

THE MARSHALL CONSTITUTION AND THE JURISPRUDENCE OF ARTICLE 16

RYAN T. SCHWIER*

INTRODUCTION

On the afternoon of Friday, July 5, 1912, Indiana Governor Thomas Marshall “waited in his executive offices almost a half hour later than usual.”¹ Reports had circulated throughout the Statehouse that day that the Indiana Supreme Court would hand down its decision in the highly anticipated case of *Ellingham v. Dye*.² After nearly a year and a half of political wrangling, litigation, and appeals, the Court would soon decide the question of whether state constitutional reform by statute and referendum was “a valid exercise of legislative power by the General Assembly.”³

To most modern observers, resolution of this controversy may seem evident. Under the state’s fundamental law, article 16 provides a straightforward, albeit cumbersome, method of constitutional reform: For any proposed amendment, section 1 requires a majority approval from members of the General Assembly at two successive legislative sessions before submission to the people of the state for a vote.⁴ A majority of voters in favor of ratification then results in constitutional amendment.⁵

Yet a closer reading of the document reveals a different, if not more suitable, provision for realizing organic change. Under article 1, section 1,

all power is inherent in the PEOPLE; and . . . all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well being. For the advancement of these ends, the PEOPLE have, at all times, an indefeasible right to alter and reform their government.⁶

If the Indiana Bill of Rights vests directly in the people an “indefeasible right to alter and reform their government,” then what need is there for a prescribed

* Law Clerk to the Honorable Mark S. Massa. J.D. (2016), Indiana University Robert H. McKinney School of Law; M.A. History (2012), Indiana University–Indianapolis; M.L.S. (2004), Indiana University–Indianapolis; B.A. (2001), Indiana University–Bloomington. This article has its genesis in a case note prepared in the fall of 2014 for Professor Frank Sullivan, Jr.’s course on Law and the Administration of Justice. It was a privilege to have studied under the guidance of such an outstanding scholar and I am grateful for his support in my academic endeavors. I am also honored by the support and encouragement of Justice Massa, Justice Geoffrey Slaughter, Jessica Hughes, and Alexandria Hanauer Pittman.

1. *Supreme Court Holds Constitution Act Void*, INDIANAPOLIS STAR, July 6, 1912, at 1 [hereinafter *Constitution Act Void*].

2. 99 N.E. 1 (Ind. 1912).

3. *Id.* at 2.

4. IND. CONST. art. 16, § 1 (amended 1998).

5. *Id.*

6. IND. CONST. art. 1, § 1 (amended 1984).

mechanism of constitutional change? Is strict adherence to formal method a necessary prerequisite for amendment? Or may extra-textual means suffice to accomplish these ends?⁷

Ellingham v. Dye resolved the tension between these competing theories of constitutional reform. This article illuminates that story and the role it played in shaping the Indiana Constitutional experience. To that end, part one discusses the history of debate over amending state constitutions in the context of evolving national developments. Part two, in turn, examines Indiana's attempt to legislate constitutional reform and the reasons behind the efforts of those advocating extra-legal change to the state's fundamental law. Part three summarizes the *Ellingham* decision and surveys subsequent developments in the law. Finally, the article concludes with an assessment of this history and the implications it carries for Hoosiers today.

I. THE EXPERIMENT OF STATE CONSTITUTIONAL REFORM: FROM REVOLUTION TO DELIBERATION

State constitution making during the early national period was an experimental process. In wrestling with the idea of a written fundamental law beyond the reach of ordinary legislation, the fledgling states—those laboratories of democracy—debated not only the scope of a constitution's substantive rights, but also its procedural mechanisms—drafting, adoption, ratification, and amendment—to carry those rights into effect.⁸

Central to these early debates was the question of how to fashion a document as an adequately stable yet dynamic body of fundamental law. Should a constitution be easy or difficult to amend? Was it necessary to follow a formal, established procedure? Or should the will of the people dictate the proper method?⁹

Following the American Revolution, most of the original thirteen states rewrote their fundamental charters, premising their authority on the theory of a social contract and the revolutionary principles articulated in the Declaration of Independence.¹⁰ “Whenever any Form of Government becomes destructive of these Ends,” Thomas Jefferson declared, echoing the contemporary Lockean rhetoric, “it is the Right of the People to alter or abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect [sic] their Safety and Happiness.”¹¹

To be sure, Jefferson cautioned that “Governments long established should

7. See James W. Torke, *Assessing the Ackerman and Amar Theses: Notes on Extratextual Constitutional Change*, 4 WIDENER J. PUB. L. 229, 259 (1994).

8. ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 87-88 (2009).

9. *Id.* at 88.

10. JOHN R. VILE, *THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT* 24 (1992).

11. *Id.* (quoting Thomas Jefferson).

not be changed for light and transient Causes.”¹² But most states carried forth his revolutionary credo, incorporating the principles of self-governance and popular consent into their new constitutions, which typically lacked a discrete method for amendment.¹³ These principles—often found in a constitution’s preamble or declaration of rights—reflected the natural rights philosophy of the late-eighteenth century.¹⁴ But as constitutional scholar John Vile points out, these principles also threatened to undermine the authority of existing governments and “did little to distinguish fundamental constitutional change from ordinary legal change.”¹⁵ “Compounding this problem,” Vile adds, “was the fact that some early state constitutions . . . had no firmer grounding than the will of the legislature that happened to adopt them.”¹⁶

