2-1930

In Re: Proposed Constitutional Convention

James W. Noel

Noel, Hickman, Boyd & Armstrong

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the Constitutional Law Commons, and the Legal History Commons

Recommended Citation
Available at: http://www.repository.law.indiana.edu/ilj/vol5/iss5/3

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
IN RE: PROPOSED CONSTITUTIONAL CONVENTION

JAMES W. NOEL*

A constitution, in its political sense, is the fundamental or organic law or principle of government, of a nation, state, society or other organized body of men, embodied in written documents or implied in institutions or customs of the country. This is the best authoritative definition of a constitution sanctioned by jurists and statesmen. The British Constitution belongs to the class of customary or unwritten constitutions susceptible to modification by act of the Parliament. The Constitution of the United States and of the States of the Union are known as rigid constitutions and cannot be modified in their express terms, except by process ordained by the constitution itself. Both customary and written constitutions yield to gradual and essentially unconscious changes through the development of the law by the judiciary. The British Constitution retains, as an essential part, the ancient Bill of Rights, first formulated as principles, then afterward enacted into written law by the British Parliament. The reform act of 1832, enacted by the British Parliament is also considered an essential part of the British Constitution. Other than by these two outstanding enactments, the British Constitution has been maintained through the centuries with all the rigidity, and even more, that has characterized any written constitution, not even excepting the Constitution of the United States. Mr. Gladstone characterized it as “a subtle organism which has proceeded from progressive history.” Once formulated, the principles erected as the guaranty of British liberty have stood unchanged by wars, revolutions and changes of dynasty. Abuse and disregard of the most sacred of those principles have at times been violent, but they have been only temporary. The same principles of government and guaranty of rights have not always been exercised toward the colonies of the Empire, but the essential rights of Englishmen have been incorporated and maintained in that body of principles heretofore and now called the British Constitution. Judicial construc-

* See p. 396 for biographical note.

1 An address delivered before the Indiana State Bar Association, January 16, 1930.

373
tion has not impaired them. So jealously have these rights been guarded, so dominant have been those great principles once established, that the very integrity of the British character has kept them unimpaired as a component part of the life of the nation itself. Once secured and formulated as essential ingredients of English liberty, the Anglo-Saxon character has regarded it as superfluous and unnecessary to reduce the system to a written instrument and the British Constitution itself has suffered less of change, as it existed at the time of the American Revolution than has the written constitution of the United States or of any of the States, excepting possibly a few of the original thirteen States. It has been supported and maintained by a population whose racial mixture has been little changed since Magna Charter. The British character has not yielded to the influence of foreign immigration or the advent of Latin or other foreign populations. From such influences its National thought, its inherent conception of freedom and its traditional jealousy of individual rights have not suffered. Unwritten constitutions can be no more stable than the National character. The British National character has been inflexible.

British reform legislation and reform movements have taken place within the narrow limits of this unwritten constitution without apparently abandoning any of its historic principles. We are often cited to modern treatment of crime in England. We know that crime is there more certainly detected and more speedily and efficiently punished than in the United States and in the popular mind it is believed that this has been accomplished by dispensing with so called technical defenses resorted to in this country, based upon the Bill of Rights which is a part of every State Constitution. This is a popular fallacy. In every court in England the accused is given the benefit of every guaranty of liberty enumerated in the ancient Bill of Rights. If inefficient counsel does not assert them in favor of the defendant, the justice upon the bench does so zealously. No accused person in a British court can be required to testify against himself. The charges against him must be definite and certain. He is entitled to a Jury trial by an impartial tribunal. His failure to testify cannot be urged against him. The accusatorial method of trial has, in no sense, been superseded by the inquisitorial method of the Latin countries toward which there is so much thoughtless editorial appeal in the United States. And it is well
known that Scotland Yard does not employ "the third degree" with persons under suspicion, a practice tolerated in the United States, but entirely abhorrent to the traditional conception of Anglo-Saxon liberty.

