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REVISION OF THE INDIANA CONSTITUTION

HUGH E. WILLOE*

Does the constitution of Indiana need revision? Should the people of Indiana in November, 1930, vote for a constitutional convention? If the people at that time vote for a constitutional convention, what sort of a constitution should the delegates thereto adopt for submission to the people? The only way intelligently to answer such questions as these is to study our present constitution, article by article, and clause by clause; and to compare this constitution with the constitutions of other states and the Federal government; and to compare the doctrines found in our constitution with the doctrines which political scientists and other experts on governmental matters think should be found in any ideal constitution.

Indiana is entitled to have as good a constitution as any state in the Union, and if its present constitution is not as good as the best there is a prima facie presumption that it ought to be revised. Most students of government now probably agree

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* See p. 396 for biographical note.

1 The General Assembly of Indiana of 1929 after amending a bill introduced in the Senate in 1927 passed an act submitting to the voters of Indiana in November, 1930, the question of calling a convention to formulate a new constitution for the state of Indiana, and in this act provided that if the voters voted in favor of such a convention, a special election should be held on the first Tuesday after the first Monday in May, 1931, to choose one-hundred delegates to this convention, apportioned in the same manner as the General Assembly, and that the delegates thus elected should assemble in convention at the Capitol in Indianapolis on the first Monday in October, 1931, at 12 o'clock.

Indiana's constitution does not provide for amendment by constitutional convention, but only for amendment by submission to the electors of proposals first passed by two successive legislatures, but it is generally held that in such case the original and typical method of amendment by constitutional convention is still available. Hall, Constitutional Law, § 13; Act 1, Sec. 1, Const. of Indiana, 1851; Bennett v. Jackson, 186 Ind., 533;
that the present constitution of Indiana is worse than the constitution of 1816, which it replaced, and much worse than the modern constitutions of many other states. The inherent defect of the constitution of 1816 and the chief reason for its abandonment was its sanction of special legislation. At the time of the adoption of the constitution of 1851 the people of Indiana seemed to have been possessed by some wild ideas of democracy which were prevalent at that time. Among these were the ideas that one man was as fit for office as another, that the best way to choose experts was by popular vote, and that the best way to have honest government is to have every officer of government independent of every other. The influence of these ideas is found in the constitution of 1851. Of course these wild ideas are no longer entertained, but other wild ideas are always prevalent and many fear that if another constitutional convention were called that the third constitution might be as much worse than the second as the second is worse than the first. It has been suggested that it would be impossible to make a worse constitution than the one Indiana now has. However that may be, the people of Indiana certainly would not want to repeat the mistakes made by the constitutional convention which drafted

Wood's Appeal, 75 Pa., 59. The General Assembly does not have legislative power to draft a new constitution under its legislative authority (Ellingham v. Dye, 178 Ind. 336), and if it proposes amendments it must be pursuant to Art. 16 by a submission to the voters of proposals first passed by two successive legislatures (Ellingham v. Dye, supra); but it would seem that the General Assembly as ordinary legislation can provide for the calling of a constitutional convention, or at least for the submission to the voters of the question of whether or not to call a constitutional convention, or for the submission of such question and the technique of such convention in case of an affirmative vote. (Bennett v. Jackson, supra).

Is it necessary for two successive legislatures to pass such bills? The answer must be “no.” Authority for such action does not come from Article 16, but from Art. 1, Sec. 1 and universal custom, and therefore it is not governed by the provisions of Art. 16. Otherwise the present arrangement for a vote on the question of a Constitutional Convention would be void, because the 1929 legislature amended and passed for the first time the bill of the 1927 legislature so that it has not as yet been passed by two successive legislatures. But since the bill does not have to be passed by two successive legislatures this fact is irrelevant.

Evidently there are many people in the state of Indiana who have come to the conclusion that the less a government is worth the more it costs; and they want to get a government which is worth more and will cost less. Those who may be called upon to formulate a new constitution for Indiana should not disappoint this sentiment.
our present constitution, and the best way to succeed in not doing so is to take steps ahead of time to insure the success of the next constitutional convention.\(^1\) Fear of a constitutional convention should not be the cause of not having one, if one is needed, but should cause the people to see that they get the right kind of a constitutional convention.

Even if the constitution of 1851 had been an ideal constitution for that time, it would not without amendment fit conditions at the present time. Since 1851 our civilization has changed from a simple, rural, physical labor civilization to a complex, urban, machine civilization. Life has become more organic, with fearful degrees of specialization. With these changes in the social order, not only is a different constitution needed, but more organization is needed to meet the more organic life.

Hence it would seem that the question is not so much, should the constitution of Indiana be revised, as how should the constitution of Indiana be revised so as to make it meet the political and social needs of today and compare favorably with the best constitutions of other states.

In the preamble and in Article 1, Section 1, of our present constitution is found the doctrine of the sovereignty of the people. Perhaps this doctrine might be allowed to stand worded substantially as it is now worded. By the doctrine of popular sovereignty is meant that the power to exercise social control is lodged in the people as a whole, and that the state and the various organs of the state are only instrumentalities or agencies established by the people to exercise certain powers given to them, and that the constitution is simply a document to limit the powers of such agencies.\(^2\) Of course, the sovereignty of the people of Indiana is subject to the paramount sovereignty of the people of the United States as a whole, and to be strictly accurate, the language in our constitution should state this. However, though it is not stated, it is implied, because the Indi-

\(^1\) The debate sponsored by the Indiana Bar Association on January 16, between Albert Stump and James M. Noel was a propitious beginning in the work to be done to insure the success of such a convention. The writer offers the suggestions herein, in the hope that they also will help voters and delegates, if there should be delegates, in performing the task laid upon them by the legislative branch of the Indiana government.

ana constitution is subject to the constitution of the United States; and unless it was deemed best to do otherwise, the matter might be left as it is. No one in Indiana or in the United States would contend for any other theory of sovereignty than that of popular sovereignty.