During the early nineteenth century, extra-legal reform methods remained a vital component of state constitutional development, although not without controversy. Many states—including Connecticut, Massachusetts, New York, Virginia, Pennsylvania, and North Carolina—encountered strong political disunity over constitutional reform, where proponents of “law and order” clashed with activist factions embracing the doctrines of popular sovereignty and self-governance.¹⁷ This political quarreling came to a head in 1842 with the famous Dorr Rebellion in Rhode Island, where the state constitution—a colonial-era relic lacking an express provision for amendment—contained strict limitations on voting rights.¹⁸ When reformists failed to induce change through the existing government, they adopted their own “People’s Constitution” and organized a new, populist government led by Thomas Dorr.¹⁹ The incumbent government reacted swiftly to this threat, charging Dorr and others with treason.²⁰

12. *Id.*

13. *Id.* Only six of the original eleven state constitutions—Delaware, Georgia, Maryland, Massachusetts, Pennsylvania, and South Carolina—expressly provided for constitutional amendment (Connecticut and Rhode Island carried forth their colonial charters). Torke, *supra* note 7, at 260 n.158. The other five state constitutions contained no amending provision beyond the standard alter-or-abolish clause. *Id.* at 260. The 1777 New York Constitution, for example, vested in the “people” the right to “alter or abolish” any form of “destructive” government, “and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect [sic] their safety and happiness.” 5 FRANCES NEWTON THORPE, *FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* 2626 (1909).

14. VILE, *supra* note 10, at 24.

15. *Id.* at 25.

16. *Id.*

17. WILLIAMS, *supra* note 8, at 88-89.

18. *Luther v. Borden*, 48 U.S. (7 How.) 1, 35 (1849).

19. John S. Schuchman, *The Political Background of the Political-Question Doctrine: The Judges and the Dorr War*, 16 AM. J. LEGAL HIST. 111, 115 (1972).

20. Torke, *supra* note 7, at 265-66.

Compromise eventually led to a new state constitution (with more liberal voting rights), but not before armed insurrection threatened bloodshed.²¹

While the Dorr Rebellion marked an important chapter for defenders of popular sovereignty and direct democracy in America, the episode ultimately signaled the victory for orderly, institutional authority.²² After the Rhode Island Supreme Court declared the People's Constitution void, the question of whether the federal government might recognize a *de facto* state government found its way to the nation's highest tribunal.²³ But the U.S. Supreme Court, in *Luther v. Borden*, declined to answer that question.²⁴ The Guarantee Clause of the U.S. Constitution, Chief Justice Roger Taney concluded, empowered Congress, not the judiciary, "to decide what government is the established one in a State."²⁵ By invoking the political-question doctrine, the Court effectively repudiated the people's right to alter their government by revolutionary means.²⁶

By the early twentieth century, most states had formalized their procedural mechanisms for constitutional amendment, preferring this "safety-valve" approach to the revolutionary—and potentially violent—methods of reform. But the difficulty with the amending process remained a frequent source of debate. Social and political reformists of the Progressive Era—while encouraging measured change through judicial interpretation and executive action—lobbied vigorously to liberalize the "slow and cumbersome" process of amendment.²⁷

II. THE MARSHALL CONSTITUTION

On January 5, 1911, Governor Marshall convened the opening session of the sixty-seventh General Assembly. In addressing his audience, the governor stood before several new faces. Elections the previous year had given the Democrats a majority in both houses for the first time since 1892.²⁸ Following brief introductory remarks, Marshall pointed to "certain provisions of our Constitution which do not meet present conditions."²⁹ While having "met in nearly every particular our wants and needs," he acknowledged, the sixty-year old document contained "certain clauses which might be changed with value to good

21. *Id.* at 266.

22. *Id.*

23. *Luther*, 48 U.S. (7 How.) 1.

24. *Id.* at 40. The case involved a civil trespass action brought by Martin Luther, a Dorrite, against a state militiaman who tried to arrest him when Rhode Island was under martial law following the rebellion. *Id.* at 34.

25. *Id.* at 40. Article IV, Section 4 of the United States Constitution "guarantee[s] to every State in this Union a Republican Form of Government," with the United States bound to "protect each of them against Invasion [and] against domestic Violence." U.S. CONST. art. IV, § 4.

26. *Luther*, 48 U.S. (7 How.) at 40.

27. VILE, *supra* note 10, at 139 (quoting WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 242 (1913)).

28. JUSTIN E. WALSH, CENTENNIAL HISTORY OF THE INDIANA GENERAL ASSEMBLY, 1816-1978, at 331 (1987).

29. H. JOURNAL, 67th Gen. Assemb., Reg. Sess. 18 (Ind. 1911).

government.”³⁰ The problem, he asserted, was “that while an amendment is awaiting the action of the electors, no additional amendment shall be proposed.”³¹ At the time, article 16, section 2 prohibited the submission of a proposed amendment pending approval of the second, consecutive General Assembly or a majority of voters.³²

Marshall considered it imprudent “[t]o elaborate on this condition of affairs” in light of other pressing issues before the legislature.³³ However, “[s]hould disposition of these matters be made in time for proper consideration of these constitutional questions,” he concluded, “it is not improbable that I shall again address you upon them.”³⁴

The governor’s cryptic remarks were, in the words of one Indiana historian, “a poor indication of the legislative firestorm he would soon unleash.”³⁵ Marshall had not made constitutional reform a part of his campaign platform for the 1910 election. But only six short weeks after his legislative address, “the General Assembly was in full partisan cry over not just a few amendments or a call for a full-fledged constitutional convention, but an entirely new Indiana Constitution.”³⁶

On February 14, Governor Marshall announced that the Democratic joint caucus had approved a plan of submitting legislation to amend the state’s fundamental law.³⁷ The following day, Senator Evan Stotsenburg introduced Senate Bill 407, providing “for an act to submit to the voters of the State of Indiana . . . a new constitution.”³⁸

Needless to say, the attempt to legislate constitutional change proved highly controversial. Republicans from both houses of the General Assembly attacked the measure as “makeshift and subterfuge,”³⁹ a “usurpation of power bordering on anarchy,”⁴⁰ “contrary to precedents and usage,”⁴¹ “un-American, undemocratic,”⁴² and “revolutionary.”⁴³ The resounding condemnation from this

30. *Id.* at 18-19.