The States of the Union, as colonies denied the protection of the British Constitution, invoked the written constitution as a definite compact and guaranty assuring their liberties against encroachment of arbitrary power. The United States Constitution being a grant of power was necessarily a written instrument because of the nature of the compact, but the States themselves deemed it obligatory to require a written definite declaration of principles and division of the powers of Government with the statement in no uncertain terms of restrictions upon such powers. So jealous were the people of the new States that there should be no failure of explicit definition of the rights of free men, that the State of Virginia refused to ratify the Constitution of the United States, excepting upon agreement that the first ten amendments constituting the Bill of Rights should be speedily adopted as amendments to the Federal Constitution. Some of the State constitutions were engrafted upon and copied in part after the grants to the colonies from the British Government. Others were formulated as new instruments in virile language made certain, specific and powerful by great men on fire with the passion for perpetual liberty, self government and order on this continent. The men who formulated these early constitutions were deeply versed in the philosophy and history of government. Prior to the Revolution, General Gage wrote back to the Prime Minister in London that more copies of Blackstone's Commentaries had been sold in the colonies than in all the remainder of British Dominion; that every man was a lawyer and familiar with the principles underlying government. The Declaration of Independence itself was the greatest declaration, as well as definition, of liberty and the rights of men then formulated. Ever since its adoption the statesmen and philosophers of the world have agreed that the Constitution of the United States was "the most wonderful work ever stricken off at a given time by the brain and purpose of man". These were all fresh in the minds of the people, together with all the discussion involving them. The Federalist papers written by Hamilton, Madison and Jay, had almost universal circulation in the new States and were then the greatest and soundest dis-
quisitions upon constitutional government that had ever been read at a Nation's fireside. In 1787 John Adams, while minister to England, wrote and published those three unanswerable volumes, "Defense of the American Constitutions" in which he reviewed for America, as well as for English readers, all the experiments in democratic government in recorded history. In these he so well answered and satisfied both foreign and domestic criticism of the character of our constitutions that no one of magnitude has ever had the temerity to propose an improvement upon the plan, the character, the assertion of rights, the distribution of powers and the constitutional restrictions which characterize not only the constitution of the United States, but the flock of new constitutions then being formulated by the new States. At this day it is necessary to make a search to secure those precious volumes outside of well established libraries. In the early days of our country, those volumes were familiar to the educated portion of the people of the United States.

The rigid constitution, besides being a safeguard against arbitrary encroachment and a direct result of the desire to perpetuate in explicit, definite form the principles for which the country had sacrificed so much in blood and effort, was necessary as a protection against the mighty influences foreseen by those wise men, soon to pervade American life. No immigration of different blood, traditions, customs or concepts of liberty could impair the power of that great statement of principles known as the British Constitution, but from the beginning America had become the asylum of the oppressed people of the European nations; the population even of the colonies was becoming influenced by immigration from the Latin countries and from other countries whose national and political ideals were different from those of Great Britian and of the original population of these colonies. Jefferson foresaw, in 1803, a tremendous migration that would march across the continent and purchased the Louisiana territory; and a few adventurous and idealistic spirits foresaw the march of Empire from the Atlantic to the Pacific between the 44th degree latitude and the Gulf of Mexico. It is apparent therefore, and goes without argument that a country such as the United States, with a heterogeneous population, excluding none but the Mongolians, must foresee that the ideals resulting from amalgamation of races may vary from time to time from the essential concepts of Anglo-Saxon liberty.
It could not be conceived that people coming from so many sources, combining themselves into a new race, could in the future, with any safety, be left free to expand or contract an unwritten constitution, as differing local, racial, commercial or religious influences might suggest, and yet make the experiment of democratic government successful and permanent. It was necessary that the States of the Union formulate rigid written constitutions to conform to the great ideals of the founders and to comport with the original notions of Anglo-Saxon liberty. So were the constitutions of the States made definite and certain. They were ordained as organic law, as a statement of fundamental principles of government for the States. Only upon such rigid definition and statement of rights, correct distribution of the powers of government, careful provision of checks and balances, loyal recognition of judicial authority and of the authority of the constitution as the Supreme law and by its terms made difficult of amendment could we depend for the success of this greatest experiment of all time in self government. (Note—Marbury v. Madison, had been decided in 1801.)

So, when the constitution of Indiana was formulated in 1816, it was written and adopted in nineteen days by a body of fifty delegates inspired by great ideals, influenced by the then new and modern philosophy expounded by the founders of our institutions. The leaders of those times who had adventured in the territory of Indiana were for the most part educated men. They were scholars in the history and philosophy of government. Their personal memory reached back into the atmosphere of the Revolution and of the great contests in our own country when the principles of constitutional government were first formulated in the Federal Constitution and the earlier State Constitutions. Through the one hundred fourteen years elapsed since then, we have devoted ourselves to the development of a great country in the firm belief that our liberties were established, that all we have to do is govern ourselves and become rich and powerful, forgetting that except for these great bulwarks of liberty, unconsciously enjoyed, every man must carry a sword and be surrounded by a band of armed retainers. Those great men were scarcely removed from the sound of battle and sight of blood out of which these great principles had been preserved to them. It was recognized that no government of a people given to temporary and transient tendencies could endure without a rigid
written constitution with such provisions for amendment as would require deliberation and difficulty in changing the organic law, the result of centuries of development.

It will be noted that the constitution of 1816 was copied almost entirely from the constitutions of Ohio and Kentucky, then recently adopted and nearly identical. The statement of rights and the distribution of powers were so well formulated and so well known that it only required nineteen days to formulate this constitution under which we lived without any amendment whatsoever until 1851.

So much for background. The late Lucius B. Swift's book, "How We Got our Liberties" should be read by every American, and particularly by every delegate to a Constitutional Convention. Ignorance of history begets lack of reverence for sacred things.

The makers of the Constitution of 1816 were the direct representatives of the people of Indiana, and were clothed with plenary powers subject to the limitations that the new Constitution should be republican in form, should not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence and that the Convention should accept all the terms of the Enabling Act. The work was well done and responded to the spirit of the times. The instrument provided for the submission to the people on every twelfth year of the question as to the calling of a constitutional convention. No such convention was held until the year 1850. Notwithstanding frequent agitations for amendment, no amendments to this Constitution were made until the general revision made in the convention held in 1850.