In Article 16 of the Indiana constitution is found the doctrine of the amendability of the constitution. By this doctrine is meant that the constitution as it is at any time worded binds all of the agencies of the people and protects the people as a whole as to all the rights, powers, privileges and immunities of individual members as against the state, unless the constitution is first changed; but that because the people are sovereign they may at any time change their fundamental law. The amendability of a constitution eliminates both the necessity and the probability of political revolutions. Indiana's first constitution of 1816 did not provide for amendment (though it did provide for a vote every twelve years on the question of a constitutional convention). The present constitution of 1851 provides for amendment by the agreement of a majority of the members of two successive General Assemblies and a ratification by a majority of the electors, which the Supreme Court has interpreted to mean a majority of the votes cast at a general election if the amendment is submitted at a general election. A great many people have thought that this provision in our present Indiana constitution is too stringent.

One reason for this thought is the great amount of deadwood in the constitution. The constitution provides for the registration of voters. This was refused for thirty years, finally provided for by the legislature in 1911, but such action was repealed in 1927. The constitution also provides for re-apportionment every six years. There has been none since in 1921. The constitution provides that no increases of compensation for members of the General Assembly shall take effect during a session at which such increase may be made; but, in spite of this, to anyone not a lawyer it would seem that the legislature has provided for an increase of salary during such time, and such increase has been upheld by the Supreme Court. The

3 Constitution, Art. 2, Sec. 14.
4 Constitution, Art. 4; Secs. 4 and 5.
5 Constitution, Art. 4; Sec. 29.
6 State v. Bowman, 199 Ind. 436.
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constitution provides that no bill shall be presented to the governor within two days next previous to the final adjournment of the General Assembly, but the Supreme Court has held that authentication pursuant to Article 4, Section 25 has the effect of making the first constitutional provision a nullity. The constitution provides for taxes on the property of corporations for the purpose of the common school fund, but no special taxes on corporations for common school purposes have ever been levied by the legislature. The Constitution provides for the reading of bills. This provision was placed in the constitution when printing was expensive. Reading now is a mere pretense. It accomplishes no good. There is no need of it and it ought to be stopped. The Constitution gives the General Assembly the power to deprive of suffrage and to render ineligible for office any persons convicted of an infamous crime, but this power has never been fully exercised. The Constitution provides for the division of the state into as many districts as there are judges of the Supreme Court, as nearly equal in population as without dividing a county the same can be made. This mandate has not been obeyed. The constitution provides for justices of the peace as constitutional officers. Justices of the peace are not needed and in most cases their decrees are in violation of the due process clause of the United States Constitution and they should be abolished. The Constitution makes the jury in criminal cases judges of both the law and the facts. As a matter of fact, no juries in Indiana presume to know the law, but are instructed on the law by the court. The Constitution provides that the governor shall take care that the laws be faithfully executed but it does not clothe him with sufficient power to execute the laws.

Another reason for the thought that the provision as to amendment is too stringent is the fact that the Supreme Court

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7 Constitution, Art. 5; Sec. 14.
8 Western Union Tel. Co. v. Taggart, 141 Ind. 281.
9 Constitution, Art 8; Sec. 2.
10 Constitution, Art. 4; Sec. 18.
11 Constitution, Art. 2; Sec. 8.
12 Constitution, Art. 7; Sec.3.
13 Constitution, Art. 7; Sec. 14.
14 3 Ind. Law Journal, 654.
15 Constitution, Art. 1; Sec. 19.
16 Constitution, Art. 6; Sec. 16.
has warped the constitution to give it more elasticity. A num-
ber of illustrations of this have been given in the preceding
paragraph. Other illustrations can be given. Most of these
are illustrations of liberal constructions. For example, where
the Supreme Court construed the words "majority of said elec-
tors" to mean a majority of the electors voting; and when,
though political and municipal corporations are forbidden to
incur indebtedness in excess of two per cent of the assessed
valuation, the Supreme Court freed these subdivisions of such
debt limit by holding that a city is a number of cities, it
adopted liberal constructions. But in the case of the city man-
ger law, the Supreme Court warped the constitution in favor
of a strict construction instead of a liberal construction.

The third reason for this thought is the number of unsuc-
cessful attempts which have been made to amend the Indiana
constitution. Thus, efforts have been made to amend the con-
stitutional qualifications of lawyers, to provide in the constitu-
tion for the registration of voters, to provide for the service
of negroes in the state militia, to provide for the counting of
women as well as men in the six year enumeration of citizens
and voters, when women at present are voters but are not
counted as a basis for legislative apportionment, to provide for
an income tax law, to provide for congestion in the Supreme
Court, and to give the governor power to veto special items
in the appropriation bill. All proposed amendments have failed,
for one reason or another. Apparently, Indiana and New Jersey
are the only states in the union which refuse to amend their
constitutions.