31. *Id.* at 19.

32. IND. CONST. art. 16, § 2 (amended 1966).

33. IND. H. JOURNAL, 67th Gen. Assemb., Reg. Sess. at 20.

34. *Id.*

35. Ray Boomhower, “*To Secure Honest Elections*”: Jacob Piatt Dunn, Jr., and the Reform of Indiana’s Ballot, 90 IND. MAG. HIST. 311, 311-12 (1994).

36. *Id.*

37. WALSH, *supra* note 28, at 331-32.

38. S. JOURNAL, 67th Gen. Assemb., Reg. Sess. 1099 (Ind. 1911).

39. *Id.* at 1482 (Sen. Edgar Durre).

40. IND. H. JOURNAL, 67th Gen. Assemb., Reg. Sess. at 1758.

41. *Id.* at 1482.

42. *Id.* at 1759 (Rep. Vermont Finley).

43. *Id.* at 1482 (Sen. Kimmel). Protests from members of the House came with a force even greater than in the Senate. A total of thirty-eight representatives invoked Article 4, Section 26 of the Indiana Constitution, lodging formal objections covering nearly twenty pages of the House

side of the political aisle, however, failed to prevent Democratic forces from moving forward. On Monday afternoon, February 27, the Senate passed the bill by a vote of twenty-nine to twenty-one.⁴⁴ On Thursday of that week, after a third reading in the House, the bill passed by a comfortable margin of sixty to thirty-nine.⁴⁵ The following day, Governor Marshall signed the bill into law.⁴⁶

On first impression, the scathing Republican portrayal of these extra-legal methods of constitutional reform seems justified. After all, the proposed measure clearly circumscribed the procedural apparatus of article 16. Yet the counter-narrative to Republican commentary reveals something less than political “subterfuge.” What the Republicans deemed “subversive” or “revolutionary,” the Democrats (or a majority of them) saw a practical measure to implement much-needed reform in the state’s fundamental law. Several provisions in the document had become outdated and attempts at amendment had met with repeated failure, not necessarily because of partisan politics, but from a combination of factors: article 16’s formidable amendatory process, the lack of provision for calling a constitutional convention, and strict judicial interpretation of the ratification clause.⁴⁷

The interpretation of article 16 by the courts had proved especially burdensome for those advocating constitutional reform. What, precisely, constituted “a majority of the electors” for purposes of ratification?⁴⁸ In 1880, the Indiana Supreme Court, in *State v. Swift*, decided that a constitutional amendment must pass by a majority of the electorate as a whole, not just a majority of those voting on the amendment.⁴⁹ And because a mere plurality of affirmative votes meant neither the ratification nor the rejection of a proposed amendment, the Court concluded that such a proposal stood pending before the voters.⁵⁰ These “zombie” amendments, if you will—neither fully dead nor fully alive—created further obstacles: so long as they remained in their suspended state, “awaiting the action of a succeeding General Assembly, or of the electors,” article 16, section 2 prevented legislators from introducing new ones.⁵¹ Lawmakers could resubmit these zombie amendments at a subsequent election, but the usual practice was to remove them by legislative act to open the door for other proposals.⁵² Of course, this latter process forced legislators to start the article 16 process anew.

The ratification question arose again several years later when lawmakers sought to repeal section 21 of article 7, the constitutional provision entitling

Journal. *Id.* at 1753-71.

44. *Id.* at 1485-86.

45. *Id.* 1751-52.

46. *Id.*

47. WALSH, *supra* note 28, at 329.

48. IND. CONST. art. 16, § 1 (amended 1998).

49. *State v. Swift*, 69 Ind. 505, 525-26 (1880).

50. *Id.* at 526.

51. IND. CONST. art. 16, § 2 (amended 1966).

52. WILLIAM P. McLAUCHLAN, THE INDIANA STATE CONSTITUTION 22 (G. Alan Tarr ed., 2011).

“[e]very person of good moral character, being a voter” to practice law in the State.⁵³ In 1897, the General Assembly adopted an amendment that would allow it to establish rigorous standards for admission to the state bar.⁵⁴ After the proposed amendment passed the second, consecutive legislative session—as required by article 16, section 1—the question was then presented to voters at the general election on November 6, 1900.⁵⁵ Over 650,000 Indiana residents cast their vote for governor that day.⁵⁶ The “Lawyer’s Amendment” received just over 240,000 votes in favor of ratification, and just over 144,000 against.⁵⁷ As a result, the Marion County Circuit Court—proceeding under the assumption that the amendment had been adopted—established new rules for the admission of bar candidates and appointed a board of examiners.⁵⁸

