

The Narratives and Counternarratives of Indiana Legal History

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Every state has a story its citizens tell to identify where they are from and who they are.¹ Indiana's narrative is both American and midwestern. Hoosiers are the most representative of Americans, or so we believe. Indiana is the home of Middletown, the name sociologists Robert and Helen Lynd gave to Muncie, the site for their famous studies in the 1920s and 1930s. We are literally and metaphorically residents of the "Crossroads of America," the tag cited most often by the state's tourism and economic development offices. We live in the nation's heartland, a broad middle ground from Ohio to Kansas where the values that made our country great find their strongest and most fruitful expression. Like all midwesterners, but more so, we Hoosiers are authentically American.

Of course, there is a counternarrative to the Indiana story that emphasizes the middling nature of our history. In this telling, we are stifled by con-

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¹The idea of narratives used in this essay is borrowed from Andrew L. Cayton and Susan E. Gray, eds., *The American Midwest: Essays on Regional History* (Bloomington, Ind., 2001).

sensus and marked by mediocrity. We are followers, not leaders; the state of vice presidents, not presidents. We are the “booboisie”: small-minded shopkeepers, farmers, and mill workers who are always placing respectability before creativity, petty morality before progressive ideas. Our motto in this counternarrative is “Good enough is good enough.”

In both versions of the Indiana story, law plays a role. In them, as in all variants of the American story, law is an embodiment of values. We are a nation—and a state—of laws. In our national mythology, law is the instrument of popular will and the protector of individual liberties. Stemming from fundamental compacts, national and state constitutions, these laws reflect who we are and shape the society we are becoming. The preferred narrative casts law as forward-looking or progressive. Law has enabled a polyglot society to meld and has provided both ballast and impetus to an economy that rapidly moved from agriculture to industry to service activities over a brief 150-year history. The counternarrative is darker in its portrait, seeing law as discriminatory and protective of entrenched interests. In this story, law is oppressive and moralistic, the stern guardian of small-town values that kept Indiana benighted and backward, an obstacle to progress rather than its aide.

Neither story is correct, but what is striking about both is their inability to speak with discernment or detail about the role of law in Indiana's history. A cursory glance through our primers reveals why. For most of our chroniclers, law is present primarily during the foundational moments in our past—the Northwest Ordinance of 1787, the Constitution of 1816, and the Constitution of 1851. During these events, law is seminal: it is the expression of our highest aspirations, and sometimes—as with the 1851 prohibition of African American immigration—it reveals our deeper shame. At other times, law is largely the result of politics, the true central actor in both versions of the Indiana story. It is the exercise of power—sometimes for good cause, sometimes not—wielded by the legislature or by the governor but only rarely by its chief guardian, the state's courts.

In truth, the role of law in Indiana's story is complex. It has been progressive and conservative, enlightened and reactionary, influenced by law elsewhere and isolated from the larger national legal culture. Dominant political and economic interests have wielded it to serve their purposes, but its basic thrust has been democratic, not hegemonic. In a state not known for innovation, Indiana law has been cautiously progressive.

Legal culture, by definition, is the formal and informal expression of values, attitudes, and assumptions that have shaped both the operation and perception of law. It is the matrix of ideas that expresses how the world should operate; these ideas reflect, as well, beliefs about how the world operates in fact. Legal culture is also the response of law, in its structure and substance, to individual and group interests. It is both an expression of

power and an attempt to find an acceptable compromise among diverse and competing interests within the larger society.²

American society, past and present, is marked by diversity and conflict. One measure of the law's success and vitality is the degree to which it promotes consensus. By this standard, Indiana's legal culture demonstrates a remarkable consensus on values that continues to shape the state's response to contemporary issues. These values include gradual change, accommodation, public-private cooperation, and economy in government. Indiana's legal history reflects that of the nation and makes real the oft-repeated claim of the state's representative character. But to rely too heavily on this theme is to obscure the nature of Hoosier jurisprudence. It fails to acknowledge how Indiana law fits squarely with the national paradigm—and, at times, how it does not. Indiana legal history may exist at the crossroads of the history of American law, but more than once the state has taken a road less traveled.

