The Triumph and Failure of Article 16: *Ellingham v. Dye* and the Jurisprudence of Constitutional Reform in Indiana

Ryan T. Schwier

I. Introduction

In the late 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 state house that day that the Indiana Supreme Court was expected to 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 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, which, as originally adopted, states as follows:

> Section 1. Any amendment or amendments to this Constitution, may be proposed in either branch of the General Assembly; and, if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered on their journals, and referred to the General Assembly to be chosen at the next general election; and if, in the General Assembly so next chosen, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the General Assembly to submit such amendment or amendments to the electors of the State; and if a majority of the said electors shall ratify the same, such amendment or amendments shall become a part of this Constitution.

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[1] *Supreme Court Holds Constitutional Act Void*, INDPLS STAR, July 6, 1912, at 1.

[2] 178 Ind. 336, 99 N.E. 1 (1912) (Morris and Spencer, JJ., dissenting). The author of this note is 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.

[3] 99 N.E. at 2.

> Section 2. If two or more amendments shall be submitted at the same time, they shall be submitted in such manner, that the electors shall vote for or against each of such amendments separately; and while an amendment or amendments, which shall have been agreed upon by one General Assembly, shall be awaiting the action of a succeeding General Assembly, or of the electors, no additional amendment or amendments shall be proposed.[4]

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

> [A]ll 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.

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 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?[5]

Ellingham v. Dye settled the tension between these two competing theories of constitutional reform. This Note seeks to illuminate that story. To that end, part two briefly discusses the history of debate over amending state constitutions in the context of evolving national developments. Part three, 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. Following an overview of the case's procedural history, part four summarizes the decision of the Indiana Supreme Court. And finally, the Note concludes with a brief analysis of the case in relation to modern developments in constitutional reform in Indiana.

II. Toward a Method of Reform

[4] IND. CONST. OF 1851, art. 16 (amended 1966, 1998).
[5] *See* James W. Torke, *Assessing the Ackerman and Amar Theses: Notes on Extratextual Constitutional Change*, 4 WIDENER J. PUB. L. 229, 259 (1994).

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 nascent American polity—in the laboratories of the states—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.[6]

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?[7]

Following the American Revolution, most of the original states rewrote their fundamental charters, premising their reformative authority on the idea of a social contract and the revolutionary principles articulated in the Declaration of Independence.[8] In affirming this view, Thomas Jefferson declared:

> Whenever any Form of Government becomes destructive of these Ends, 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 their Safety and Happiness.[9]

As a qualification, Jefferson cautioned that "Governments long established should not be changed for light and transient Causes."[10] Still, many of the states incorporated these revolutionary principles of self-governance into their new fundamental charters, which otherwise lacked a discrete method for constitutional amendment.[11]

These provisions—often found in a constitution's preamble or declaration of rights—reflected the natural rights philosophy of the late-eighteenth century; however, as constitutional scholar John Vile points out, "not only did they potentially undercut the

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[6] ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 87-88 (2009).
[7] Id. at 88.
[8] JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT 24 (1992).
[9] *Id.* (quoting Thomas Jefferson).
[10] *Id.*
[11] *Id.*

authority of existing governments, but they also did little to distinguish fundamental constitutional change from ordinary legal change."[12] "Compounding this problem," he adds, "was the fact that some early state constitutions . . . had no firmer grounding than the will of the legislature that happened to adopt them."[13]

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.[14] This political quarreling came to a head in 1842 with the famous Dorr Rebellion in Rhode Island, where the state charter—lacking an express provision for amendment—contained strict suffrage provisions. The resulting compromise between reformists and the charter government led to a new state constitution with more liberal voting qualifications.