When an applicant by the name of George Denny failed to meet the new standards by refusing to sit for the prescribed examination, he appealed.⁵⁹ The circuit court upheld the board’s decision denying Denny’s admission to practice.⁶⁰ But on appeal, the Indiana Supreme Court reversed.⁶¹ In *In re Denny*, the Court, upholding the *Swift* precedent, concluded that the amendment had failed ratification for receiving a mere plurality—rather than the required absolute majority—of all votes cast at the general election, which totaled over 650,000.⁶² “It seems unnatural,” the Court reasoned, “that the indifference of the many should be a positive element in effecting an organic change desired by the few.”⁶³

Because the proposed Lawyer’s Amendment had neither been approved nor rejected, article 16, section 2 prohibited further amendment proposals pending the action of a succeeding General Assembly.⁶⁴ Between 1901 and 1909, legislators readopted the amendment at each session, and resubmitted the proposal for ratification in 1906 and 1910.⁶⁵ Each time, the amendment failed under the *Denny* rule.⁶⁶ As one historian aptly observed, “between the letter of the Constitution and judicial interpretations of what it meant, amendment of the state’s fundamental law was a practical impossibility.”⁶⁷

53. IND. CONST. art. 7, § 21 (repealed 1932).

54. S. Hugh Dillin, *The Origin and Development of the Indiana Bar Examination*, 30 IND. L. REV. 391, 392 (1997).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *In re Denny*, 59 N.E. 359, 360 (Ind. 1901).

61. *Id.* at 366.

62. Dillin, *supra* note 54, at 392.

63. *In re Denny*, 59 N.E. at 360-61.

64. *See* IND. CONST. art. 16, § 2 (amended 1966).

65. Dillin, *supra* note 54, at 392-93.

66. Boomhower, *supra* note 35, at 331.

67. WALSH, *supra* note 28, at 329.

Seeking to penetrate this constitutional impasse, Governor Marshall turned to a small circle of advisors, relying predominantly on the work of lawyer, historian, and Democratic lobbyist, Jacob Piatt Dunn.⁶⁸ Dunn's scheme to circumvent the amendatory process and state supreme court rulings represented a brilliant display of creative lawyering: while the legislature, under article 16, had no authority to propose an amendment, the constitution, he submitted, contained no restrictions on adopting an entirely new fundamental law.⁶⁹ Absent this constraint, Dunn argued, the basis for creating a new constitution arose from the people's "indefeasible right to alter and reform their government" and "[t]he legislative authority . . . vested in the General Assembly."⁷⁰

Dunn also had the benefit of precedent, at least in part.⁷¹ Article VIII of the Indiana Constitution of 1816 provided that every twelve years the electorate, with the approval of the General Assembly, would decide on whether to call a convention.⁷² But the constitution did not specify whether electors could vote at more frequent intervals. Despite the persistent opposition of a Whig minority, the Democrat-controlled General Assembly—premising its authority on article I, section 2 of the 1816 Constitution—submitted the question five times between 1823 and 1849 (with proposals made even more frequently).⁷³ Delegates to the 1850-51 Convention recognized this procedural variance but defended their actions on the absence of the constitution's express prohibition on revising the state's fundamental law.⁷⁴

For Marshall, Dunn, and their supporters, the revised—or "new"—constitution merely reflected long-standing principles of direct democracy in Indiana. Among other things, the enacted measure granted the legislature authority to set bar admission standards; increased the number of Indiana Supreme Court judges from five to as many as eleven; enlarged the House of Representatives from 100 to 130 members; extended the regular legislative session from 60 to 100 days; authorized the General Assembly to enact workers' compensation laws; empowered the state, "in case of necessity," to take personal property without first assessing and tendering compensation; required a three-fifths vote by the House and Senate to override a governor's veto; provided the governor with line-item veto authority on appropriations bills;

68. *Id.* at 331.

69. J.P. Dunn, *The Proposed Legislative Constitution of Indiana*, 8 PROC. AM. POL. SCI. ASS'N 43, 44 (1911).

70. *Id.* See also Boomhower, *supra* note 35, at 332-33.

71. See Boomhower, *supra* note 35, at 333.

72. IND. CONST. of 1816, art. VIII.

73. McLAUCHLAN, *supra* note 52, at 6-7; Dunn, *supra* note 69, at 46. The 1816 Constitution's Bill of Rights provided "[t]hat all power is inherent in the people; and all free Governments are founded on their authority, and instituted for their peace, safety and happiness." IND. CONST. of 1816, art. I, § 2. Accordingly, "they have at all times an unalienable and indefeasible right to alter or reform their Government in such manner as they may think proper." *Id.*

74. Dunn, *supra* note 69, at 46.

prohibited salary increases for public officials during their elected terms; authorized the adoption of laws providing for the initiative, referendum, and recall of state and local officials, except judges; and imposed strict residency, poll tax, and language requirements on voters.⁷⁵

Of course, the measure also simplified the procedure for amending the constitution.⁷⁶ For any proposed amendment, the new article 16 required approval from a *single* General Assembly before submission to voters.⁷⁷ And ratification called for a simple majority of those “voting on such amendment” (rather than a majority of all votes cast at the general election).⁷⁸ The absence of a majority vote would constructively defeat the proposed amendment.⁷⁹ Finally, article 16 expressly provided for a constitutional convention, so long as a majority of voters ratified an act of the legislature calling for such a measure.⁸⁰

Beyond the unavailing protests of a dissenting political minority, the only obstacle to adopting the new “Marshall Constitution” was the general election slated for Tuesday, November 5, 1912. Such an illusion would be short lived.