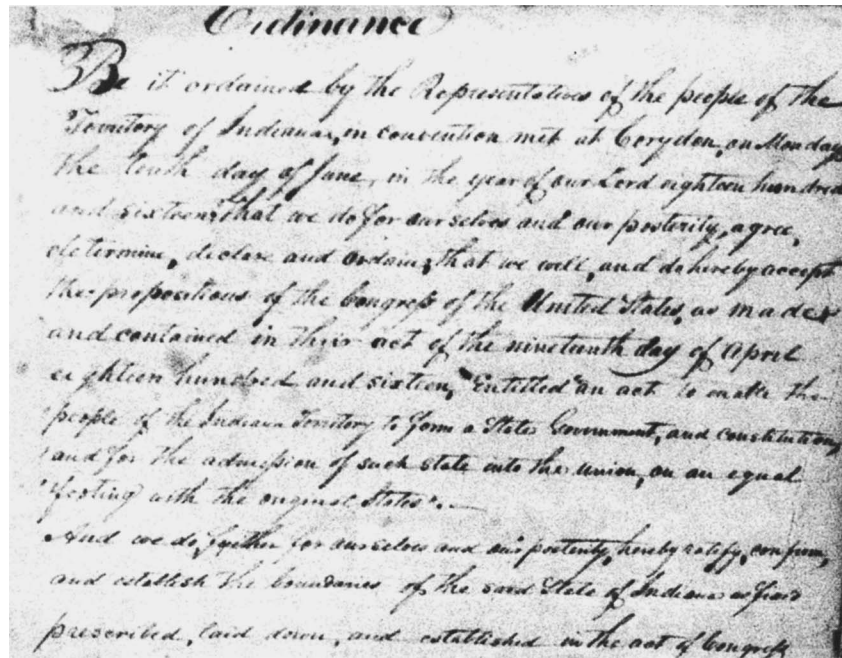
Three cultural moments in the state's past help us to understand the contours of Indiana's legal heritage—its birth in an age of revolutionary republicanism, its growth in a democratic and entrepreneurial society, and its maturity in an environment of corporate and national power. The story that emerges is one of transition from law as an instrument to create the good society to law as the protector of a society deemed good by its residents.

An accident of timing shaped the initial nature of Indiana law. The state was the sixth created after the American Revolution and the first admitted after the War of 1812, the so-called second war for independence that secured the nation's revolutionary character. Equally important, Indiana was the second state developed out of the Northwest Territory established by the Northwest Ordinance of 1787. This charter document was seminal in establishing a midwestern legal culture. Not only did it set forth a common framework for territorial expansion based on the principles and ideas of revolutionary republicanism, but it represented a "heroic effort to guarantee the nation's future prosperity and power by defining the rules of everyday conduct on both the private and public levels."³ The influence of the Ordinance persisted long after pioneer settlements had become prosperous and stable communities.

The values embraced by the Northwest Ordinance included widespread ownership of property as a guarantor of social stability, the use of agriculture to promote prosperity, and a commitment to moral and material

²Kermit L. Hall, *The Magic Mirror: Law in American History* (New York, 1989), 6.

³Andrew R. L. Cayton and Peter S. Onuf, *The Midwest and the Nation: Rethinking the History of an American Region* (Bloomington, Ind., 1990), 3; Peter S. Onuf, *Statehood and Union: A History of the Northwest Ordinance* (Bloomington, Ind., 1987), chaps. 4-7.



Indiana State Constitution of 1816

Born in an age of revolutionary republicanism, the state constitution invoked law as the instrument of a good society.

Courtesy Indiana State Archives

development. It was a Jeffersonian vision that emphasized public virtue, civic engagement, and interdependence as antidotes to the rampant individualism and selfishness associated with frontier societies. In its recipe for an orderly march to statehood, the Ordinance sought to link material and moral progress. Encouraging the establishment of courts, schools, and churches, and banning slavery from the territory, for example, promoted public morality and good citizenship and made possible a “new republican order of prosperity, peace, and decorum.”⁴

Although the Ordinance’s specific provisions ceased to possess legal authority after statehood, much of Indiana’s early law reflects its continuing influence. The Constitution of 1816, for example, created a state obligation to encourage educational progress by free and open public schools and by publicly funded libraries. It required the state’s laws “to countenance and

⁴Cayton and Onuf, *The Midwest and the Nation*, 9.

encourage the principles of humanity, honesty, industry, and morality," virtues that were at once both republican and midwestern. Indiana's penal code was to be "founded on the principles of reformation, and not of vindictive justice," and the General Assembly was charged with establishing asylums for the aged, infirm, or other persons who needed the "aid and beneficence of society" to become productive citizens and "lose, by usefulness, the degrading sense of dependence."⁵