By the early twentieth century, most states had formalized their procedural mechanisms for constitutional amendment, preferring the "safety-valve" approach to revolutionary methods of reform. However, the difficulty of 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.[15]

III. 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.[16] Following brief introductory remarks, Marshall

[12] *Id.* at 25.
[13] *Id.*
[14] WILLIAMS, *supra* note 6, at 88, 89.
[15] VILE, *supra* note 8, at 139, *quoting* WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 242 (1913).
[16] JUSTIN E. WALSH, CENTENNIAL HISTORY OF THE INDIANA GENERAL ASSEMBLY, 1816-1978, at 331 (1987).

pointed to "certain provisions of our Constitution which do not meet present conditions."[17] 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 government."[18] The problem, he asserted, was "that while an amendment is awaiting the action of the electors, no additional amendment shall be proposed."[19] Marshall considered it imprudent "[t]o elaborate on this condition of affairs" in light of other pressing issues before the legislature.[20] 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."[21]

The governor's cryptic remarks were, in the words of one leading historian, "a poor indication of the legislative firestorm he would soon unleash."[22] 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."[23]

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.[24] The following day, Senator Evan Stotsenburg introduced Senate Bill 407, entitled

> [a] bill for an act to submit to the voters of the State of Indiana at the general election to be held on the first Tuesday after the first Monday in November, 1912, a new constitution, permitting the same to be adopted or opposed by any political party, and . . . providing the method in which the same shall become a part of the party ticket, providing for the canvass of the votes and the proclamation

[17] H. JOURNAL, 67th Gen. Assemb., Reg. Sess. 18 (1911).
[18] *Id.* at 18-19.
[19] *Id.*
[20] *Id.* at 20.
[21] *Id.*
[22] 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).
[23] *Id.*
[24] WALSH, *supra* note 16, at 331-32.

> of the Governor announcing its adoption or rejection, and other matters connected therewith.[25]

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,"[26] a "usurpation of power bordering on anarchy,"[27] "contrary to precedents and usage," "un-American, undemocratic,"[28] and "revolutionary."[29] The resounding condemnation from this 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.[30] On Thursday of that week, after a third reading in the House, the bill passed by a comfortable margin of sixty to thirty-nine.[31] The following day, Governor Marshall signed the bill into law.

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 because of partisan politics per se, but from a combination of factors: (1) Article 16's formidable amendatory process,[32] (2) the

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[25] S. JOURNAL, 67th Gen. Assemb., Reg. Sess. 1099 (1911).
[26] S. JOURNAL, 67th Gen. Assemb., Reg. Sess. 1482 (1911) (Sen. Edgar Durre).
[27] H. JOURNAL, 67th Gen. Assemb., Reg. Sess. 1758 (1911) (Rep. Jesse Eschbach).
[28] *Id.* at 1759 (Rep. Vermont Finley).
[29] S. JOURNAL, 67th Gen. Assemb., Reg. Sess. 1482 (Sen. Kimmel). Protests among 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, with formal objections covering nearly twenty pages of the House Journal. H. JOURNAL, 67th Gen. Assemb., Reg. Sess. 1753-1771.
[30] S. JOURNAL, 67th Gen. Assemb., Reg. Sess. 1485-86.
[31] H. JOURNAL, 67th Gen. Assemb., Reg. Sess. 1751-52.
[32] Framers of the 1851 Constitution had made the amendment process intentionally difficult. In proposing the provision that would ultimately become Section 1 of Article 16, Mr. Robert Dale Owen while acknowledging "that changes and amendments should from time to time be made," he ". . . would not have them made without due consideration." 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

lack of provision for calling a constitutional convention, and (3) strict judicial interpretation of the ratification clause.[33]

In 1897, the General Assembly adopted an amendment establishing rigorous standards for admission to the state bar.[34] 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 elections on November 6, 1900.[35] Over 650,000 Indiana residents cast their vote for governor that day. The "Lawyer's amendment" received 240,031 votes in favor of ratification, and 144,072 against. 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. When an applicant failed to meet the new standards by refusing to sit for the prescribed examination, he petitioned for judicial relief. The circuit court, however, upheld the board's decision by denying his admission to practice.[36] On appeal, the Indiana Supreme Court reversed. In *In re Denny*, the court, upholding earlier precedent,[37] concluded that the amendment had failed ratification for receiving a mere plurality—rather than a required absolute majority—of *all* votes cast at the general election. "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."[38] In addition, because the proposed amendment had neither been approved nor rejected, Article 16, Section 2 prohibited further amendatory proposals pending the action of a succeeding General Assembly. Between 1901 and 1909, legislators readopted the amendment at each session, and resubmitted the proposal for ratification in 1906 and 1910. Each time, the amendment failed under the *Denny* rule.[39] As one historian aptly observes, "between the letter of the Constitution and

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adoption." 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1939 (1850).