III. *ELLINGHAM V. DYE* AND THE JURISPRUDENCE OF ARTICLE 16

A. Procedural History

On May 1, 1911, John Dye—a prominent Indianapolis attorney and former president of the Indiana State Bar Association—filed suit in the Marion Circuit Court for himself and on behalf of “all the electors and . . . taxpayers in the State of Indiana.”⁸¹ The complaint sought to enjoin the election board—comprised of Governor Marshall, Secretary of State Lew Ellingham, and others—from certifying the measure to voters at the general election.⁸² Among other things, Dye argued (1) that the General Assembly lacked the authority to prepare and submit to the electorate a new constitution, and (2) that the method of submission violated constitutionally-prescribed procedures.⁸³

The trial court agreed and, on September 24, declared the act invalid, enjoining the Secretary of State from certifying the proposed constitution to

75. Act of Mar. 4, 1911, ch. 118, 1911 Ind. Laws 205. *See also* 2 CHARLES KETTLEBOROUGH, CONSTITUTION MAKING IN INDIANA 387-88 (1916); WALSH, *supra* note 28, at 334-35.

76. Act of Mar. 4, 1911, ch. 118, 1911 Ind. Laws 205.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Complaint at 4, *Ellingham v. Dye*, 99 N.E. 1 (Ind. 1912) (No. 22,064) (on file with the Indiana State Archives). I am indebted to the Indiana State Archives for locating this case file, which had likely sat undisturbed for close to a century among the records from the Indiana Supreme Court.

82. *Id.*

83. *Id.* at 8, 11-12, 16.

voters at the general election.⁸⁴ The method established under article 16, Judge Charles Remster opined, “would seem to operate as a prohibition against proposing many amendments in the form of an entire new constitution.”⁸⁵

Ellingham, Marshall, and the remaining Board of Election Commissioners appealed directly to the Indiana Supreme Court.⁸⁶ In their brief, the appellants argued that (1) Dye lacked standing since the costs involved were “too trifling” and “speculative to establish irreparable injury”; (2) the court had no jurisdiction over the executive or legislative branches of government; (3) the General Assembly possessed sole authority to “initiate, prepare and submit a new constitution to the people in such form and manner” as it deemed proper; and (4) because it was “a new constitution and not a series of amendments,” the act did not violate article 16 of the Indiana Constitution.⁸⁷

On Wednesday, April 24, counsel for both sides presented oral arguments before the Indiana Supreme Court. “The courtroom at the State House,” the *Indianapolis Star* reported, “was filled with many interested persons throughout the six-hour session.”⁸⁸ Counsel for the appellants, “made the first plea before the court,” basing much of their argument on the “extraordinary powers of the Legislature.”⁸⁹

Attorneys for Ellingham and Marshall had good reason to emphasize legislative authority and separation-of-powers doctrine. The court’s political complexion had recently changed. Following the general election of 1910, Indiana Democrats enjoyed a majority not only in both houses of the General Assembly, but also on the state’s highest bench.⁹⁰ With only two Republican

84. See Brief for Appellee at 36, *Ellingham v. Dye*, 99 N.E. 1 (No. 22,064) (on file with the Indiana State Archives). See also *Constitution Act Void*, *supra* note 1, at 1.

85. Brief for Appellee, *supra* note 84, at 36.

86. Transcript of Proceedings, *Ellingham*, 99 N.E. 1 (No. 22,064) (on file with the Indiana State Archives).

87. Appellants’ Brief at 80, 83, 87, 92-93, *Ellingham*, 99 N.E. 1 (No. 22,064) (on file with the Indiana State Archives).

88. *Pleas Are Heard in Charter Case*, INDIANAPOLIS STAR, Apr. 24, 1912, at 16. Contemporary rules of court limited oral argument “to some definite time, not exceeding two hours (to be equally divided between the parties) except in cases in which counsel shall request and secure in advance of the argument a longer time.” IND. SUPREME COURT, RULES OF THE SUPREME COURT OF INDIANA IN FORCE FROM AND AFTER THE FIRST DAY OF THE MAY TERM, 1889 (1889). Appellants requested “not less than two days’ time for oral argument,” considering “the importance, magnitude and number of issues involved in said cause,” and because it would have been “impossible to intelligently argue the same . . . within the time ordinarily allowed under rule 27.” Transcript of Proceedings, *Ellingham*, 99 N.E. 1 (No. 22,064) (on file with the Indiana State Archives). The Court granted the petition, but allowed only three hours for each side. *Id.*

89. *Pleas Are Heard in Charter Case*, *supra* note 88, at 16.

90. *Ruling Expected in Charter Case Before June 30*, INDIANAPOLIS STAR, May 12, 1912, at 33. The 1851 Constitution originally provided for the popular election of judges. This process remained in place until 1972, when a constitutional amendment, adopted two years prior, eliminated the direct election of judges at the appellate level. Under the amendment, Indiana now

judges sitting among a court of five, the prospect of judicial deference to the legislative branch seemed inevitable.⁹¹

B. The Decision

The certainty with which Democrats expected a ruling in their favor collapsed when, on July 5, 1912, the Indiana Supreme Court upheld the trial court's decision by a narrow one-vote margin. Judge Charles E. Cox—the sole Democrat to cross party lines—wrote for the majority in concluding that “[t]he presence of [article 16] fights against the contention that the general grant of legislative authority bears . . . any power to formulate and submit proposed organic law[,] whether in the form of an entire and complete instrument . . . or single amendment.”⁹² Rather, he declared, constitutional revision is the product of specific “modes pointed out or sanctioned by the legislative authority.”⁹³ “Constitutions do not change with the varying tides of public opinion and desire,” Judge Cox reasoned, “the will of the people . . . is the same inflexible law until changed by their own deliberative action.”⁹⁴ And as an “exercise of power by the people for the general good,” the judge concluded, reform must yield to the “restraints of law.”⁹⁵