Statute law and judicial opinion often, although not always, mirrored these constitutional injunctions. Legislators early abolished whipping as a permissible form of punishment. Debates on the abolition of the death penalty were a staple of General Assembly sessions during the middle decades of the nineteenth century, but reformers succeeded only in shifting from public hangings to executions held behind prison walls. Establishment of a penitentiary also found support, and a state-funded institution founded on reformatory ideals was established in 1821. Missing from this list of progressive acts were public schools. The legislature created what is now Indiana University in 1820, but the free and open schools mandated for the lower grades never materialized. Public libraries, too, remained more promise than reality.

The use of law to create the good society also found expression in measures to regulate morality through criminal law. The code itself—actually the criminal statutes taken as a whole—doubled in size between 1816 and the Civil War, and most violations were classified as misdemeanors or minor crimes that threatened the good order of society more than life or property. Although economic crimes such as theft were a central concern of lawmakers, an increasing number of laws focused on preserving public morality. Hoosier lawmakers targeted sexual deviance, intemperance, and especially gambling; one-seventh of the substantive sections of the state's 1817 code, for instance, addressed gaming.⁶ These laws, along with others that focused on public disorder and riots, provide an index to the values most important to Indiana residents. The good society fostered responsible citizens, civic order, and public morality.

In their attempt to shape the infant state through the adoption of law, legislators and judges responded both to their environment and to ideals

⁵Indiana Constitution of 1816, art. 9, secs. 1, 2, 4, 5. Documents relevant to the Constitution of 1816 and the full text of the Constitution are printed in Charles Kettleborough, *Constitution Making in Indiana: A Source Book of Constitutional Documents with Historical Introduction and Critical Notes*; Vol. 1, 1780-1851 (*Indiana Historical Collections*, Vol. 1; Indianapolis, 1916), 65-133.

⁶David J. Bodenhamer, *The Pursuit of Justice: Crime and Law in Antebellum Indiana* (New York, 1986), 26.

that sprang from the revolutionary experience. Early Indiana was a pioneer state, sparsely settled with untamed lands and poor transportation. Like all frontier states, it appealed to immigrants who sought new opportunities and the chance for a new life. Exploiting the imagined riches of an untapped landscape required, above all, the protection of private property and the stability of economic transactions. But society was more than an economy: it was community, as well, and here lawmakers accepted the American Revolution's embrace of communal norms and a publicly virtuous citizenry as essential for the advancement of liberty itself. Not surprisingly, many of the state's laws, civil and criminal, sought to advance these goals, which, after all, were central to the concept of a triumphant new American society, radically different from the corrupt order of ancient Europe.

Out of this conception of Indiana as a commonwealth, the General Assembly acted to promote the state's interests. An early example was the 1821 act creating an ambitious state highway system: two dozen roads to link all parts of Indiana to the new capital at Indianapolis and paid for by the sale of public lands. The law's purpose was both democratic and economic. Roads were necessary to allow all citizens the opportunity to participate in state government; they also were required to move goods to market. Other states sought to attract private investment for such public purposes through monopoly charters, but Indiana chose instead to use public funds to advance a public good. It followed the same path when it floated state-backed bonds to finance the construction of a statewide canal network in the 1830s. The impulse to use public funds to promote the general welfare proved short-lived, running afoul of a preference for local control and decentralized administration in the construction of roads and a depression that rendered the state insolvent and forced it to jettison the canal project. The lessons in these uses of law were instructive for Hoosiers, even if scholars have labeled the projects as misguided: private initiative, not public action, was a safer way to promote the public good.⁷

Another contradiction between constitutional ideals and the law in practice emerged early in the state's history. An aversion to taxes, still a hallmark of Indiana culture, forced numerous compromises with the lofty sentiments expressed in the 1816 constitution. A statewide system of public schools was stillborn, starved by lack of funding and a fear of losing local control. By the 1840s, the visions of reforming criminals in a state penitentiary had become a cost-saving system of private prisons and convict labor.

⁷James H. Madison, *The Indiana Way: A State History* (Bloomington, Ind., 1986), 86. On the Internal Improvements Act see Donald F. Carmony, *Indiana, 1816-1850: The Pioneer Era* (Indianapolis, 1998), 185-201.