It was well suited to the needs of an American state. The chief abuse under it was the passage of special and local legislation, of which there were more than 600 instances in the legislative session of 1847. Indeed, special legislation for a long time engaged fully three-fourths of the time of the General Assembly, and lobbyists for special acts largely controlled general legislation by trading and "log rolling". Most vigorous demands for amendment began in 1846, when citizens, newspapers and public meetings proposed more than fifty amendments, many of them afterwards ignored. Among the principal propositions seriously considered were the following:

A proposal for biennial sessions of the legislature; abolition
of associate judgeships; appointment of associate judges and justices of the peace; remodeling of the judiciary with adequate compensation for judges; the creation of probate courts; the delegation of local legislation to local authorities; abolition of local or special legislation; prohibiting legislative divorces; fixing the membership of the House and Senate at different numbers; fixing the age of representatives and senators; fixing legislative sessions at six weeks and the compensation of members at $2.00 per day; different proposals as to the Governor’s term of office; providing that all fines should be applied to the support of common schools instead of county seminaries; prohibiting the creation of any state debt except in case of war or invasion and subject to other various limitations; prohibiting the renewal or creation of any charter for banks; abolition of the poll tax; election of all judges and state officers; establishment of a system of free common schools; the restriction of suffrage to white males who were actual residents; the abolition of licenses for trades and professions; prohibiting imprisonment for debt in any form; fixing the amount of exemption from execution; prohibiting the passage of all relief laws; guaranteeing to females the absolute control of their own property; changing the time of general elections from August to October; placing restraints upon the growth of monied monopolies, and numerous other suggestions.

Notwithstanding the numerous suggestions as to the change of a then very scientific and satisfactory organic law, Governor Whitcomb, in recommending a convention, stressed only the great evil of local or special legislation, recommending the prohibition of legislation of a local and private character and making it the duty of the legislature to confer the requisite powers upon local boards or functionaries. He further recommended that sessions of the legislature be held biennially, rather than annually; also that there be prohibited the creation of any public debt except under restrictions as to amount and object.

It would appear that except for the dominant sentiment against local and special legislation, the Constitution of 1816 might have gone many additional years without revision or amendment. The great majority of the people seemed well satisfied with their organic law. There was the constantly expressed fear that general revision might result in evils greater than any then endured. There was the constantly expressed question, “Where is the security against extremes?”
Some of the merits of that Constitution are outstanding. The legislature retained the sovereign power of taxation without any embarrassing restrictions; there was a short ballot; the Supreme Court and other important judges were appointive, and otherwise the departments of the sovereign government suffered less from restriction than at present. But following the election of President Jackson, a new political slogan had been adopted by both parties, and public offices became classed as spoils. Therefore, elective public offices ought to be increased and as a political measure favored by both parties, under the guise of an inducement to immigration, the franchise was offered to aliens who had been here for one year and had declared intentions. There were editorial expressions, certainly applicable in the forties, as to "the lamentable state of public mind" asserted against both those favoring and those objecting to a constitutional convention.

The convention was called in October of 1850 and adjourned in February of 1851, after 127 days of labor. Contrast this with the 19 days of labor required for the production of the first constitution. The business of restriction and amendment became a craze, with astounding proposals and contentions expressed by newspapers, individuals, organized societies and politicians. There seemed to be chaos of thought and expression upon the subject. Innumerable requests were made for changes, and altogether 333 resolutions were proposed to the convention by delegates and were acted upon. If adopted, they were submitted to the appropriate committees. These resolutions all proposed changes in or additions to the then existing constitution. The resolutions were with respect to a large variety of subjects:— As to rights and privileges of citizens, 42; as to suffrage, tenure of office and removal, 50; as to administration of justice and the judiciary, 47; as to corporations, banking institutions and finance, 40; as to the executive department, 11; as to the legislative department, 49; as to schools and education, 18; as to negroes, 7; as to methods of amending the Constitution, 4; as to intoxicating liquors, 3; as to the militia, 3; and a large number of miscellaneous and nondescript provisions. Fifty-two petitions by the people, mostly with respect to slavery, the prohibition or regulation of intoxicating liquors, the poll tax, banking and the rights of married women were referred to committees by the convention. The convention which the leaders had sup-
posed was called to correct a few major evils, was immediately assaulted, petitioned and abused with respect to a myriad of proposed changes emanating from the people.

The convention of 1850-51 fortunately included in its membership a large number of learned men who were conspicuous for their knowledge of constitutional law, of our own institutions and of social science and who possessed a wide range of learning. Except for the outstanding character of the leaders in that convention, our present Constitution might have been a monstrosity of strange proportions.