Do these things show that it is too difficult to amend the In-
diana constitution? On the face of things it would seem as
though this was the case, but perhaps the trouble with our con-
stitution is not so much the article in regard to amendment as
the rest of the articles in the constitution. If the constitution
as a whole were what it ought to be, there would not be so much
need for amendment. The important thing is to make a con-
stitution what it ought to be in the first place—make it as short
as possible, and keep as much legislation out of it as possible;
then to make it reasonably difficult to amend it. But even

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17 Constitution, Art. 13.
18 Caldwell v. Bauer, 179 Ind. 146; Brown v. Guthrie, 185 Ind. 669.
under this test, perhaps our Indiana constitution is not easily enough amended. In other states it is easier to amend constitutions. The model state constitution of the National Municipal League suggests that the constitution should be amendable either by initiative petition, or by the proposal of an amendment by a majority at any regular or special session of the legislature and approval by majority of the qualified voters voting on the amendment. For this reason, it might be well to revise our Indiana constitution so as to make it amendable in the way suggested by the model state constitution. And, whether or not the constitutional deadwood and judicial constructions of constitutional provisions are arguments for more liberality in the power of amendment, their great accumulation at the present time is an argument for a constitutional convention and a new constitution.

In Article 2 of our present constitution is found the doctrine of universal suffrage. This doctrine means that all citizens of the United States, whether men or women, who fulfill a modest residential requirement are entitled to vote in this state. This is becoming the accepted doctrine the world over, and of course Indiana would not want to take any backward steps in this respect. Our present constitution now provides that the General Assembly shall have the power to deprive of the right of suffrage persons convicted of an infamous crime. This is a provision which not only should be retained in the new constitution, but it is one whose mandate should have had more influence upon the legislature. It is a means of divorcing politics from crime and criminals.

Our present Indiana constitution is silent upon two fundamental doctrines of government. One is the doctrine of a dual form of government, and the other is the doctrine of the supremacy of the Supreme Court. The doctrine of a dual form of government is one which has been established by the United States constitution and the decisions of the United States Supreme Court, and Indiana could not by its constitution establish any other kind of government. It might be well, therefore, for the Indiana constitution to meet the United States constitution on this doctrine. However, if there is any objection to intro-

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20 Model State Constitution, Secs. 95-98.
21 Willis, Our Dual Form of Government, 15 Ky. Law Journ. 175.
22 Thayers' Legal Essays, 1.
ducing this material, of course it would make no material difference to leave the matter out, because the whole topic is covered by Federal constitutional law. The doctrine of the supremacy of the Supreme Court is a doctrine of Indiana constitutional law the same as it is a doctrine of United States constitutional law, and, as by the United States Supreme Court in the case of United States constitutional law, so the doctrine has been written into our Indiana constitution by the Supreme Court of Indiana. In a new constitution it would be well to have a separate article on this doctrine and in this article it should be specified over what the Supreme Court is supreme. I take it that the Supreme Court now has and should continue to have power to uphold all of the great constitutional doctrines of the constitution. It should have the responsibility of maintaining the doctrine of the sovereignty of the people, the doctrine of the amendability of the constitution, the doctrine of universal suffrage, the doctrine of a dual form of government, and the doctrine of its own supremacy already referred to, and the doctrine of separation of powers, and the doctrine that many forms of personal liberty are protected by the constitution against social control—to be referred to hereafter. It also should have power to uphold the rules of legal procedure formulated by itself or by a judicial council, and power over the admission and disbarment of attorneys. The Supreme Court should be given this supremacy because it is not only the appropriate tribunal to exercise these functions but is the one to which these functions can the most safely be entrusted.

In Article 1 of our present constitution occurs what is called a bill of rights. A more appropriate name for the material found in this article would be the doctrine that various forms of personal liberty are protected by the constitution against social control until the constitution is first amended. This also is the most comprehensive doctrine found in the United States constitution, and is the one which is perhaps prized the most by the great body of citizenship. Because of long years of English history the American people feel that there are certain forms of personal liberty which should remain inviolate. This doctrine, or bill of rights, should of course be continued in any new constitution but it should be entirely re-stated. The whole matter of personal liberty and social control should be overhauled and the line between personal liberty and social control
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re-drawn. The doctrine, as it is found in the Constitution of 1851, is in certain parts obsolete, other parts ambiguous, and in other parts not an accurate statement of what is the law. Sometimes too much personal liberty and too little social control are allowed, and sometimes not enough personal liberty and too much social control. In the reference to natural rights in our present constitution an attempt was made to guarantee too much personal liberty, but since the statement is false, it has had, of course, no effect on social control.\textsuperscript{23} This provision is an illustration of something which is obsolete and should be omitted. Criminals are, by our present constitution, given too much personal liberty and society not enough social control.\textsuperscript{24} The theory of our criminal law should be neither vengeance nor reformation, except insofar as reformation is possible, but the protection of society. The jury in criminal cases should be made judges only of the facts and not of the law. The provision in regard to self-crimination does not give sufficient personal liberty, in that it does not protect at present against third degree work; and too much personal liberty, in that it does not permit comment on the failure of the defendant to take the stand. It is not clear under our present constitution what is the nature of the right to a jury trial. In the new constitution it should definitely be provided that the right to jury trial in both civil and criminal cases and in the case of indirect contempt of court\textsuperscript{25} should remain inviolate, but that the legislature should have the power to provide for a jury of less than twelve and for less than a unanimous verdict and for a waiver of the right to a jury trial. In the matter of freedom of speech, too much social control and not enough personal liberty are allowed.\textsuperscript{26} Our constitution states the law as it was before the time of Blackstone and not as it was in Blackstone's time, or as it is today, and this provision should be brought up to date. The immunities against impairing the obligation of a contract, against \textit{ex post facto} laws, and against other civil retroactive laws should all be made subject to the exercise of the police power, power of taxation, and the power of eminent domain, so


\textsuperscript{25} Willis, \textit{Punishment for Contempt of Court}, 2 Ind. Law Journ. 309.

far as to make them embody the constitutional doctrines developed by the Supreme Court. In the new constitution there should be a provision that the power of taxation, the power of eminent domain, and the police power can never be surrendered, suspended, or contracted away, so as never to protect personal liberty against these forms of social control. The guaranty against unreasonable searches and seizures and the guaranty against the deprivation of life, liberty, and property without due process of law, and practically all the other provisions and immunities found in the present Article 1 should be re-phrased so as to make them say what the Supreme Court has interpreted them to mean, unless the people of Indiana prefer to repudiate the interpretations of the Supreme Court; but even then the privileges and immunities should be re-worded so as to make it necessary for the Supreme Court to give the different meaning desired.