In other ways not affected by public funding, lawmakers set a course at odds with the state's formally ascribed aspirations. The Constitution of 1816 banned slavery in the state—and, in unambiguous language, the Indiana Supreme Court decided in *State v. Lasselle* (1820) that the few slaves still in the state were free—but neither the constitution's prohibition of slavery nor its assertion that all men were born free and equal blocked the spate of antiblack legislation passed during the first five decades of statehood. Even the promise of stable communities anchored by strong families came under assault in the scandal of easy divorce laws in the 1850s.

The development of such tensions precipitated the rise in Indiana of a new legal ethic—one that emphasized individual autonomy more than communal values. Individualism and equality had emerged as dominant themes in American culture by the 1830s, as witnessed by the triumph of free-market capitalism and Jacksonian democracy. Both developments emphasized limited government as a condition of liberty. The lineage of this belief ran to the Revolution, but it acquired new language and achieved new force in the middle decades of the nineteenth century. The contemporary French visitor Alexis de Tocqueville had observed that the quest for profit was the quintessential characteristic of the American people, and now a majority of Americans, including Hoosiers, believed that the surest road to profit lay through privatizing the marketplace.

Under this new creed, the signal role of government—and, therefore, of law—was to remove barriers that prevented men from competing as equals in the political arena and economic marketplace. Universal white adult male suffrage and general incorporation statutes were only two of the numerous legal reforms embraced by Indiana and other states to achieve this end. Both legislators and jurists demonstrated a keen awareness of the course of legal reform nationally and acted to bring state law into a closer correspondence with national norms. Initiatives to codify the law in the 1830s and 1840s followed templates established by the nation's leading commercial states, especially in banking, creditor-debtor, and contract law.⁸ The respected supreme court reports compiled by Isaac Blackford, the leading Indiana jurist of his day, also promoted the notion that the state's case law aligned with the national legal culture.

This awareness of events in other states provided the context for a new constitution, even though the immediate impetus came from the fiscal crisis that followed the canal debacle. A wave of state constitutional reform had begun in the 1820s and had reached its zenith by the 1840s, with one-half of the states revising or rewriting their constitutions by 1861. After several

⁸See Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass., 1977).

false starts earlier in the decade, Hoosier leaders in 1848 agreed that Indiana required a new constitution to make government more responsive to changing social and economic conditions. The Indiana Constitution of 1851 largely reflected the same impulses that drove the creation of new state constitutions throughout the Midwest. The result of market-oriented Jacksonian democracy, it captured the popular wariness of government by limiting its role, especially in matters relating to the economy, taxation, legislative authority, and individual liberties.⁹ The constitution also included darker language from the state's counternarrative: it banned black migration, making Indiana the only midwestern state to do so in its fundamental charter.

The ethic of individualism and the distrust of governmental power embodied by the 1851 constitution promoted a conception of criminal law that was more liberal than the national norm. The new charter, for example, granted authority to the legislature to modify or abolish the grand jury. To its defenders, the grand jury was an ancient and essential instrument in the continuing battle to maintain public order and promote public virtue. Opponents, who proposed an alternate system of public examination and presentment, viewed the institution as inimical to individual liberty because of its secret, *ex parte* proceedings. Three midwestern states—Michigan, Ohio, and Indiana—debated the abolition of the grand jury in constitutional conventions in the late 1840s and early 1850s, but Indiana was the only state to include a clause permitting the legislature to abolish it.¹⁰ Three years later, the state supreme court also embraced the philosophy of restraint on governmental power by interpreting the new constitution's promise of right to counsel to mean that the state had to provide an attorney at public expense for indigent defendants in felony cases, a result the U.S. Supreme Court did not reach until the 1960s.¹¹

⁹Hall, *Magic Mirror*, 103-105. On the Constitution of 1851 see Carmony, *Indiana, 1816-1850*, 403-51. For a comparison with Ohio's Constitution of 1851, see Barbara A. Terzian, "Ohio's Constitutional Conventions and Constitutions," in *The History of Ohio Law*, ed. Michael Les Benedict and John F. Winkler (2 vols., Athens, Ohio, 2004), 1:50-60. Significantly, the framers of Indiana's new constitution saw the legislature, not the executive, as the primary threat to liberty, or so the president of the convention believed, as noted in his closing remarks: "[O]f the three departments . . . the legislative or law making department or power, is the one above all others most likely to encroach upon the rights of the citizen and to subvert the liberties of the mass of the people; hence the necessity to restrain, (within proper and safe limits) not the people themselves, but those to whom their power for a time may be delegated, for the purpose of making laws for their government." *Journal of the Convention of the People of Indiana* (1851; Indianapolis, 1936), 997.