Notable among those leaders were Judge Pettit, Robert Dale Owen, Thomas A. Hendricks, Judge Biddle, William S. Holman, David Wallace, Schuyler Colfax, Alvin P. Hovey and Bright, Badger and George Whitfield Carr, who was President of the convention. William H. English, himself a scholar and historian, was Secretary. We quote from Governor Ralston's message to the legislature of 1917:

"An Indiana historian has said that 'No more important body of men ever assembled in the State of Indiana than that which met in the hall of representatives in the old state capitol in Indianapolis, October 7, 1850, to revise the constitution of the state.' The statement might have gone further without transcending the truth and have declared that no abler body of men than these ever assembled in this state. Their work lives after them and will long be recognized as a memorial to their superior wisdom."

Upon the major points of prohibition of special and local legislation, of restriction upon bonded debt and provision for the common school system, the new instrument was an improvement, but in other respects it was far from an improvement, and it is out of these errors there comes now an insistent demand for revision or amendment. First, a short ballot was changed into a long ballot, for a greater number of constitutional offices were created and made elective. Second, the suffrage was extended to aliens by a measure satisfactory to spoils-men. Third, the judiciary was made entirely elective, whereas the Supreme Court and the presiding judges of the circuits were theretofore appointive. Fourth, the sovereign power of taxation which was unlimited in the first Constitution, was restricted by the so-called uniform provision for assessment and taxation in our present Constitution, which practically all the citizens of Indiana agree should be changed. In these respects, however, the delegates yielded to a then loud demand for re-
vision. Upon these points we now have a popular demand for revision and for a restoration of substantially the original provisions of the 1816 Constitution.

The Constitution was submitted to the people and ratified by a large majority; the negro colonization provisions were also submitted separately and approved by the people. The new Constitution also delegated to political subdivisions and to municipal corporations a proper degree of self government. Under seventy-eight years of that Constitution Indiana has progressed and developed to its present status. The increase in elective offices has contributed to make the state a hot-bed of political activity, the candidates for all elective offices constituting in a greater or less degree the nucleus of political organizations or so-called "machines." The Bill of Rights, however, has been maintained, respected and enforced, although lack of good administration and the over-zealousness of attorneys for defendants have sometimes prostituted those sacred rights to the disadvantage of society. By legislative enactment under the Constitution, property has been made secure, vested rights protected and corporate activity more or less encouraged until by the Act of 1929 the General Corporation Act provided a model law with proper restrictions and safeguards which will invite to the State of Indiana much capital which will add to its wealth and industrial, commercial and agricultural development.

This Constitution has been subjected to much agitation but has been but little amended. After twenty-six years, the Wabash and Erie Canal amendment was adopted. In 1881, seven amendments were adopted, conforming the Constitution to the new status of the negro race, changing the general election from October to November, providing that official salaries might be graded according to population and service, providing a constitutional two per cent debt limit, and striking out the word "inferior" as applied to courts other than the Supreme Court; and in 1921 there was adopted the Women's Suffrage amendment.

So now, the organic law of the state known as our Constitution, constitutes a very proper declaration of principles, an entirely correct apportionment of powers to the three departments of government and contains orderly provisions placing restrictions upon and checks and balances against the exercise of such powers, which for seventy-eight years have received such wealth
of judicial construction as have given them a definite, certain and well understood meaning to lawyers and citizens alike. Indeed, this Constitution, notwithstanding its defects, has been so satisfactory to the citizens of the State that they have been indifferent, except in the aforementioned cases, to proposed amendments to the organic law and have failed to interest themselves in amendments heretofore proposed which seemed of vital importance to the proponents thereof.

Particularly within the first fifteen years of the present century, there were insistent proposals for change. On the part of certain organized groups there existed much radicalism and many proposals were made with respect to labor, and capital, monopolies, the control of railroads and public utilities, restraint upon the power of injunction, the initiative and referendum, the recall, and charges in the provision respecting taxation. Particularly, from the years 1905 to 1915, there was insistent agitation upon those subjects for constitutional change.

Going back to 1880, and the years following, even Governors recommended the calling of a convention, sometimes the retiring governor favoring and the incoming governor opposing a convention in messages delivered in the first week of the same session. Many of these proposals required, and have since been solved by, legislation enacted within the general power residing in the legislature. The complaints as to the necessity for change in our system of taxation, with respect to the substitution of a short ballot for our long ballot, and with respect to the organization of the judiciary, have not and can not be met by legislation within the terms of the present Constitution. But the history of the period from 1880 to the present has demonstrated that most of the relief sought by amendment was possible through legislation, without constitutional change, and such has been accomplished.

