
unlimited funds without creating resentment on the part of
the taxpayers; to extract money with the least pain.

Our constitution provides that there must be a uniform
and equal rate of assessment and taxation, and a just valua-
tion for taxation of all property both real and personal. It
is a notorious fact that intangible property has never paid its
just share of taxes, and the result has been that real estate
has more than borne its share of the burden. Those who
feel the need of a change in constitution admit that under
our present fundamental law, statutes might be enacted by
which personal property would be adequately taxed, but it
is believed that were the question of taxing intangibles taken
seriously, considerable wealth would be driven from the State of Indiana into other commonwealths where capital would be more kindly treated. However, those who believe that the matter of raising revenue may be solved in a constitutional convention have not set down beforehand any definite views on the matter. At the present time there appears to be some movement in favor of a state income tax. Economists who have gone into the question find that state income tax can never be a substantial producer of funds so long as the Federal Income Tax law is in effect. Then, too, it is the opinion of many able lawyers that a state income tax law may be enacted without change in the constitution.

Another proposed method of producing revenue is by excise taxes, and this, in all likelihood, will be the most popular method of the future. At the present time, the tax on gasoline is producing about sixty per cent of the state's total income, and this method of taxation meets with as little protest on the part of the people as any. Professor Willis of Indiana University recently said that Indiana's present plan of taxing is a system of tolerated dishonesty. He advocates the abolition of the personal property tax, and the adoption of an inheritance tax, an income tax, an excise tax. The Professor's scheme could be adopted without any change in the constitution. However, we now have the inheritance tax and the excise tax, and no one seriously protests the tax he pays on personal property. If we were to classify property for taxation, we shall only have partially aided the situation. Incidentally, it must be kept in mind that taxes are always grudgingly paid.

An attack has been made upon the length and frequency of the sessions of the General Assembly. We have spoken of this above and repeat that we do not believe there is anything to be gained from changing this phase of our constitution.

The present constitution provides that every bill introduced into the assembly shall be read by sections on three successive days in each house, except that the first reading may be dispensed with, "but the reading of a bill by sections
on its final passage shall in no case be dispensed with." It has been found impossible, in view of the length of the legislative session, to comply with this provision of the constitution and the same has been disregarded. The practice, however, has been indulged in for a long period of time without any known harm.

Proponents of the Constitutional Convention feel that there should be some legal machinery by which judges may be removed. The Supreme Court has held that a judge can only be removed from office after conviction of crime. Admittedly, we should not have tyrants or criminals on the bench because there is no law to remove them. The necessity, however, of a practical method of removal would become far more important if our judges were appointed for life during good behavior instead of elected either for four or six years. So far as we know there has been little protest against the conduct or integrity of our judges. Those of us who have practiced in the Federal courts have found that some judges thereof become autocratic and overbearing, largely due to the fact that their appointment is practically assured for life. We see no reason for changing our constitution on this subject merely to take care of hypothetical cases, and we have yet to be referred to any actual instances of faithless judges.

City government presents another great issue. We hear talk about home rule, and the gradual encroachment of the state upon the city. There is much to be said on both sides of the matter. Everyone recognizes that many civic problems may be peculiar to a single community, and that a general law to be applicable must sometimes be so vague as to be worthless. On the other hand, communities often fall into the clutches of unconscionable politicians. If such men should possess extraordinary power which home rule advocates believe a city should have, sufficient harm may be done in a short period of time to ruin a community for a score of years. Too much power for local authorities is worse than not enough.
Considerable criticism has been levied at our courts since the Dale and Shoemaker cases. The power of the court to punish for contempt is vital. Perhaps our Supreme Court was not wise in going to the extent it did in the Shoemaker case. We believe it is true, however, that the reason for the unusual notoriety of this case was the prohibition angle and the fame of the defendant rather than the correctness of the court's ruling. The courts have so infrequently used their power to punish for contempt that we do not believe that any conclusion of abuse of this power is well-founded. Again, the matter would require much closer attention were our judges appointed for life instead of being elected for a relatively short term of years.