¹⁰David J. Bodenhamer, "Criminal Justice and Democratic Theory in Antebellum America: The Grand Jury Debate in Indiana," *Journal of the Early Republic*, 5 (Winter 1985), 481-502.

¹¹*Webb v. Baird*, 6 Ind. 13 (1854).

Two particular constitutional provisions strongly influenced the future development of Indiana legal culture—the prohibition on state debt and the popular election of state judges. Unlike the new constitutions in sister states, Indiana's constitution did not place a limit on state indebtedness: it banned it outright. Though a reasonable response to the unfulfilled promises of the failed internal improvement scheme, the ban inhibited the pace of change by forcing Indiana lawmakers into extraordinary measures to keep state government responsive to new needs. The popular election of judges had a similar effect, though in a different direction. Not only were all levels of state courts elective, but the new constitution expanded the number of lower courts and required circuit judges to live in a county within the circuit. When coupled with other mandates reflective of Indiana culture but at odds with national trends—for instance, that juries be arbiters of both fact and law in criminal cases and that any adult male of good moral character could be admitted to the bar—the election of judges reinforced the state's insular and localist tendencies and inhibited the development of a consistent and cohesive common law.

As has often been the case in Indiana history, outside forces provided a counterbalance to the particularistic impulses of Indiana lawmakers. The Civil War strengthened the role of the national government and blunted the political claims of Democrats, who not only ardently advocated limited government and local control, but also lent only lukewarm support to the Union and completely rejected emancipation. The industrialization spurred by the Civil War and the emergence of a national market drew the state headlong into a new economic order, but the depression of the 1870s reinforced the localism and hostility to government that had marked the state's late antebellum years.¹² The legal response fit the dominant laissez-faire economic theory of the period, which advocated a limited role for government in the market and no restrictions on the free flow of capital. Lax banking laws, a favorable tort environment, and the absence of corporate regulation were hallmarks of late nineteenth-century Indiana law. The state trailed other midwestern states in passing labor and welfare legislation, not from a lack of concern about the conditions of the industrial workplace but because its blended creed of individualism and Social Darwinism found value in unrestrained competition. In a legal culture that favored limited government interference in the economy, the absence of regulation extended as well to the struggle between labor and management. For this reason, perhaps, labor unions found a home in Indiana.

¹²Indiana was not alone in its retreat from the more activist government of the Civil War period. See Morton Keller, *Affairs of State: Public Life in Late Nineteenth-Century America* (Cambridge, Mass., 1977), 318-20.



An Indiana glassworks at midnight, August 1908

Late nineteenth-century Indianans were slow to accept protection for child workers, and the state's courts of the time provided little recourse for anyone injured on the job, child or adult.

Photograph by Lewis Hine, courtesy Library of Congress

Late nineteenth-century Indianans did not use law aggressively to redeem constitutional pledges or to address social issues. Consider child labor. In this area, Hoosiers uniformly expressed concern—it was not uncommon for children as young as ten years of age to perform heavy work for long hours in Indiana factories—but the state lagged behind others in providing a legal remedy. The General Assembly began debating the issue shortly after the Civil War, but not until 1897 did it prohibit the employment of children under fourteen in manufacturing or limit the work day of any child under sixteen to ten hours. Even then, the law was not enforced vigorously. A 1910 survey revealed that Indiana had a higher percentage of child labor than all but two northern states. The regulation of working conditions for women was slower still in coming, despite documentation of low wages and dismal working conditions.¹³

When working conditions led to injuries, workers had little prospect of obtaining compensation through the courts. Like most other states in the

¹³Madison, *Indiana Way*, 165–67; Clifton J. Phillips, *Indiana in Transition: The Emergence of an Industrial Commonwealth, 1880-1920* (Indianapolis, 1968), 327-36.

nineteenth century, Indiana had adopted various common-law doctrines that, taken together, made recovery extremely difficult. One of these, the fellow-servant rule, held that employers were not vicariously liable for injuries to one worker caused by the negligence of another worker. Courts also recognized assumption of risk as a defense available to employers, saying that an employee fit for the job could be deemed to understand and assume the risks that came with it and might indeed be better informed about the details of those risks than the employer. Finally, an employee's contributory negligence, even if it played a lesser role in the injury than the negligence of the employer, commonly barred recovery. The General Assembly attempted to open the door to recovery by workers in 1893, but the judiciary held unconstitutional enough of its provisions that the effort went for naught. It was only when Indiana adopted a comprehensive workers' compensation scheme in 1915 that the deadly trio of common-law doctrines finally was put to the sword.¹⁴