The writer will give one illustration of the futility of introducing into the organic law provisions which are purely legislative and which arise only from transient conditions and a temporary state of public mind. In 1907 the new State of Oklahoma adopted a constitution of nearly four times the length of the present Indiana Constitution and nearly eight times the length of our Constitution of 1816. This Constitution was adopted in a new state which had drawn upon the best blood and best educated forces of the remainder of the Nation. Oklahoma was
young but not primitive. Its lawyers were men of learning and experience. Justice Day once, commenting upon the ability of western lawyers, said that if the Supreme Court of the United States were not previously to acquaint themselves with the venue from which an appeal proceeded, they would not be able to tell from the ability, character and forcefulness of the lawyers there making argument whether the advocates were from Oklahoma or from Massachusetts. In 1907 the atmosphere was full of theories and vagaries with respect to the control of monopolies, restraint upon corporations, limitations upon injunctive relief from the courts, and with respect to socialistic propaganda then new and some of it seriously considered by even the conservative portion of the American people. That convention committed the error of enacting into constitutional provisions much that was in its nature purely legislative. Instead of limiting the Constitution to a declaration of principles, it devoted more than half its pages to pure legislation. (1) It made a constitutional provision in detail for the initiative and referendum with respect to all legislation, going so far as to provide for the enactment of laws and amendments to the Constitution without consulting the legislature at all. It further made the primary permanent and mandatory in all elections. (2) It provided that the legislature might repeal corporate charters and thus destroy vested rights, and that no corporation then doing business in Oklahoma could claim the benefit of any future legislation without accepting that provision of the Constitution. (3) It enacted the Federal Clayton Act in almost identical words as a part of its organic law. The Economic changes and commercial necessities of the nation have rendered its predecessor, the Sherman Law, obsolete—and further economic development has minimized the value of the Clayton Act, but it is a part of the organic law of Oklahoma which cannot be easily changed. (4) It provided in great detail for a Railroad and Public Service Commission covering the entire ground of the Indiana legislation on these subjects. (5) It defined the jurisdiction of the inferior courts with such great particularity that changes in the volume of business of that growing state and the allocation of great populations to different points, render the constitutional provision often inapplicable and inoperative, to the great embarrassment of the administration of justice. It contained many other provisions of a purely legislative character, concern-
ing which the public mind was then at white heat, which are either now obsolete or embarrassing and of great detriment to the state, the public mind having changed after a period of delirium.

Instead of shortening the ballot, it provided for the election as constitutional officers of a commissioner of labor, of an insurance commissioner, of a chief mine inspector, of a commissioner of charities and correction, and other unimportant officers, in addition to the usual state offices.

The state of Oklahoma was no exception. The constitution of California, revised within the same period, contains much that is purely legislative, necessarily transient in character and must be revised out of the organic law of California before the respective powers of government may be exercised as sovereign powers within their legitimate spheres. The state of Ohio has done little better, carrying into its new and recent constitution much of a purely legislative character and abrogating to communities and to cities many powers that logically inhere in the state itself. There is no time for further illustration of the evil committed by practically every constitutional convention in this new century in enacting into permanent form as a part of the organic law, where it does not belong, much transiens legislation with no place in any proper declaration of principles or distribution of the powers of government.

During all this recent period of ferment, the state of Indiana has resisted any attempts at amendment excepting that with respect to suffrage. Notwithstanding the futile agitation for such constitutional amendments, the state of Indiana has provided by legislation all of the means for regulation of railroads and public utilities that ought to be provided in order to meet even extreme views upon that subject. Through legislation, its regulation of banking is modern and satisfactory. Its restrictions upon domestic and foreign corporations have been more than sufficient to satisfy even those prejudiced against that form of industrial and commercial activity. Its Criminal Code is modern and complete, and the legislature has the power to make any changes in procedure that may expedite justice without trespassing upon the inalienable rights of men as guaranteed by the Bill of Rights. The legislature and courts together have entire power to revise criminal procedure, trial and appellate, so as to dispense justice with all the alacrity and efficiency
practiced in England, within the terms of that sacred declaration of rights; and the property rights of married women, made the subject of a great contest by Robert Dale Owen in our last convention, were settled to his satisfaction by act of the legislature introduced by himself.

The process of securing amendments is slow and difficult. It ought to be slow and difficult. The underlying principles of our government have developed through centuries. Our theories as to the distribution of powers in a republican form of government were not new when our constitutions were adopted. They have received the approval of civilized men. The checks, balances and restraints imposed by our present constitution upon the exercise of executive, legislative and judicial power have been so well construed by the courts that their meaning is well and certainly established, and all men may know the law in those respects.

The Decalogue is more than 4,000 years old, yet what changes have been seriously proposed through all the centuries of theological discussion? It stands as the expression of great principles and as an announcement of fundamental rules of conduct which all men accept.

Statutes and not constitutions should yield by quick and easy change to the demands of temporary states of mind, which by experience are transient with a few years or a few decades at most in their application to problems that arise with change in population, change in racial ideals and characteristics, change in economic situations and in the superficial thought and discussion of a people now given more to superficial discussion than to erudite learning. It is argued that seventy-eight years of experience and growth have qualified us to make intelligent changes in our organic law. Even centuries do not change eternal principles. Our period of statehood has seen no change in the theory or character of republican government as established on this continent. The inalienable rights of men, in theory at least, have not been diminished. The great advances in invention, in commerce and in industry have neither changed the principles of philosophy nor the inherent aspirations and qualities of men. It is therefore beside the point to urge that because of the elapse of 78 years a body of delegates, who can not possibly measure up in philosophical learning to the founders of our republic and of our original constitutions,
should attempt to revise the instrument as a whole, running the risk of the misstatement of important principles, of disturbing settled judicial construction by ill-considered changes in verbiage and of disturbing the political organization of the state as now organized and operated.