[33] WALSH, *supra* note 16, at 329.

[34] At the time, "[e]very person of good moral character, being a voter, [was] entitled to admission to practice law in all courts of justice." IND. CONST. OF 1851, art. 7, § 21 (repealed 1935).

[35] Boomhower, *supra* note 22, at 330.

[36] *In re* Denny, 59 N.E. 359, 360 (1901).

[37] *State v. Swift*, 69 Ind. 505 (1880).

[38] *Id.* at 361.

[39] Boomhower, *supra* note 22, at 331.

judicial interpretations of what it meant, amendment of the state's fundamental law was a practical impossibility."[40]

In 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.[41] Dunn's scheme to circumvent the amendatory process and state supreme court rulings represented a brilliant display of creative lawyering.[42]

According to Dunn, "while the legislature had no power to propose an amendment" under article 16, the constitution contained no restrictions on adopting an entirely new fundamental law.[43] Absent this constraint, the basis for creating a new constitution derived from the people's "indefeasible right to alter and reform their government," and the "legislative authority . . . vested in the General Assembly."[44] Dunn also had the benefit of precedent, at least in part. 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.[45] The constitution did not, however, 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[46]—submitted the question five times between 1823 and 1849 (with proposals made even more frequently).[47] Delegates to the 1850-51 Convention recognized this procedural variance but defended their actions on

[40] WALSH, *supra* note 16, at 329.
[41] *Id.* at 331.
[42] *See id.*
[43] J.P. Dunn, *The Proposed Legislative Constitution of Indiana*, 8 PROC. AM. POL. SCI. ASS'N 43, 44 (1912).
[44] *Id.* (quoting IND. CONST. OF 1851, art. 1, § 1 and art. 4, § 1); *see also* Boomhower, *supra* note 22, at 332-33.
[45] IND. CONST. OF 1816, art. VIII, *repealed by* IND. CONST. OF 1851.
[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." 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." IND. CONST. OF 1816, art. I, § 2, *repealed by* IND. CONST. OF 1851.
[47] Dunn, *supra* note 43, at 46; WILLIAM MCLAUCHLAN, THE INDIANA STATE CONSTITUTION 7 (2011).

the absence of the constitution's express prohibition on revising the state's fundamental law.[48]

For Marshall, Dunn, and their supporters, the revised (or "new") constitution merely reflected long-standing principles of direct democracy in Indiana. As enacted,[49] the 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 to 130 members; extended the regular legislative session from sixty to one hundred days; authorized the General Assembly to enact worker's 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; prohibited salary increases for public officials during their elected term; authorized the adoption of laws providing for the initiative, referendum, and recall of state and local officials except judges; and measures for the initiative, referendum, and recall of all elected officials except judges; imposed strict residency, poll tax, and language requirements on voters; and, of course, a simplified the procedure for constitutional amendment. [50]

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 was short lived.

Part IV. The Case

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," seeking to enjoin the election board—comprised of Governor Marshall, Secretary of State

[48] The only exception was the prohibition on slavery or involuntary servitude, "otherwise than for the punishment of crimes." IND. CONST. OF 1816, art. VIII.
[49] Act of March 4, 1911, ch. 118, 1911 Ind. Laws 205.
[50] 2 CHARLES KETTLEBOROUGH, CONSTITUTION MAKING IN INDIANA 387-88 (1916); *see also* WALSH, *supra* note 16, at 334-35.

Lew Ellingham, and others—from certifying the measure to voters at the general election.[51] In his complaint, Dye argued, among other things, that (1) the General Assembly lacked the authority to prepare and submit to the electorate a new constitution, and (2) the method of submission violated constitutionally-prescribed procedures.[52]

The trial court agreed and, on September 24, declared the act invalid. In his opinion, Judge Charles Remster concluded that

> [t]he delegation of power is specific and empowers the General Assembly to propose one amendment or any number of amendments to the constitution. This power does not specifically authorize the proposal of an entire new constitution. The specific mode prescribed [under Article 16, Section 2] would seem to operate as a prohibition against proposing many amendments in the form of an entire new constitution. While this applies to submitting the proposed amendments to the electors to be voted for or against each amendment separately, yet, it clearly shows the intention of the framers as to the mode prescribed in their grant of power.[53]