In Articles 3-7 of the constitution of 1851, is found the doctrine of separation of powers. Article 6 might well be omitted and the material therein, so far as it is retained, covered in other articles. The other articles should be retained, but almost completely revised. The doctrine of separation of powers under the Indiana constitution, as under the United States constitution, has so many checks and balances and exceptions that a better name for it perhaps would be the doctrine of confusion of powers, instead of the doctrine of separation of powers. One branch of the government also is continually trying to encroach upon the other branches of the government. The usual division of powers is into the legislative, executive, and judicial, but in Indiana each of these branches is so subdivided that it might be better to say that there are twenty-five to thirty different branches of government. So far as the executive branch of the government is concerned, the Indiana state government is a conglomerate of petty executives with no one in supreme command. There is a popular notion, and there is a declaration in the state constitution, that "the executive power of the state shall be vested in a governor,"27 and the candidates for governorship in 1928 promised to clean house from the basement up, but under our present system no governor in Indiana could do this. The governor is not the business head of the state. He does not appoint the heads of the various executive departments. The

27 Constitution, Art. 5; Sec. 1.
people elect seven state officials, and even go through the ridiculous process of electing a clerk and a reporter of the Supreme Court. The attorney-general, though for some reason forgotten by the state constitution, is elected by the people and entirely independent of the governor. The secretary of state is a sort of governor himself. He is overseer of the business corporations, the head of the securities department, issues automobile licenses, is the head of the state police and is head of criminal identification. He is in no way responsible to the governor. In the state of Indiana, there are eighty-nine boards and commissions, most of them independent and many of them overlapping others in their work. For example, departmental police forces. Indiana has no real police force. Yet there are several state departments with police forces. The secretary of state can dress a man in a uniform and call him a state policeman, but this policeman can not stop a man from setting fire to a building, because that is the business of the state fire marshal who happens to be appointed by the governor. An inspector of boilers employed by the Industrial Board will not concern himself with the theft of an automobile, because that is the business of the state police. There are men employed by the Board of Health to see that kerosene does not contain too much gasoline. There are other men who hunt down violators of the fish and game laws. This shows the situation in Indiana so far as a police force is concerned. It is a typical situation.

All the executive powers should be lodged in the governor of the state and he should be made the true business head of the state and should appoint the secretary of state, the treasurer, the attorney-general, and all of the other state officials, with the exception of the auditor. The auditor should be appointed by the legislature, because it should be his duty to conduct a continuous audit of all accounts of the various departments and offices of the state government. This is the plan found in the model state constitution prepared by the National Municipal League. The plan of lodging all executive power in the governor is called the short ballot and is recommended by the National Municipal League;\textsuperscript{28} is the plan of the federal government;\textsuperscript{29} and is the plan recently worked out by the state of Virginia\textsuperscript{30} under the patriotic leadership of Governor Byrd. The

\textsuperscript{28} Model State Constitution, Secs. 41, 46.
\textsuperscript{29} United States Constitution, Art. II, Secs. 1-2.
\textsuperscript{30} Virginia Constitution, Sup. '29, Art. V. Secs. 69, 73, 80, 81.
success of the federal plan, where the people elect a President
and he chooses all the other federal officers (even under the
spoils system) ought to be enough to commend it. This was
also the plan in the old constitution of 1816. In Maryland,
Delaware, New Hampshire, New Jersey, New York, and Ohio
an approach has been made to this plan. In addition, all of the
executive and administrative departments should be reorganized
and consolidated for efficiency in administration, somewhat
after the plan of the reorganization in the state of Virginia and
the reorganization of the federal government proposed by Presi-
dent Hoover. This would make the governor the chief executive,
in fact, a real state manager, and might spell efficiency in ad-
ministration. It also would make it easier for the electorate to
exercise their franchise intelligently, because they could inform
themselves as to one man, whereas it is impossible for them to
inform themselves as to all of those for whom they are now
called upon to vote. If all the officers of state in the depart-
ments of the state government were responsible to the governor,
the people of the state could hold the governor responsible. As
it is now, they try to hold the governor responsible, but this
is not fair to the governor when he is without power. The
theory of the present constitution apparently is that the people
will have better control of government if they elect all of their
numerous state officials. This theory does not work out in
practice. Most citizens are too busy with their personal affairs
to know or care who besides the governor are candidates for
state office. They vote for or against a candidate for governor
and the rest of the ticket goes up or down with him.