Turning to the question of jurisdiction, the majority acknowledged the “principle that each department of the government is independent when acting within the sphere of its powers.”⁹⁶ However, this did not preclude as justiciable the governor's acts in his ministerial (rather than executive) capacity with the board of election commissioners. And since the proposed constitution “was passed in the form of and in accordance with the prescribed rules of ordinary enactments,” the measure was “subject to interpretation and construction of the courts.”⁹⁷

Finally, on the issue of standing, the majority concluded that the “small proportionate” cost of the election to Dye as a taxpayer was “not of itself

uses a merit selection process, often referred to as the “Missouri Plan,” for choosing appellate court judges. *See* IND. CONST. art. 7, §§ 9-11 (amended 1970). Proponents of this nonpartisan court plan sought to eliminate perceived abuses and weaknesses in other methods of judicial selection. Edward W. Najam, Jr., *Merit Selection in Indiana: The Foundation for a Fair and Impartial Appellate Judiciary*, 46 IND. L. REV. 15 (2013).

91. In fact, Indiana courts during this period did little to interfere with legislative prerogative: “The judiciary’s influence on law during these decades came largely as confirmation of the changes wrought by legislative action.” David J. Bodenhamer & Randall T. Shepard, *The Narratives and Counternarratives of Indiana Legal History*, 101 IND. MAG. HIST. 348, 361 (2005).

92. *Ellingham v. Dye*, 99 N.E. 1, 8 (Ind. 1912).

93. *Id.* at 7.

94. *Id.* at 13 (quoting *People ex rel. Bay City v. State Treasurer*, 23 Mich. 499, 506 (1871)).

95. *Id.* at 7.

96. *Id.* at 23.

97. *Id.* at 27.

sufficient to destroy his competency to sue.”⁹⁸

In dissent, Judge Douglas Morris, with whom Judge John Spencer concurred, considered the legislative measure a “purely political” question, “one over which the courts have no jurisdiction.”⁹⁹ Judge Morris denounced as “illusory” the idea that, “in performing a duty under the election laws[,] the Governor is merely acting as a member of the election board.”¹⁰⁰ Because “[t]he Constitution prohibits the Governor from holding any other office,” he opined, the court lacked the authority to restrain the act of an executive.¹⁰¹ And while acknowledging that “a taxpayer may, by a suit in equity, enjoin the unlawful levy of a municipal tax, or . . . expenditure of public funds,” Judge Morris concluded that the nominal expense of a general election—borne largely by the state and county treasuries—conferred no entitlement to relief.¹⁰²

When Governor Marshall received news of the court’s decision late that afternoon, he made “no indication of disappointment or displeasure.”¹⁰³ “I have no right to discuss or criticise an action of the Indiana Supreme Court,” he remarked, for “[t]hat body is part of the state government and it is not incumbent upon me to criticise its actions.”¹⁰⁴ Rather than publicly condemn the decision, Marshall petitioned the U.S. Supreme Court, alleging denial of a “republican form of government” for the people of Indiana in violation of Article IV, Section 4 of the federal Constitution.¹⁰⁵ The Court, however, denied the petition, finding “no justiciable controversy” over a political question reserved for Congress.¹⁰⁶

C. Post-Ellingham Developments

For several years following the decision in *Ellingham*, efforts at constitutional reform in Indiana continued to flounder. In 1913, Democrats—resolute in accomplishing what they had intended two years prior—passed twenty-two separate measures (labeled the “Stotsenburg amendments”) incorporating most of the recently-defeated Marshall Constitution.¹⁰⁷ With Democratic losses in the General Assembly in 1914, however, the effort failed, ultimately signaling the

98. *Id.* at 29.

99. *Id.* at 36.

100. *Id.* at 33.

101. *Id.*

102. *Id.* at 36-37.

103. *Constitution Act Void*, *supra* note 1, at 1.

104. *Id.*

105. *Marshall v. Dye*, 231 U.S. 250, 256 (1913).

106. *Id.* Ironically, perhaps, the judicial defeat of the “Marshall Constitution” catapulted the political career of Marshall himself. The national media attention over his campaign for constitutional reform portrayed him as a model statesman of the Progressive Era, leading to his vice-presidential nomination at the 1912 Democratic National Convention and, ultimately, two-term tenure of office under President Woodrow Wilson. *See Boomhower*, *supra* note 35, at 342; *Walsh*, *supra* note 28, at 334.

107. CLIFTON J. PHILLIPS, *INDIANA IN TRANSITION, 1880-1920: THE EMERGENCE OF AN INDUSTRIAL COMMONWEALTH* 120 (1968).

death of Indiana's most famous constitution that never was.¹⁰⁸

But as constitutional reformists suffered defeat at the legislative level, they seemed to have found a newly-receptive audience in the state judiciary. In 1913, the Indiana Supreme Court, in *In re Boswell*, once again considered the Lawyer's Amendment, which (once again) had failed ratification for receiving a mere plurality of votes despite its legislative approval.¹⁰⁹ Following the *Swift* and *Denny* precedent, Judge Charles Cox, for the Court, "refused to bend constitutional provisions by construction to serve convenience."¹¹⁰ However, the Court went on to decide that a proposed amendment *not* ratified by a majority of voters was rejected and automatically removed from further consideration unless reintroduced by the legislature. In so holding, the Court cleared the way "for the proposal of such amendments to the Constitution as the General Assembly may feel that the people demand."¹¹¹ Indeed, the case marked the beginning of a subtle, albeit important, shift in the jurisprudence of article 16.