Two weeks later, the judge "entered a formal order enjoining Secretary of State Ellingham from certifying [the] proposed constitution to voters at [the] general election."[54]

Ellingham, Marshall, and the remaining Board of Election Commissioners appealed and, on November 11, filed their assignment of errors with the Indiana Supreme Court.[55] In their brief, consisting of a massive 327 pages, the appellants argued that (1) because the costs involved were "too trifling" and "speculative to establish irreparable injury," Dye lacked standing; (2) the court had no jurisdiction over (a) the executive or (b) 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; (4) because it was "a new constitution and not a series of amendments," the act did not violate Article 16, Section 1 of the Indiana Constitution;

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[51] Complaint at 4, Dye v. Ellingham, No. 22,064 (Marion Cir. Ct. Nov. 12, 2003) (on file with the Indiana State Archives).
[52] *Id.* at 8, 11-12, 16.
[53] Brief for Appellee at 36, Ellingham v. Dye, No. 22,064 (Ind. March 1, 1912) (on file with the Indiana State Archives).
[54] *Supreme Court Holds Constitutional Act Void*, INDPLS STAR, July 6, 1912, at 1.
[55] Transcript of Proceedings, Ellingham v. Dye, No. 22,064 (on file with the Indiana State Archives).

and (5) the new constitution did not conflict with the state enabling act or other federal law.[56]

On Wednesday, April 24, counsel for both sides presented oral arguments before the Indiana Supreme Court. "The courtroom at the State House," according to the *Indianapolis Star*, "was filled with many interested persons throughout the six hour session," including "[a] number of law students from Indiana University."[57] Counsel for the appellants, "made the first plea before the court," basing much of their argument on the "extraordinary powers of the Legislature."[58]

In briefs and at oral argument, 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,

[56] Appellants' Brief at 80, 83, 87, 92-93, 94, Ellingham v. Dye, No. 22,064 (Ind. Jan. 23, 1912) (on file with the Indiana State Archives). The last of these arguments (which Dye also raised in his brief on appeal) presents an fascinating question on the extent of federal limits on state constitutions—specifically the binding, enduring requirements of state enabling acts. The year prior to the decision in *Ellingham*, the U.S. Supreme Court held in *Coyle v. Smith* that while "Congress may require, under penalty of denying admission, that the organic law of a new state at the time of admission shall be such as to meet its approval," a state constitution—"subject to alteration and amendment by the state after its admission" to the Union on an "equal footing" with existing states—could not be controlled by federal conditions of admission. 221 U.S. 559, 568 (1911). Had the Indiana Supreme Court ruled differently in *Ellingham*, the "Marshall Constitution" would likely have withstood federal judicial scrutiny on this point.

[57] *Pleas Are Heard in Charter Case*, INDPLS STAR, April 24, 1912, at 16. Court rules at the time 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." R. Sup. & App. Cts. Ind. 27 (1900). 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 v. Dye, No. 22,064 (Ind. April 6, 1912) (on file with the Indiana State Archives). The Court granted the petition, but allowed only three hours for each side. *Id.*

[58] *Pleas Are Heard in Charter Case*, INDPLS STAR, April 24, 1912, at 16.

but also on the state's highest bench.[59] With only two Republican judges sitting among a court of five, the prospect of legislative deference was a very real possibility.[60]

As the judicial term came to a close and the court's summer adjournment drew near, members of the bar and other interested observers expected a ruling by the end of June.[61] They would have to wait, however, until after the July 4th holiday.

B. The Decision

On July 5, 1912, the Indiana Supreme Court, by a narrow one-vote margin, upheld the decision of the trial court by declaring the act void. 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 . . . by implication any power to formulate and submit proposed organic law[,] whether in the form of an entire and complete instrument . . . or single amendment."[62] Rather, constitutional revision is the product of specific "modes pointed out or sanctioned by the legislative authority," typically by "summoning a convention."[63] Further, as an "exercise of power by the people for the general good," reform must yield to the "restraints of law."[64]

In 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."[65] However, this did not preclude as justiciable the governor's acts

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[59] *Ruling Expected in Charter Case Before June 30*, INDPLS STAR, May 12, 1912, at 33. The 1851 Constitution originally provided for the popular election of the Indiana judiciary. This process remained in place until 1970, when a constitutional amendment eliminated the direct election of judges at the appellate court level. Under the amendment, which took effect in 1972, Indiana uses a merit selection process, often referred to as the "Missouri Plan," for choosing appellate court judges. IND. CONST. OF 1851, art. 7, secs. 9 to 11. 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).