The legislative power in Indiana is vested in two houses and
in the governor. The governor may not be the executive head
of the state, but he certainly has encroached upon the legislative
functions of the state legislature until he has become the legisla-
tive head. Because of his veto power, and because of his power
of patronage, and because many members of the state legisla-
ture have too little knowledge of the workings of the state gov-
ernment, the governor is able to exercise more and more power
over legislation, and leaders in the legislature more and more
sneak in the back door of his office to learn confidentially just
what legislation he really wants. The legislature also has an
elaborate system of plunderbund, whereby its employees are
chosen, not on the basis of experience and efficiency, but on the
basis of political patronage. The legislative power ought to be lodged in one house whose representatives should be few in number and should hold office for a short period of time, as has been recommended by the National Municipal League.\textsuperscript{31} Of course, it has been customary in the United States to have two houses of legislation. There are two in the Federal government. The two in the Federal government were the result of a compromise between the small and large states. There is no reason for two houses of legislation in Indiana today. Any reasons for two houses which existed in former times have become obsolete. Yet the sentiment for two houses and a large representation may be too deep to be uprooted. In that event, it might be well to continue our present plan of vesting legislative power in two houses, a Senate and a House; but, then, the representation in one house should be according to interests, or vocational representation instead of geographical, in order to abolish the "third house" of the lobbyists, and there should be a legislative council consisting of the governor and seven members chosen by and from the General Assembly, whose duty it should be to collect information concerning the government and welfare of the state and to report to the legislature.\textsuperscript{32} In addition, all employees of the legislature should be placed upon a civil service basis, so as to procure experienced employees whose work will not have to be watched by the individual legislators for mistakes and inaccuracies. The people also should have the power by petition to propose laws and amendments to the constitution and directly to enact or reject laws and amendments at the polls, a power known as the initiative; and the power to require by petition that measures enacted by the legislature be submitted to the voters for their approval, a power known as the referendum.\textsuperscript{33} Such a reform of the legislative branch of our government would undoubtedly make this branch of the government more effective than it is at the present time, and give us a more scientific body of statutory law.\textsuperscript{34}

\textsuperscript{31} Model State Constitution, Sec. 13.
\textsuperscript{32} Model State Constitution, Secs. 29-32; cf. Legislative Reference Bureaus; 29 Col. Law Rev. 381.
\textsuperscript{33} Model State Constitution, Secs. 33-40.
\textsuperscript{34} The above remarks have been concerned with the substance of legislation, but the form of legislation is also important. The title of the Primary Election Act, Chap. 68 of the Acts of 1929, is a legal monstrosity. It is so monstrous that it has invoked an editorial in the \textit{New York Times}
The judicial power at the present time is not vested in one court but in many different courts, which are presided over by elected judges, who operate under mandatory statutory rules, so that this branch of government is not only subdivided but its work is becoming more and more unsatisfactory. The consequence of this system is injustice rather than justice. The judicial system has become a system of delays, uncertainties, technicalities, and expense. The courts are spending more than half of their time litigating the rules of legal procedure, instead of deciding the substantive question of clients. The judges have lost the principal control of the conduct of trials, and it has been taken over by the trial attorneys. The outcome of cases in court depends upon the way the attorneys play the game of legal procedure. Cases are decided by a mental wager of battle which has been substituted for the old Norman physical wager of battle. The reasons for these consequences are not far to seek. They are the fact that the courts are not organized as they should be for the conduct of judicial business, the fact that the judges are elected, and the fact that the rules of legal procedure are mandatory statutory rules. Because the courts are not organized into one court, but many, necessitates the bandying of cases from one court to another with the abominations of new trials and reversals for technicalities. Because the judges are elected, their personnel is not what it ought to be; and they do not dare to take the control of the trial of cases away from the trial lawyers who might see that they were defeated in the next election. In Indiana, judges to be elected for the supreme and appellate courts are nominated in state conventions by a handful of delegates holding proxies, after the other state officers have been nominated, and are frequently nominated as the result of trades made in efforts to nominate candidates for other offices. Because the rules of legal procedure are manda-

ridiculing the legislative processes of Indiana. If our present constitution is responsible for such a monstrosity something ought to be done to the Constitution, but the monstrosity is probably the product not of the Constitution but of cumbersome legislative technique, which might have avoided this result by the process of amending another section of the original act or by passing a bill de novo, and repealing all prior acts or parts of acts, inconsistent therewith. But if there is danger of a continuance of this cumbersome legislative technique perhaps some provision, in addition to Secs. 19 and 21 of Article 4, should be placed in the constitution to control the matter and to correct the form of legislation.
tory statutory rules, any violation of them is reversible error, and it enables the attorneys to play their game of legal procedure by taking advantage of errors in the record and even by introducing errors into the record. The judicial power should be vested in one general court of justice with three different branches, a Supreme Court, district courts, and county or probate courts. All of the judges of the Supreme Court should be appointed by the governor for life, with the consent of the legislature (or senate), from a list nominated by the judicial council, and all of the other judges should be appointed by the governor for life from a list nominated either by the Supreme Court or by the judicial council. A judicial council made up of the chief justice of the Supreme Court, three presiding justices of the several district courts, two justices of the Supreme Court, one practicing attorney and one member of the faculty of the Law School of Indiana University should also be constituted. This judicial council should have power to nominate candidates for appointment to judicial office to formulate the rules of legal procedure and to control any matters of administration which concern the judicial power; but it should be provided that in formulating such rules of legal procedure the judicial council should adopt notice pleading instead of issue or essential fact pleading; that the judge instead of the attorneys should be the directing, controlling factor in the conduct of trials; that the Supreme Court should always render final judgment, and never remand a case for a new trial; that all rules of legal procedure should be directory and not mandatory; and that all decisions of the court on a point of procedure, whether a point of pleading, evidence, or practice, should never be regarded as a binding precedent for the decision of a procedural point in a later case. In this way judges of higher ability would be obtained, impartiality would be introduced into the trial of cases, judicial business would be expedited, and cases would be tried on their merits. This is essentially the modern English legal procedure. It is the plan advocated by the drafters of a model state constitution, except for the term of

35 36 W. Va. Law Quar. 9. Sixteen states of the Union have already established judicial councils.

office of the judges, and in this respect I think the model state
constitution does not go far enough. Judges were appointed
by the governor under the old Indiana constitution of 1816 and
they are appointed for life in the Federal courts of the United
States. In Maryland, judges are elected for fifteen years, in
New York, for fourteen years, in Pennsylvania, for twenty-one
years, and in Massachusetts and New Hampshire, with certain
exceptions, they hold office during good behavior.