It has been said recently by those advancing the demand for revision that the Bill of Rights is so imbedded in the public mind and heart that it will not be disturbed. On the contrary, we have insistent demand that the accused be required either to testify at his trial or have his failure to do so taken against him, an outrageous trespass upon the principle many centuries old that under the Anglo-Saxon system of accusatorial rather than inquisitorial trials, he shall not be required to testify against himself. There is insistent editorial demand in general terms that the so-called technicalities asserted in the defense of the accused shall be dispensed with by constitutional or legislative enactment. There is insistent demand that the search and seizure section be modified in violation of all of our sacred traditions and charters. They know not what they do. There is insistent demand, editorial and otherwise, that trial by jury as known to the common law, be impaired and changed, in violation of historic precedent. Those advocating a revision of the constitution in convention in order to accomplish three or four changes much to be desired, should beware that an effort at general revision does not result in a constitution so obnoxious that they will be obliged to vote against it if it is submitted to the people.

It must be remembered that it is the office of statutes to respond to a transient state of the public mind. A constitution can never respond to transient demands and remain properly the organic law. The insistent demands since 1851 for sound legislation, truly legislative in character, have been met. The restriction upon the sovereign power of taxation, which should have been left to the legislature without restriction, provides now the greatest moving cause for amendment. The lesson should be obvious.

Who now desires the initiative and referendum, the recall, the mandatory primary, provisions against monopolies, or requirements for arbitration of labor disputes carried into the constitution as rigid, permanent parts of the organic law? Yet in 1914 the proponents of a constitutional convention dissemi-
nated much literature in favor of such proposals. Such literature demanded a provision in the constitution against relief by injunction in labor disputes, seeking to cripple the arm of the court of equity, which through all time has been the resort of the weak and oppressed. New provisions were demanded respecting "labor and social justice." A budget system, now so well accomplished through legislation, was demanded as a constitutional requirement. Especial provision was demanded in the organic law for the commission or city manager plan of city government, perfectly feasible through legislation. There was a considerable demand for an amendment providing home rule for cities. It was demanded that the constitution prohibit different taxing districts occupying the same territory, so as to put an absolute limit of two per cent upon all bonded indebtedness. The abolition of capital punishment was urged. The things demanded were largely legislative in character and the passion for most of them has passed. In 1914 a large part of the population, irrespective of political party, was demanded and requiring a constitutional provision making the primary a permanent institution. An insistent demand was made that the constitution provide for the recall of officials. There was demand of some magnitude for regulation of the coal industry within the constitution itself. Such regulation has been upheld as a proper exercise of the police power, but the wrongs have yielded to economic law and such regulation was not properly the subject either of constitutional provision or even of legislation excepting in case of great temporary emergency. But while many vagaries have evaporated, new ones are in misty formulation.

In 1916 the legislature proposed, and ratified in 1918, an amendment providing that the legislature should have power to classify property for the purpose of taxation, and further should have power to collect an income tax. These proposed amendments were debated in this body similarly to the present debate. The amendment proposing to classify property for the purpose of taxation was opposed by a lawyer, who announced that the power of taxation should not be left to red legislatures without the present restriction requiring uniformity. Manufacturers' associations, merchants' associations and industrialists generally, frightened and enraged by a vision of the red flag of anarchy, opposed and defeated this provision which is now the
subject of almost universal demand in Indiana. How transient and unstable is the American mind! There can be no better argument for rigid permanency in our organic law and for the present provisions for amendment, which require that amendment be slow, deliberate and well considered.

If the demand for an amendment is not sufficiently strong to withstand four or five years of consideration; if such demand is not persistent enough to make itself felt during two consecutive sessions of the legislature and to keep itself alive for the referendum to the people, then such change or amendment to the organic law ought not be made. The very feebleness and lack of power displayed in the numerous and unsuccessful attempts to amend the present constitution argue that it is not sorely in need of amendment. If the large majority of the people are satisfied with their organic law as it now is, then it should not be revised at the instigation of enthusiasts; individuals with noble or ignoble theories, political inventors of plans of doubtful and untried value should not be permitted to gather together in a constitutional convention to revise a fundamental law of which they know little, for the sole purpose of planting permanently in our body politic a few strange organisms which may properly be the subject of legislative experiment, but never the subject of constitutional experiment. I do not discount the noble aspirations and admirable ambition of devoted men who seek the public good, many of them unselfish and actuated by purposes beyond criticism. I may, and do, doubt their judgment and urge with all my power that the field of experimentation be confined to legislative hall and to the Hustings. The best considered judgment of Indiana lawyers and citizens is that our present constitution ought to be amended in a few important particulars. So thought Governor Whitcomb when he made his recommendations in 1848. However, the call for the convention was followed by a maelstrom of intelligent and unintelligent demand for change in the organic law.