The two major evils under the Indiana Constitution of 1816 were annual unlimited sessions of the legislature and the freedom to pass special legislation. Our present Constitution places considerable restriction against special legislation, but we find that this limitation is often circumvented. In the case of cities and towns, classification may be made according to population and taxable wealth, and may be so refined that only one city is in a certain class. In many instances this is admittedly an abuse. It is rather difficult to define just how the problem may be solved in convention.

While on this subject, we are reminded of another evil which has sprung up in the nature of an evasion of the constitutional provision concerning debt limitation of municipalities. We often find the creation of several public corporations in one city. First, there will be the municipal city, then the school city, then the park board, next the sanitary district, now the aviation commission. Each of these is considered a separate city for the creation of obligations, and we feel quite certain that in 1881, when the electors amended the Constitution, they did not have in mind that the legislature could so simply evade their handiwork. In this respect, there should be some indication on the part of the people, whether through convention or through amendment, as to the propriety of these laws creating city upon city by a mere legislative fiat.
We have observed above the number of times that the question of public education has been up for constitutional expression. It is highly doubtful whether any definite policy should be fixed in the main law in view of the fact that the theories of education seem to be constantly changing. Indiana's school system rates high and we do not know of any peculiar charm that would promote our progress along these lines by changing the Constitution.

In criminal cases, the jury is the judge of the law as well as of the facts, and many advocate that the court should instruct the jury as to the law in criminal cases in much the same fashion as it does now in civil cases. This seems to be immaterial. I believe that most lawyers will admit that juries decide cases as they see the light and without much regard for the court's instructions.

Qualification for admission to the bar seems to be a most important subject among lawyers. The great majority of lawyers are in favor of a change along these lines. The Constitution at present provides that anyone of good moral character, over twenty-one years of age, may practice law. Most jurists hold that a person who has had no legal preparation is immoral if he pretends to advise clients. This seems logical and if it is the correct view, no amendment is needed for prescribing requirements for admission to the bar.

It is urged that the selection for state offices be made by the short ballot; that there is no particular reason for electing a superintendent of schools or a clerk of the Supreme Court or an auditor of state or any number of other offices by popular vote. The short ballot was in existence in Indiana for a period of thirty-five years, from 1816 to 1851, and the people disapproved of it.

Much has been said about the desirability of appointing instead of electing Supreme Court judges: Judges were appointed under the constitution of 1816, and the people became dissatisfied with this method in 1851. Whether we would obtain more competent judges, especially of the higher courts, by appointment than by election, raises a question.
The authority of the Indiana decisions is such that our courts are among those of the first ten states most frequently cited in other jurisdictions.

We are so constructed that no constitution which could be drafted would meet with the approval of all of us. There will always be a group against whatever law we have. When we had the short ballot, when we appointed judges, it was thought that the long ballot and the election of judges would be better. If we are to go back to the old method, there will be those who demand more elective offices and judges chosen at the polls. Many today are in favor of annual unlimited sessions of the legislature. In 1851, after thirty-five years of experience, it was determined that the legislative term should not be too frequent or too long.

A volume might be written without exhausting the subject of this paper. How much time to give to any particular point has been no easy matter. It is hoped that the most important phases of the subject have, at least, been mentioned. You will not be annoyed with a lengthy resume; I shall conclude briefly.

The argument narrows down to this: All admit that certain changes should be made in the constitution. Should these be undertaken by amendment or by a convention? If improvement of the fundamental law is made by amendment, the people will have four or five years to consider the merits of any change and will have the privilege of voting on each amendment separately. If a new constitution is drafted by a convention, the electors will probably have to vote on the same as an entirety within a year. The requirement of four or five years to change so important a law as the constitution does not seem too long a time. The electors will answer the convention question next month; whether they answer the question correctly remains to be learned.

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