In Article 11 of our present constitution are some provisions
on private corporations. An article on private corporations
should be incorporated in the new constitution, but it should be
worked out better than the present article. For example, while
the new constitution should give the legislature power to pro-
vide for the incorporation of domestic corporations and the ad-
mission of foreign corporations, both those engaged in interstate
commerce and those not engaged in interstate commerce, sub-
ject to the Federal government's jurisdiction over interstate
commerce, such legislative power should be limited to forbid
the incorporation of corporations by special act, but only by
general laws, and to require a double liability of all bank stock-
holders and a single liability of the stockholders in all other
corporations, and to provide that the charters of corporations
should be subject to the police power, the power of taxation and
the power of eminent domain.

Article 2 in our present constitution relates to suffrage and
election. The topic of suffrage has already been referred to.
There should be incorporated in the new constitution most of
the material on elections found at present in Article 2. Such
a section as Section 8 for example, which gives the General
Assembly power to deprive of the right of suffrage and to ren-
der ineligible for office any person convicted of an infamous
crime should be retained. The initiative and referendum have
been referred to in connection with legislation. The people
should also have the privilege of recall of officers and the consti-
tution should require the legislature to provide for the registra-
tion of voters (either as advocated by the League of Women
Voters or according to some other plan) and for primary elec-
tions. All of these new matters are in line with modern political
trend and operate as a check on bad government.

A new article which should be introduced in the new constitu-
tion is one on the qualifications for office of state officers and on
the appointment and removal of such officers. The present constitution prescribes qualifications only for attorneys and that is a qualification which has made Indiana a laughing-stock throughout the United States. The new constitution should prescribe high qualifications, not only for lawyers and judges, but for police and all the other officers of the state. Not the same requirement should be imposed upon all officers but the requirement should be appropriate to the office. The qualifications for judicial positions might well be a college education and a law school education. For all officers in the executive branch of the government, except the governor and the members of his cabinet (or heads of departments) the rule of civil service should be adopted.

Article 8 of our present constitution has some material on education and Article 9 some material on state institutions, but on these points it compares very unfavorably with the constitution of 1816. There should be some material on both of these topics but the material in our present constitution is wholly inadequate. For example, the educational institutions are not included in the list of state institutions and it is not clear whether Indiana University is a part of the public school system of Indiana or not. Indiana University was recognized by the constitution of 1816, but now it is only a statutory institution. The superintendent of public instruction should be appointed for life by the governor from a list nominated by the State Board of Education, whose constitution should be placed on a new basis.

Careful consideration should be given to the question of whether all our schools should not be placed under the jurisdiction of the state. The expense of education has reached a point when it can no longer be met by a property tax alone. Many other states are now diverting a part of excise or inheritance, or income taxes for school purposes. In Indiana schools must be supported in part or altogether in this way. Perhaps state administration should go along with support. This would be a sure way of abolishing the inexcusably inefficient and vicious township control and accomplishing needed consolidations and higher standards.

There should also be some material in the constitution on the maintenance of state highways.

Article 13 has one meager section on the subject of political and municipal corporations. Some well worked out material
upon the subject of municipal corporations and county government should be incorporated in the place thereof. There is no part of the constitution of Indiana which is in need of greater revision than that part which relates to local government, and probably there is no part of the constitution which it will be harder to revise so as to make it what it ought to be. City government in Indiana, as generally in the United States, is bad enough; but of all units of government county government is the most unprogressive and corrupt, and the most neglected by citizen, press and reformers. County government is really no government at all, but merely a political machine. Reform waves have made machine rule precarious in our city and state governments, but county government has not felt the shock of any of the waves of reform. Tricks which would not be tolerated in the modern city hall are still respectable in the county court house. The low estate of the county unit is only exceeded by the township. While Hoosier educators have been decrying lack of money to keep the state abreast of progress, it has been asserted by high authority that school funds have here and there been squandered in a way bordering on criminal racketeering; teachers' payrolls have been padded; fabulous prices have been paid for perfumed disinfectants for use on floors; costly reference books of doubtful value have been purchased; and relatives of trustees or political patrons have been hired to operate school busses for exorbitant wages. The last legislature decided to clean house and invested the state superintendent of public instruction with new powers to that end. This, however, is only a temporary make-shift. Some day the people of the state will have to face the question of doing away with the township as a basic unit of the educational system. Because of the lack of revenue in Indiana and because of the constitutional debt limit for political or municipal corporations, the problem of providing enough revenue to provide for necessary new school buildings and the rest of the educational program of the state is a vital problem in this state. The constitutional provision has been evaded by a judicial interpretation which will permit one taxing unit to be set up in the same political or municipal corporation, so that a school township can issue bonds up to the debt limit and the civil township do the same, but no permanent relief can be obtained through such evasions. Some relief can