The law of contract also proceeded in classic formulas, much influenced by the growing importance of business transactions among expanding commercial organizations. The courts recognized regular defenses to contract claims, like duress and mistake, but always attached substantial importance to the notion that people could make their own agreements and expect them to be vindicated at law. This notion found such a robust and lengthy life in the state that a federal appellate court in Chicago in the late twentieth century observed, "Freedom of contract is alive and well and it is living in Indiana."¹⁵

The democratic zeal for local control that marked Indiana's legal culture began to lessen, albeit slowly, during the first decades of the twentieth century as Hoosiers wrestled with the transition from a rural agricultural society to an urban industrial one. The harsh consequences of laissez-faire economics finally provoked a progressive response from both major political parties that mimicked the reform platforms from other midwestern states, especially Wisconsin. Child labor and workers' compensation laws, a state income tax, a central highway commission, health and safety regulations, and a host of other bills appeared routinely before the General Assembly in the late nineteenth and early twentieth centuries. The result—hesitant, moderate reform—remained true to the state's character. Enacted measures included a strengthened child labor law, the establishment of an inheritance tax, the creation of state railroad and public service commis-

¹⁴Indiana, *Laws of the State of Indiana, Passed at the 69th Session of the General Assembly* (Indianapolis, 1915), 392.

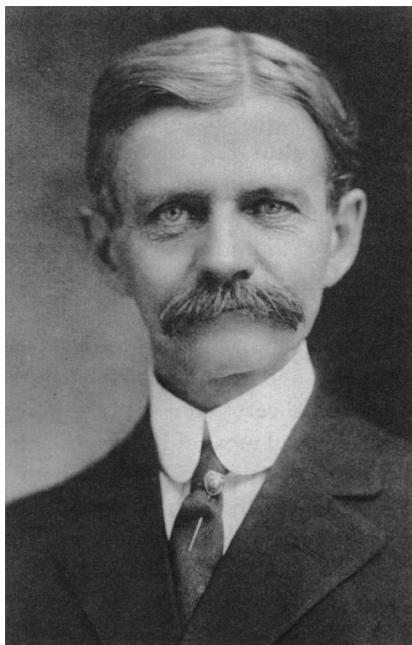
¹⁵*United States v. Stump Home Specialties Mfg., Inc.*, 905 F.2d 1117 (7th Cir. 1990).

sions, and the second juvenile court system in the United States. Other progressive reforms came from energetic efforts by leaders of long-established agencies, such as the successful efforts by the state board of health to combat disease and protect the purity of food and water. But the state was too divided politically and its cultural divisions too stark, as seen in the campaigns to enact prohibition, to bring much change. "Conservative resistance among citizenry and political leadership," historian James Madison observed, "combined with a cautious state supreme court and difficulties of amending the state constitution to defeat or postpone many of the progressive proposals."¹⁶

The progressive movement in Indiana found its strongest voice during the 1910s and 1920s in Congressman Charles LaFollette of Evansville, a member of the family whose very name represented progressivism in the national mind. Indiana adopted most of the prominent measures of the age, addressing the working conditions of women and children and enacting a workers' compensation system that wiped out the unholy trinity of legal doctrines—the fellow-servant rule, assumption of risk, and contributory negligence—that had previously barred injured employees from receiving any damage awards for injuries on the job. The state dithered on other progressive issues until federal action forced a change. Woman suffrage finally won favor in the General Assembly in 1917, but the difficulty of amending the state constitution and an adverse decision by the Indiana Supreme Court kept women from the ballot box until the ratification of the Nineteenth Amendment to the U.S. Constitution in 1920. The next year Indiana voters approved an amendment to keep the Indiana constitution consistent with the U.S. Constitution.