When our Legislature provided for the referendum in 1914 with respect to the calling of a convention, it was deemed by the Legislature that the constitution ought to be amended in a few important particulars. The Citizens' League of Indiana and numerous other organizations prepared and compiled literature proposing so many radical and desperately necessary changes that a stranger who had not read our present constitution would
easily have come to the conclusion that we had no constitution at all. It is quite possible that the people of Indiana entertained wholesome fear of such proposed radical changes and that such fears were the motive which, in the public mind, defeated the convention proposed in 1914.

Let us learn from the past—from the remote, as well as the immediate past. The soundest exponents of a constitutional revision by convention admit that half a dozen organic changes would satisfy the requirements of business, the progress of industry and the necessity for better protection of society against crime. It may be safe to prophesy that immediately upon the determination of the people to call a convention, proposed changes and amendments will appear by the thousand. They will cover a wide range of subjects. The enthusiastic proponents of them will organize with others of like purpose to elect delegates to the convention who will be active advocates of unsound theories. The session would necessarily be a long session. It would require leadership and learning of the highest order to lead the state through a maelstrom of discussion and proposal, relating, for the most part, to matters of purely legislative character but in a large part to changes in our organic law utterly abhorrent to our established institutions. In the election of delegates there would be campaigning and organization on the part of political leaders and organizations in both parties to defeat the short ballot. County officers' organizations, trustees' societies, public utility groups, labor unions and farmers' organizations would provide hot contests for the election of representatives to their convention. If delegates half way comparable in character, dignity and learning to those of the convention of 1850 should be selected, it would be nothing short of a miracle. Such miracle will not happen. It is with much regret that I say that the bar of the present day, while much more efficient in their special lines than the bar of 1850, and particularly in comparison with the bar of Indiana in 1894 when the writer came to the bar, has abandoned the ambition for learning and for scholastic attainment. The graceful accomplishments and fine learning which ornamented and dignified the bar of the "nineties" is a thing of the past. The present bar has adapted itself proficiently to the demands of industry, finance, corporate organization and management, and in those respects is more learned than ever before in the history of the world, but the
bar has forgotten the fundamentals underlying liberty and vested rights. It has devoted more time to the study of the law of Delaware corporations than it has to the reading of the Federalist, of Benjamin Franklin's great treatises upon government and John Adams' great discussions of our constitutions. A lawyer who should now before our Supreme Court deliver such orations upon liberty and the fundamentals underlying self government as were given before the Supreme Court of the United States in the early days by William Wirt, John Randolph and Daniel Webster would find his audience leaving him with disgust, would face a court half asleep and uninterested and would find that in the decision of his cause his great pronouncements had been uninfluential.

So, if a constitution be decided upon, we may expect delegates of entirely different character from those who enacted our former constitutions with a view to perpetuating American liberty and guaranteeing forever an unadulterated form of republican government.

Let us consider the soundest suggestions from authoritative sources as to proposed changes:

First. The court should be the judge of law in criminal trials. This change is theoretically sound. The members of this bar and the judges here present know better than any other group of men to what extent the present requirement really influences verdicts. It is my experience and observation that the only value in such change would be to give more liberty to the court in the way of peremptory instruction.

Second. Lawyers should have other qualifications than good moral character. To this proposed change the electorate of Indiana has been indifferent. It is theoretically important to the bar itself. Its practical importance would not seem so great. The lawyers of our bar compare well in ability, dignity and character with the bar of those states making rigid requirements for admission.

Third. The judicial system should be reorganized and changed so as to provide longer tenure of office and to make judicial officers largely, if not entirely, appointive. In the present state of the public mind it would seem that this could be accomplished by one well drawn amendment.

Fourth. The Legislature should be free to exercise the sovereign power of taxation without the present constitutional re-
restrictions, and possibly should be given explicit power to provide and collect an income tax. There seems to be an almost universal sentiment on the part of our people that such change should be made, a complete reversal of the attitude of business and the electorate as expressed in 1918. This can be accomplished by one very simple amendment.

Fifth. Changes should be made which would result in a short ballot instead of the present long ballot, thus increasing the responsibilities and appointive power of the executive and at the same time simplifying elections. This could be accomplished by a small number of simple amendments.

The last change suggested I prophesy will be futile as to attainment. A short ballot would be secured only in the face of the most vigorous opposition from political organizations and other influences dependent very largely upon mutual obligations and support derived from a large number of candidates and resulting patronage from a large number of elected officers, and there would be most vigorous opposition from present incumbents.

Sixth. The proposed change as to classification for the registration of voters might be convenient, but is not at all essential. The registration law recently repealed worked an inconvenience and caused expense, but the inconvenience and expense were not at all in proportion to the great benefits realized, and such amendment is not highly necessary to a reliable registration.

Seventh. It is proposed that the township be abolished. This would indeed constitute a fundamental change, not to be made lightly. The beginnings of self-government were in the town meetings. From thence came the highest expressions of liberty. The township evolved as the local unit, not only interested in local self government, but it constituted the local contact first with the colonial government and afterwards with the state and nation. By legislation, township government and township control can be so limited so as to avoid many objections as to duplications and uselessness, but the township should by all means be retained as the local unit for self expression of the community as well as for control of its intimate local interests. This one landmark should be preserved in the great movement for centralization.