37 See note 18.
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undoubtedly be obtained by a scientific means of obtaining revenue for the state, but more relief will have to be obtained through a reform in local government. The maintenance of obsolete forms of local government is costing Indiana citizens millions of wasted dollars annually. The state board of accounts uncovers this information and occasionally sends a local officer to prison, but it can not prevent unbusinesslike and bad management. It can not, for example, prevent county commissioners from purchasing worthless gravel at twice the price other commissioners are paying for good gravel. Yet on the whole, county commissioners are performing a better service than township trustees. If any officers have vindicated their abolition it is township trustees. Township trustees are constantly managing less mileage of roads but constantly at a higher cost. Township trustees are spending startling sums of money for poor relief. In one county it is said seven doctors were paid $83,000 for charity medical cases. A separate county government and several township governments within a city are unnecessary and expensive. In some states county and municipal government have been consolidated. The county especially is suffering from too many county officers. As said above, the county government is not a government. It is not a legislative government; it is not an executive government. So far as it is a government at all, it is a congeries of independent antagonistic administrative departments. In some counties, the office-holders still keep the fees. In Lake County, fees retained by some county officials amount annually to more than the salary of the president of the United States. The framers of the Indiana constitution, as well as those who framed other constitutions, evidently thought that the way to keep county government close to the people was by electing numerous officials so that one official would be a check on another. They did not foresee how all of these men would become cogs in a political machine which would be master of them all. The people in Indiana elect a county assessor, a township assessor, township trustee, justice of the peace, members of the township advisory board, and three or more constables, in addition to a clerk of court, an auditor, recorder, treasurer, sheriff, coroner, and surveyor, judge, and prosecutor. None of these officials are responsible to any one except possibly the political party. All of this array of officialdom thwarts good government. The people can not be
informed about so many candidates. This gives the slate makers and political bosses the opportunity which they desire.

What is needed in local government is not only home rule, but a reorganization of government so as to make home rule mean something. There should be local government only for the protection of local interests such as local safety, parks, zoning, water and gas and electric supply. For the protection of any social interests which are state wide, like transportation, education, health, charities, etc., the state government either should act directly or through an administrative unit or agency subject to the control of the state as principal. First and foremost should come the abolition of the township, and the making of the county the chief administrative unit of the state. Home rule should be provided by the cities of Indiana according to a city manager form of government. City home rule would stop the biennial march of the mayors of Indiana on the legislature. The present constitution of Indiana does not refer to municipal corporations, except for the debt limit provision in Article 13, but the Supreme Court has held that the phrase in Section 13 of Article 11, that corporations other than banking shall not be created by a special act, refers to municipal corporations; and that Section 23 of Article 4, requiring laws to be general and of uniform operation throughout the state applies to legislation in behalf of municipal corporations, in spite of the fact that every session of the legislature is passing all sorts of acts for municipal corporations, which seem to be special in fact and which have been held to be constitutional. Hence, it is so difficult to procure home rule for cities under the present constitution, that a new constitution is needed. The matter of county government is entirely omitted by our present constitution. The new constitution should make the county commissioners a true legislative body; and should concentrate in one head all the executive officers of the county, who should be given the authority to appoint all other county officers, except the auditor, who should be appointed by the county commissioners. In other words, the county government should be organized somewhat on the lines of the city manager form of city government, and the form of state government advocated herein, and the present government of the United States. These reforms would make

38 Longview v. Crawfordsville, 164 Ind. 117.
39 See note 6.
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local government, both city and county, effective government, and might make it possible to eliminate some of the rottenness which is now inherent in local politics.

Another topic which should receive careful consideration if a new constitution is to be adopted is the topic of taxation and finance. This topic is now Article 10 of the present constitution. This may not be the most important topic in our constitution, but it is probably the one with which the people of Indiana are most concerned and if a revision of our constitution comes to pass the demand for a revision of our scheme of taxation and finance will probably be more responsible for it than anything else.

Indiana's present plan for the raising of revenue is a system of tolerated dishonesty. Essentially it is a scheme of direct taxation; but one-half of the wealth of the state is forced to pay all of the direct taxes and the other half of the state's wealth is avoiding the payment of anything toward the support of local and state governments. Roughly, there is ten billion dollars of wealth in Indiana. A little more than one-half of this amount is on the tax duplicate. The rest of the wealth of the state is escaping taxation. The wealth escaping taxation is in the form of money, stocks and bonds, and other money credits. In Indiana, with the exception of automobilists, recently heavily taxed for state revenue, those who are carrying the tax load are the owners of farm lands, city lots, houses and buildings; but because of the exemption of public, church, fraternity and other property, the burden of the city lot owner is even greater than that of the farmer. The reason for this is partly the provision in our present constitution that "The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property both real and personal." In accordance with this mandate the legislature has prescribed that all property must be assessed at its true cash value. This provision did not work so badly at the time of its adoption, when most of the wealth of the state was in the form of land and corporal chattels, or tangibles. Since that time an enormous amount of the wealth of the state has gone into intangibles. Many men have large incomes but practically no property, visible or invisible. If the constitution and the legislature were obeyed, intangible property would have to be as-
sessed at its true cash value. The tax rate has increased until it is around four per cent. This rate would be confiscatory. As a consequence the large owners of intangible wealth fail to list it. It is useless to rail at them. They ought to list it, but they haven’t and they won’t. Apparently the tax officers are helpless. If intangibles were assessed at their true cash value and this rate of taxes collected, the wealth would not remain in the state. Possibly this fact may in some way affect the situation. The only hope if this form of taxation is desired seems to be a change in the constitution itself. It has been proposed to bring intangible wealth out of its hiding places by treating its value for taxation to be twenty-five per cent of its total value. Even if this proposal would have the result expected, it is doubtful whether it would be constitutional in Indiana. The proposal might escape the prohibitions of “just valuation,” “due process,” “equality” and “uniform and equal rate of taxation,” but it could not escape the prohibition of “uniform and equal rate of assessment.”