Four years later, the Court opened yet another door to prospective constitutional reform. In *Bennett v. Jackson*, the Court considered whether the General Assembly, absent the approval of voters, could enact legislation calling for a constitutional convention.¹¹² Legislators had, in fact, submitted the question to voters at the 1914 general election. But the electorate voted against the proposal. Interpreting that vote as "the last expression of the people of the state on the question of calling a constitutional convention," the Court—invoking section 1 of the Indiana Bill of Rights—declared the act devoid of "commission from the people" and thus invalid.¹¹³ But the opinion went further. While recognizing the lack of express constitutional authority, the Court, citing "universal custom," recognized the convention as a proper means of amending the state's fundamental law.¹¹⁴

Despite the questionable authority on which it rested,¹¹⁵ the *Bennett* decision revitalized the efforts of constitutional reformists. Indeed, the prospect of a systematic and comprehensive revision of the state's fundamental law, rather than the piecemeal method of amendment under article 16, generated vigorous debate

108. *Id.* at 119-20.

109. *In re Boswell*, 100 N.E. 833, 834-35 (Ind. 1913).

110. *Id.* at 835.

111. *Id.*

112. *Bennett v. Jackson*, 116 N.E. 921, 923 (Ind. 1917).

113. *Id.*

114. *Bennett*, 116 N.E. at 923. Framers of the 1851 Indiana Constitution expressly considered, but ultimately rejected, the convention as a means of amending the state's fundamental law. 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1913 (1850) [hereinafter 2 DEBATES AND PROCEEDINGS].

115. See Thomas Raeburn White, *Amendment and Revision of State Constitutions*, 100 U. PA. L. REV. 1132, 1137-38 (1952) (concluding that the court's opinion was "based mainly upon what it erroneously thought was a universal custom").

in the ensuing years.¹¹⁶ But when the opportunity presented itself on the 1930 ballot, a proposed constitutional convention failed to garner the necessary public support.¹¹⁷

Undeterred, advocates of reform shifted their attention back to the courts. And in 1935, their efforts paid off. In *In re Todd*, the Indiana Supreme Court finally upheld the Lawyer's Amendment on the grounds that a plurality of votes constituted ratification.¹¹⁸ In reversing over fifty years of precedent, the Court recognized two fundamental policies: (1) restraint in "the making of hasty and inadequately considered changes" to the constitution, and (2) preservation of the popular vote in the ratification or rejection of a proposed amendment.¹¹⁹ The former policy, the Court noted, is intrinsic to article 16's procedural mechanism for proposed amendments.¹²⁰ As for the latter policy, the Court found no violation in leaving the decision to those actively exercising the right to vote. "Progress in popular government," the Court reasoned, "should not be at the mercy of those who have no interest in the problems of government."¹²¹

CONCLUSION: THE MIDDLE GROUND OF CONSTITUTIONAL REFORM

By abandoning its strict interpretation of article 16's ratification clause, the Indiana Supreme Court removed "the greatest obstruction to the amendability of the Constitution of Indiana."¹²² And yet, despite the Court's philosophical shift, the piecemeal approach under article 16 has left much to be desired. In 1950, as the state constitution approached its centennial, a new wave of reformers sought to revitalize what they saw as an outdated document that failed to adapt to shifting social conditions.¹²³ Naturally, one of the primary obstacles to modernization, according to commentators at the time, was the amendment process under article 16—that "doorway to change."¹²⁴ Aside from generating academic discussion, however, the renewed calls for amending the amendment process fell short of their objective.

Even today, article 16 remains the primary obstacle to constitutional change.¹²⁵ Consistent efforts at reform—on issues as diverse as a balanced

116. McLAUCHLAN, *supra* note 52, at 28-29. See also Albert Stump, *Indiana Should Call a Constitutional Convention*, 5 IND. L.J. 354 (1930); James W. Noel, *In Re: Proposed Constitutional Convention*, 5 IND. L.J. 373 (1930).

117. McLAUCHLAN, *supra* note 52, at 28-29.

118. *In re Todd*, 193 N.E. 865, 875 (Ind. 1935).

119. *Id.* at 879-80.

120. *Id.* at 867.

121. *Id.* at 880.

122. Carl Chattin, *In re Todd and Constitutional Amendment*, 10 IND. L.J. 510, 510 (1935).

123. See Louis E. Lambert & E.B. McPheron, *Modernizing Indiana's Constitution*, 26 IND. L.J. 185 (1951).

124. *Id.* at 187, 190. ("The least that might be done would be to rewrite [Article 16] so as to clearly state the requirement that ratification must have the approval of a majority vote on the question and to expressly state the procedure for calling a convention.").

125. The article's original language remains largely intact. Amendments to Section 1 in 1998

budget,¹²⁶ judicial application of foreign law,¹²⁷ and the election of health care coverage,¹²⁸ to name a few—continue to mark the political record. But beyond the major revisions of 1970—a watershed year, to be sure, in the modern evolution of Indiana’s fundamental law—change remains sporadic.¹²⁹

So, where does this leave Hoosiers today? What legacy does Indiana’s constitutional experience impart for the state’s civic-minded citizens? On one hand, the comparative dearth of amendments to Indiana’s fundamental law exhibits a level of political stability found in few other states’ constitutional history.¹³⁰ On the other hand, as we have seen, the cumbersome process of initiating change under article 16 can result in constitutional inertia when change is needed most.¹³¹

This paucity of reform, for better or for worse, was intentional by design and reflects Indiana’s conservative constitutional values.¹³² Framers of the 1851

resulted in the simplification of certain terms. Amendments to Section 2, in 1966, removed restrictions on further amendment proposals pending the action of a succeeding General Assembly. Compare IND. CONST. art. 16, § 1 with IND. CONST. art. 16, § 1 (amended 1998) and IND. CONST. art. 16, § 2 (amended 1966).