In the counternarrative of Indiana legal history, the decades of progressive reform also witnessed the triumph of prohibition in the state and the ascendancy of the Ku Klux Klan. Adopted by the legislature in 1917, two years before a federal constitutional amendment made the nation legally dry, prohibition was a middle-class reform aimed at what many perceived to be a lower-class and ethnic problem. The Klan also took aim at these groups in its anti-Catholic, anti-Semitic, antiblack rhetoric of superpatriotism and 100-percent Americanism. The influence of the Ku Klux Klan was enormous, reaching city halls and the State House itself. Mercifully, the Klan's reign was brief and its impact on the state's legal culture slight. The end came quickly in 1925, when Klan leader D. C. Stephenson was convicted of kidnapping and murdering a young woman, a conviction finally upheld on appeal by the Indiana Supreme Court in 1932.

¹⁶Madison, *Indiana Way*, 222; Phillips, *Indiana in Transition*, 469-502.



Governor Thomas R. Marshall, 1909-1913

This steely-eyed progressive proposed sweeping changes to Indiana's state constitution, but the state supreme court bucked tradition and partisanship to prevent the attempt.

Courtesy Indiana Historical Society, Bass Photo Company Collection, 29754

The role of the Indiana Supreme Court—and, by extension, of the state's judiciary—during this period of hesitant reform is instructive in understanding the development of Hoosier law. From the beginning of statehood, the General Assembly had remained the dominant force in shaping Indiana law. The democratic impulse that fostered ratification of the 1851 constitution simultaneously expanded the number of judicial offices dramatically and circumscribed judicial authority, at least notionally, by making judges elective and therefore accountable to voters. Although this change fit accepted notions of popular sovereignty, it inhibited the development of a truly independent judiciary, at least as measured by the norms of its federal counterpart. Judges were politicians in Indiana, and they approached lawmaking in ways both idiosyncratic and conservative. They deferred to the legislature and, at the appellate levels, did little to advance new rights or powers under the broad language of the Indiana constitution,

except in the area of individual rights. In fairness, their formalistic approach differed little from that of their brethren elsewhere during much of this period.¹⁷ Not until the advent of the Progressive Era at the national level in the early twentieth century did theories of legal realism begin to move the judicial firmament to any great degree. Indiana was no leader in this shift, either.

The judiciary's influence on law during these decades came largely as confirmation of the changes wrought by legislative action. There were but two moments when the courts stepped in to thwart the will of the other branches. The first occurred in 1911–1912, when the state's popular Democratic governor, Thomas R. Marshall, placed sweeping constitutional changes before the legislature. Marshall's plan called for a line-item veto of appropriations, raised the veto override threshold to three-fifths, expanded both houses of the General Assembly and the Supreme Court, and provided for nearly every known populist tool of the age: initiative, referendum, and recall. The changes were so far-reaching that they became known as the "Marshall Constitution." The governor and legislature agreed to submit the "new constitution" to the voters immediately, without waiting for the approval of a second General Assembly, as required by the 1851 constitution. There was, of course, some American precedent for such a maneuver: the framers of the federal Constitution submitted their work in 1787 directly to the states without pausing to comply with the amending procedure embodied in the Articles of Confederation.

Opponents of the new constitution cried foul and obtained an injunction preventing presentation of the Marshall Constitution to the voters at the 1912 general election. Although the Indiana Supreme Court had recently acquired a Democratic majority, it affirmed the injunction by a 3-2 vote when one of the Democratic members joined with the two Republicans to affirm the amending processes adopted in 1851 as the sole means of changing the state's organic law.¹⁸ Although Governor Marshall railed at the court's interference with the democratic process, he eventually withdrew his proposals and soon pursued progressive policies as vice president to the quintessential progressive, Woodrow Wilson. Tempers had calmed four years later when the wayward Democratic justice came up for reelection; his fellow Democrats renominated him unanimously. That the supreme court would stand in such strenuous opposition to the other branches in the Marshall Constitution case is the exception that proves the rule.

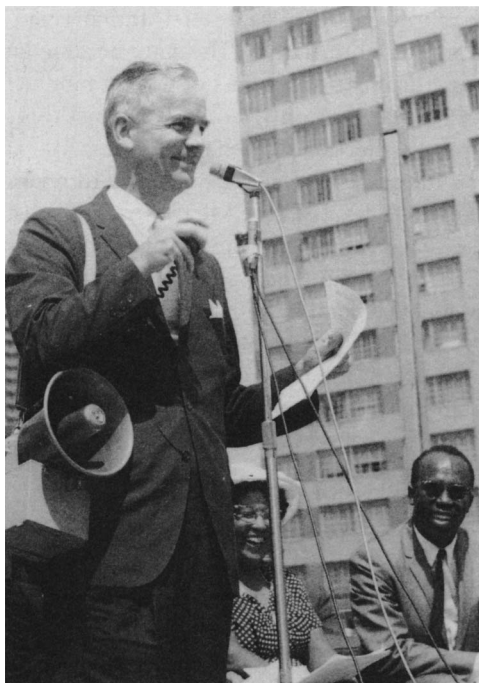
¹⁷Hall, *Magic Mirror*, 230.