[60] In fact, Indiana courts during this period did little to interfere with legislative prerogative. With the exception of *Ellingham*, "[t]he judiciary's influence on law during these decades was largely to confirm the changes wrought by legislative action." David J. Bodenhamer & Randall T. Shepard, *The Narratives and Counternarratives of Indiana Legal History*, *in* THE HISTORY OF INDIANA LAW 13 (2006).

[61] *Ruling Expected in Charter Case Before June 30*, *supra* note 57, at 33.

[62] Ellingham v. Dye, 178 Ind. 336, 99 N.E. 1, 8 (1912).

[63] *Id.* at 7. The court did not, however, expressly recognize the convention as a proper method of constitutional reform in Indiana.

[64] *Id.*

[65] *Id.* at 23, 24-25.

in his ministerial (rather than executive) capacity with the board of election commissioners. Further, 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."[66] 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 sufficient to destroy his competency to sue."[67]

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."[68] 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."[69] Because "[t]he Constitution prohibits the Governor from holding any other office," the court lacked the authority to restrain the act of an executive.[70] While acknowledging that "a taxpayer may, by a suit in equity, enjoin the unlawful levy of a municipal tax, or . . . expenditure of municipal funds," the nominal expense of a general election—borne largely by the state and county treasuries—conferred no entitlement to relief.[71]

When Governor Marshall received news of the court's decision late that afternoon, he made "no indication of disappointment or displeasure."[72] "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. To be sure I have my opinions, but it is not proper for me to discuss them."[73] 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.[74] The Court, however,

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[66] *Id.* at 27.
[67] *Id.* at 29.
[68] *Id.* at 36.
[69] *Id.* at 33.
[70] *Id.*
[71] *Id.* at 36-37.
[72] *Supreme Court Holds Constitutional Act Void*, INDPLS STAR, July 6, 1912, at 1.
[73] *Id.*
[74] *Marshall v. Dye*, 231 U.S. 250, 256 (1913).

denied the petition, finding "no justiciable controversy" over a political question reserved for Congress.[75]

Conclusion

The *Ellingham* decision, for better or for worse, preserved formal procedural methods of constitutional reform in Indiana. 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.[76] On the other hand, as we have seen, the cumbersome process of initiating change under Article 16 can result in constitutional inertia.

For several years following the decision in *Ellingham*, efforts at constitutional reform in Indiana continued to founder. 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.[77] With Democratic losses in the General Assembly in 1915, however, the effort failed, ultimately signaling the death of Indiana's most famous constitution that never was.

Frustrated with the often-futile method of amendment under Article 16, the General Assembly sought a different agent of reform. In 1917, legislators passed a statute calling for a constitutional convention; however, they had acted without first proposing the measure to the state electorate. In *Bennett v. Jackson*, the Indiana Supreme Court, relying on Section 1 of the Indiana Bill of Rights, declared the act invalid.[78] Importantly, the court for the first time expressly recognized—on the basis of state precedent and "universal custom"—the convention as a proper means of constitutional amendment.[79]

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[75] *Id.*

[76] ROBERT L. MADDEX, STATE CONSTITUTIONS OF THE UNITED STATES xxxii-xxxvii (2d ed., 2006) (comparing number of constitutions and amendments adopted by each state); *see also*, *Indiana Constitution*, BALLOTPEDIA, http://ballotpedia.org/Indiana_Constitution (last visited Nov. 14, 2014).

[77] 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 22, at 342; *and* WALSH, *supra* note 16, at 334.

[78] 186 Ind. 553, 116 N.E. 921 (1917) (Lairy, J., dissenting).

[79] *Id.* at 923.