Efforts have been made in the past in Indiana to correct the situation. Governor Ralston championed a program of assessment of all forms of property at their true cash value with a lower tax rate on the theory that if this was done intangible wealth would come out from its hiding place. Governor Goodrich championed a system of excise taxes for the state’s income. Neither of these programs was adopted. It was seen that Governor Ralston’s program was too unsophisticated and the lobbyists killed Governor Goodrich’s scheme. The only result was the raising of the rate of assessment and the creation of a tax board whose main function has been to equalize the rate of assessment and to keep down local expenditures. This board could not prevent the increased cost of living, nor the demands for more revenue. It could only keep the expenditures at a minimum. So long as the people want more advanced education, better highways, and new airports, not to mention many other modern innovations, so long will the expense of government continue to increase. During the last five years the total cost of local and state government, paid for by direct taxation, has increased three million dollars a year in spite of the work of the tax board. It is impossible to decrease the tax burden. The state of Indiana must provide more revenue in some way. The only question is who shall carry this tax burden. Hence,
the great problem for the state of Indiana is to work out a tax program which will produce the necessary revenue and at the same time be fair to all the different classes of people in this state.

What would be an ideal system of taxation for the state of Indiana? It should be a scientific and modern tax program and one not in conflict with the tax program of the United States government. In the first place, the iniquitous and unjustifiable personal property tax should be forever abolished. This tax is proving and always will prove a failure. There is no scheme known to men whereby all the tangibles or any large part of the intangibles owned by very rich men can be made to pay direct taxes. All attempts to do so only produce a population of liars, rather than revenue. This situation should be faced and some indirect method of making this part of the wealth of the state contribute its share should be devised. A highly graduated inheritance tax would be the best step in this direction. A graduated income tax could be justified on the same grounds, and the constitution should give the legislature the power to pass a graduated income tax law; but because of the Federal income tax, unless the Federal government continues to reduce its income taxes, it might be wise for the state of Indiana to relinquish this form of taxation. Because of the usual exemptions, rates, and cost of collection, it could not be made a major revenue producer anyway. Income tax laws are found only in the states of Delaware, New Hampshire, Connecticut, New York, Massachusetts, Virginia, North Carolina, South Carolina, Missouri, Mississippi, Wisconsin, North Dakota, Montana, and Oklahoma. The main reliance of the state for its revenue should be upon excise taxes. The success of the gasoline tax is enough to show how easy it is to procure revenue in this way. The last session of the legislature made a meager attempt to extend this form of taxation and did pass an excise tax on foreign finance corporations\textsuperscript{40} and chain stores\textsuperscript{41}. In the form in which it was passed, the last tax may be unconstitutional. A general excise tax on foreign corporations not engaged in interstate commerce would produce a large revenue. An excise tax on tobacco, chewing gum, patent medicines, and other luxuries would produce more revenue than the state needs and nobody would feel the

\textsuperscript{40} Chap. 79, Laws 1929.
\textsuperscript{41} Chap. 207, Laws 1929.
There could be no opposition to these forms of taxes, except from certain special interests which might be affected. They also probably could be devised so as to make a good part of their burden fall upon those who are now the owners of the intangibles which are escaping taxation. At any rate, these taxes would not burden the people of the state of Indiana in the way that land taxes are now burdening them. Of course, the tax on land should be retained but the rate should not be high enough to make it burdensome and the revenue derived therefrom should be used for the payment of county and city governments. If this revenue were not sufficient it could be supplemented by some of the revenue derived from excise taxes. Other states have come much nearer than Indiana to attaining an ideal plan of taxation. While Indiana gets for both state and local purposes 93.5% of its revenue from a direct tax on property, Delaware gets only 55.9% of its revenue. Forty-five states get more revenue than does Indiana from other sources than direct taxes. Thirty-five of the states have special excise taxes on corporations, sales, luxuries, and business. If the constitution were first amended, intangibles could be classified separately, and taxed at a lower rate. Judging from the experience of Kentucky, such a revenue would bring a great deal of intangible wealth out of hiding and this plan of direct taxation would be better than the present plan. However, the writer thinks the plan would not be as good as the one advocated herein.

The article on taxation and finance should also contain provisions against special appropriations; against exemptions from taxation unless such exemptions are in favor of everyone; and against incurring public indebtedness; for a budget; and for state liability, for breaches of contracts, torts, and other legal wrongs, to the same extent that other legal entities are liable. The iniquities of special appropriations, tax exemptions for fraternities, etc., and public indebtedness are self-evident. The constitutional policy of prohibiting the state from incurring any indebtedness has resulted in a pay-as-you-go system so far as the state is concerned, except as it has bought armories, etc., on the installment plan; but the local subdivisions are not laboring under so stringent a prohibition and they have made up for any failure of the state to incur indebtedness so that the per capita indebtedness in Indiana is up to the average of other states. A budget has justified itself not only in private business
but also in public business. The old rule in regard to a state's non-liability is only a survival of the notion that a king could do no wrong. Modern thought and experience show that it is better for the social order to have the state liable for all of the wrongs of its servants the same as a corporation. The state can afford to pay for such injury better than the private individual who has received it, and it is better for the state to pay for it in this way than to pay for it in caring for the injured as public charges.42