Eighth. Identical county and city government for large cities may be highly desirable. If sufficiently so it can be accomplished by one amendment to the constitution.
Ninth. The insistent demand for home rule for the larger cities ought possibly to be submitted by way of a proposed amendment. However, there are grave objections to such proposed change. If the population of the state were and should continue to be truly Anglo-Saxon it might be safe to accord home rule to cities. It would be fraught with danger to our settled theories of government, to our established concepts of the proper local regulation of society to accord home rule in the state of Indiana to a city which might in the future contain more of foreign population than might be found in the metropolis of the foreign country from which they came. Those who favor home rule for cities should ponder long upon such possibility, for constitutions are made for centuries and not for decades.

Tenth. Thoughtless men are urging that amendment of organic law be made more easy and quick. Thoughtful men will see serious danger in quick response in the organic law to the white heat of temporary political or social delirium.

To conclude, the few changes which are important to the commonwealth may be made by a series of brief amendments with less expense and in practically the same length of time as such changes might be made by way of revision and without the serious evils certain to result from wholesale revision. This can be accomplished if the people wholeheartedly want amendments. They can be submitted at a special election which would omit from calculation those who are indifferent or so well satisfied with our present organic law as not to attend the polls. If there is not wholehearted support for such changes on the part of the people of Indiana sufficient for the adoption of the amendments, they should not be adopted at all.

By submission separately, the people may decide which they desire and which they oppose. If objectionable changes are submitted in a proposed constitution as one unit, then the whole must fail or serious error be endured.

Present and potential candidates for delegates to such convention, private interests, enthusiasts who advocate proposals and agitators for change may bring about a convention. In such case this bar should prepare to exert itself not only in favor of the election of qualified delegates, but to help crystalize the numerous proposals and formulate them into sound statement, consistent with a place in the organic law, and present a solid
front against encroachment upon our Bill of Rights and the sacred traditions of our people. Then, as never before in our generation, will a solemn duty devolve upon the members of this bar. Such service will be as highly patriotic and as vitally important as the service of those who have borne arms and endured battle in support of our present institutions.

I would stress the value of settled construction of an instrument 78 years old. I would urge its value to personal rights and to property rights. It expedites the settlement of disputes and makes more easy and more speedy the administration of justice. Settled construction of fundamental law is necessary to officials required to construe the law in order to perform their duties efficiently. It is necessary in order to properly finance the activities of the state and to obtain credit necessary for refunding present debts and providing funds for progress. It avoids the necessity for friendly suits or contested suits necessary to be carried to the courts of highest resort in order to construe new verbiage and new provisions. We cannot overestimate the disturbance and inconvenience which would arise to the state of Indiana in case of wholesale revision of our organic law, even if we should by vigilance protect ourselves against vital loss of inherent right, dignity and the best traditions of the race.
The complete management of the Indiana Law Journal is exercised by The Indiana State Bar Association through its officers. The Editor, Editorial Boards and other officers of The Journal are appointed by the President of The Indiana State Bar Association with the advice and approval of the Board of Managers. The Indiana State Bar Association founded the Indiana Law Journal and retains full responsibility and control in its publication. The participation of Indiana University School of Law is editorial.

OFFICERS AND BOARD OF DIRECTORS OF THE INDIANA STATE BAR ASSOCIATION

JAMES M. OGDEN, President .......................... Indianapolis
W W MILLER, Vice-President .......................... Gary
JOEL A. BAKER, Secretary-Treasurer ............... Indianapolis

1st District
Henry B. Walker, Evansville
2nd District
Wm. H. Hill, Vincennes
3rd District
Wm. H. Brooks, Bedford
4th District
Frank N. Richman, Columbus
5th District
John M. Fitzgerald, Terre Haute
6th District
Wm. C. Yarling, Shelbyville
7th District
Fred C. Gause, Indianapolis

8th District
Alonzo L. Nichols, Winchester
9th District
Franklin D. Davidson, Crawfordsville
10th District
Addison K. Sills, Lafayette
11th District
Milo N. Feightner, Huntington
12th District
Phil M. McNagney, Fort Wayne
13th District
Robert E. Proctor, Elkhart

WALTER E. TREANOR, Editor
JOEL A. BAKER, Business Manager

Faculty Board of Editors
PAUL V. MCNUTT, Chairman

Milo J. Bowman .......................... James J. Robinson
Robert C. Brown .......................... Paul L. Sayre
Alfred Evans ................................ Walter E. Treanor
Bernard C. Gavit .......................... Hugh E. Willis
Vincent P Harper ..........................

Student Board of Editors
THEODORE R. DANN, Chairman

John A. Barr ................................ Russell C. Hanna
Robert R. David ............................ Joseph V Heffernan
Harold N. Fields ............................ Joseph K. Miles
Thomas H. Finn ............................ James W. Sutton
John S. Grimes ............................ Charles W. White

Albert W Ewbank

The Indiana State Bar Association does not assume collective responsibility for matter signed or unsigned in this issue.