A subsequent proposal for a constitutional convention in 1930 failed to garner the necessary public support.[80] Only five years later, however, relief from constitutional stasis came from the judicial branch. In 1935, the Indiana Supreme Court in *In re Todd* finally upheld the "Lawyer's Amendment" by deciding a plurality of votes constituted ratification.[81] In reinterpreting Article 16, the case reversed over fifty years of precedent and "removed the greatest obstruction to the amendability of the Constitution of Indiana."[82]

The *Todd* decision removed one of the most significant barriers to constitutional reform in Indiana. Still, 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.[83] Naturally, one of the primary obstacles to modernization, according to commentators at the time, was the amending process—the "doorway to change."[84] Aside from generating academic discussion, however, these renewed calls for amending the amendment process fell short.

Even today, Article 16 remains the primary obstacle to constitutional change.[85] Consistent fforts at reform—on issues as diverse as marriage,[86] judicial application of foreign law,[87] election of health care coverage,[88] and the right to hunt and fish[89]—continue to mark the political record. However, beyond the major revisions of 1970—a watershed

[80] MCLAUCHLAN, *supra* note 47, at 28.
[81] *In re* Todd, 208 Ind. 168 (1935).
[82] Carl Chattin, In re Todd *and Constitutional Amendment*, 10 IND. L.J. 510, 510 (1935).
[83] Louis E. Lambert & E.B. McPheron, *Modernizing Indiana's Constitution*, 26 IND. L.J. 185 (1951).
[84] *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.").
[85] The article's original language remains largely intact. Amendments to Section 1 in 1998 resulted in the simplification of terms. Amendments to Section 2 in 1966 went further by removing restrictions on further amendatory proposals pending the action of a succeeding General Assembly.
[86] H.J. Res. 6, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013).
[87] S.J. Res. 16, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).
[88] S.J. Res. 14, 116th Gen. Assemb., 2d Reg. Sess. (Ind. 2010).
[89] S.J. Res. 7, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013).

year, to be sure, in the modern evolution of Indiana's fundamental law[90]—change remains sporadic.

Yet the idea of Article 16 as an exclusive agent of constitutional change in Indiana—a theory upheld by the majority in *Ellingham*[91]—endorses a static view of the state's fundamental law. Constitutional reform lies not with textual revision per se; rather, as *In re Todd* illustrates, the driving force of change resides in the document's evolving interpretation and the innovative application of its principles to the emerging needs of contemporary society.[92] The now-mature field of state constitutional law in Indiana—following its "rediscovery," or "renaissance"[93] if you prefer, during the late twentieth century—embodies this modern conception of reform by rejecting the perennial critique of the charter document as "outdated" or resistant to change.

[90] Primarily in respect to Article 7, which (among other changes) introduced new methods of judicial selection at the appellate court level. *See supra*, note 61.
[91] "Constitutions do not change with the varying tides of public opinion and desire; the will of the people . . . is the same inflexible law until changed by their own deliberative action." Ellingham v. Dye, 178 Ind. 336, 99 N.E. 1, 13 (1912).
[92] WILLIAMS, *supra* note 6, at 5.
[93] Frank Sullivan, Jr., *A Look Back: Developing Indiana Law Post-Bench Reflections of an Indiana Supreme Court Justice: Selected Developments in the Indiana Constitutional Law (1993-2012)*, 47 IND. L. REV. 1217, 1217 (2014).

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Supreme Court of Indiana

Transcript [of Proceedings]

1. [Appellants'] Assignment of Errors	11 November 1911
2. Notices Issued	11 December 1911
3. Appellants' Briefs (8)	23 January 1912
4. Appellee's Briefs (8)	1 March 1912
5. Appellee's Petition for Oral Arguments	1 March 1912
6. Appellants' Petition for Time to File Reply Briefs	9 March 1912
Granted and Time Extended to April 15	
7. Appellants' Additional Authorities (2)	26 March 1912
8. Appellee's Petition to Advance Cause	1 April 1912
9. Appellants' Reply Briefs (8)	6 April 1912
10. Appellants' Petition for Advancement of Oral Argument	6 April 1912
11. Appellants' Additional Citations and Authorities	10 April 1912
12. Petition to Advance	16 April 1912
13. Appellee's Additional Authorities (8)	25 April 1912
14. 35th Day, May Term [Decisional Votes]	5 July 1912
15. Appellants' Petition and Briefs on Rehearing (8)	31 August 1912
16. Appellants' Petition on Rehearing Overruled	18 October 1912