126. S.J. Res. No. 7, 120th Gen. Assemb., 1st Reg. Sess. (Ind. 2017).

127. S.J. Res. No. 16, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

128. S.J. Res. No. 14, 116th Gen. Assemb., 2d Reg. Sess. (Ind. 2010).

129. The 1970 constitutional amendments focused largely on Article 7, which (among other changes) introduced new methods of judicial selection at the appellate court level. See IND. CONST. art. 7, §§ 9-11 (amended 1970). Hoosiers today now have a constitutional right to hunt and fish. IND. CONST. art. 1, § 39 (2016). What that right consists of, precisely, has yet to be specified.

130. See ROBERT L. MADDEX, STATE CONSTITUTIONS OF THE UNITED STATES, at xxxii-xxxvii (2d ed., 2006) (comparing number of constitutions and amendments adopted by each state); *Indiana Constitution*, BALLOTEDIA, http://ballotpedia.org/Indiana_Constitution [<https://perma.cc/3ZEL-5M4X>] (last visited Feb. 19, 2019).

131. The travesty of Article 16 is perhaps best illustrated by the protracted delay in repealing the original Article 13 of the 1851 Constitution. The latter article prohibited blacks from settling in the state, voided all contracts made with black residents, and fined persons employing “or otherwise encourag[ing blacks] to remain in the State” up to five hundred dollars. IND. CONST. art. 13, § 1 (repealed 1881). The Reconstruction Amendments to the federal constitution rendered Article 13 obsolete, and the Indiana Supreme Court declared the provision void in 1866. See *Smith v. Moody*, 26 Ind. 299 (1866). But it wasn’t until 1881 that Indiana formally repealed the racist article, a failure due in large part to the procedural obstacles posed by article 16. MCLAUCHLAN, *supra* note 52, at 22-23.

132. See generally Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, 59 MCGILL L.J. 225, 227 (2013) (discussing the constitutional values served by formal amendment rules); Randall T. Shepard, *Indiana’s Constitution as a Document of Special Aspirations*, 69 ALB. L. REV. 529 (2006) (discussing the conservative attributes of the state constitution’s substantive provisions). The prevailing sentiment of fiscal conservatism among the delegates to the 1850-51 Constitutional Convention shaped much of the debate over future constitutional reform. See, e.g., 2 DEBATES AND PROCEEDINGS, *supra* note 115, at 1259 (“[I]nstead

Constitution debated several proposals for the amendment process, some far less cumbersome than the method adopted under article 16.¹³³ But convention delegates ultimately settled on procedural rules intended to promote deliberation and to shield the constitution from the vagaries of political will.¹³⁴

Yet the idea of article 16 as an exclusive agent of constitutional change in Indiana—a theory upheld by the majority in *Ellingham*—endorses a static view of the state’s fundamental law. Constitutional reform lies not with textual revision per se. Rather, as *Bennett v. Jackson* and *In re Todd* illustrate, the driving force of change resides in the document’s evolving interpretation and the pragmatic application of its principles to the emerging needs of contemporary society.¹³⁵ Underlying this jurisprudence of reform is a dual recognition of institutional authority *and* popular will—a constitutional middle ground that preserves both formal procedural methods and the inherent, extra-textual right of the people to “alter and reform their government.”¹³⁶

of calling a Convention at the expense of some eighty thousand dollars, the amendments could be made without burthening the people with any expense whatever.”).

133. For example, one resolution specified that, “whenever the Legislature shall become satisfied that a majority of the people of the state are dissatisfied with any portion of the Constitution, it shall be their duty, by joint resolution or otherwise, to present to the voters of the state” a proposed amendment “at the next general election, and if a majority of all the votes” favor the amendment, “it shall be the duty of the executive to issue his proclamation declaring said amendment . . . to be a part and parcel of the Constitution.” 1850 JOURNAL OF THE CONVENTION OF THE PEOPLE OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION 69 (1851) (resolution of Mr. Frisbie). *See also* 2 DEBATES AND PROCEEDINGS, *supra* note 115, at 1938 (resolution of Mr. Pettit proposing that “[n]o amendment shall be made to the Constitution unless the same shall have been called for and approved of by a majority of all the voters of the State”).

134. “If there is anything that should be held sacred, and scrup[ul]ously guarded against hasty and inconsiderate changes,” one delegate observed, “it is the fundamental law of the State.” 2 DEBATES AND PROCEEDINGS, *supra* note 115, at 1914. In proposing the provision that would ultimately become section 1 of article 16, Mr. Robert Dale Owen acknowledged “that changes and amendments should from time to time be made,” but he “would not have them made without due consideration.” *Id.* at 1939. Rather, his preference was to “have at least the meeting of one Legislature intervening between the time of the first proposing of an amendment and the time of its final adoption.” *Id.*

135. *See* Shepard, *Indiana’s Constitution*, *supra* note 133, at 532-33 (discussing the Court’s pragmatism in interpreting other restrictive provisions of the Indiana Constitution).

136. IND. CONST. art. 1, § 1 (amended 1984).