¹⁸*Ellingham v. Dye*, 178 Ind. 336, 99 N.E. 1 (1912).

The judiciary's second moment of note in the first half of the twentieth century was more typical. Republicans had spent the entire Great Depression in the wilderness, even in Indiana. During the Democratic ascendancy, both nationally and in the state, government became more active and more expansive, a result embraced by Hoosiers. Paul McNutt, elected governor in the Democratic landslide of 1932, reorganized state government, placing more power in the executive branch—and more patronage in the hands of the governor—and effectively diminishing the authority of local officials. Eight years later, power shifted back to Republicans, who swept both houses of the legislature, elected a Republican to the supreme court for the first time since 1928, and carried nearly the entire list of their nominees, except for governor, for the executive branch. With a State House full of newly elected Republicans, the party decided to grab what patronage it could by reorganizing the executive branch. It advanced a plan to rearrange the government into a series of large units patterned on the McNutt proposals. Under this arrangement, the directors of each unit were to be chosen by commissions consisting of the governor and two other executive officers who almost always were Republicans. The effect would have been to strip the governor of effective control over the personnel of the executive department. With the four Democratic justices from the 1930s still in the majority, the state supreme court invalidated these statutes on a party-line vote of 4-1.¹⁹

As they had been since the 1850s, judges still were brothers in the same political club with governors and legislators, although they remained the least among equals. State parties chose both executive and judicial nominees through state conventions in which the big political prizes were the executive offices. Nominations for the supreme court frequently became occasions for balancing the ticket or for trading votes with some small county delegation to achieve victory on a more important office. This bias for relatively rural judges, of course, affected the outlook of the court itself, reinforcing the localism of Indiana legal culture. The political system also produced a high level of turnover because judges occupied “down-ballot” offices most susceptible to shifts in the political winds and because low judicial salaries led to frequent midterm resignations. The nadir of the supreme court's status under this system undoubtedly occurred in 1955. The resignation of an incumbent justice prompted a series of temporary appointments by Governor George N. Craig. In a period of less than five months, Craig appointed four different justices du jour. One of these had the bad manners to tell the press that the “last thing in my life I would do” was to stay on the

¹⁹*Tucker v. State*, 218 Ind. 614, 35 N.E.2d 270 (1941).



Governor Matthew Welsh addresses an NAACP Freedom Rally, August 10, 1963
Aligning himself with President John F. Kennedy,
this Democrat pushed the Indiana General Assembly to
reform sales tax, civil rights, and environmental protection.

Courtesy Indiana Historical Society, *Indianapolis Recorder* Collection

highest bench, but that serving for a few months “would allow my grandchildren to say that grand-daddy served on the Supreme Court.”²⁰

The election of 1960 set the stage for changes that would create a third cultural moment in Indiana’s legal history. It was, as presidential years usually are in Indiana, a Republican year; the leading exception being the young and energetic Democratic lawyer Matthew Welsh, who won the governor’s office. Welsh aligned himself with the fresh approach of the Kennedy administration and with the blizzard of policy initiatives that became the hallmark of the Johnson years. He pushed reforms through the General Assembly on policies from the sales tax to civil rights remedies to protecting the environment.

²⁰Jerome L. Withered, *Hoosier Justice: A History of the Supreme Court of Indiana* (Lafayette, Ind., 1998), 94.

With the exception of New Deal relief, Indiana had never been hospitable territory for federal initiatives; the state became famous during the 1950s and 1960s by turning down offers of federal money for various social programs. The Welsh years ran only modestly against this Hoosier wariness of things federal, but the election of Richard Nixon in 1968 altered more dramatically Indiana's idea of the role it should play in relation to the federal government. President Nixon believed that the initiatives of the Kennedy-Johnson years had placed too much emphasis on direct federal action. He devised a "New Federalism" in which state governments became the principal implementers of new federal initiatives. Although these new partnerships relied on state agreement to participate, it was usually plain that if the state government did not agree, the federal government would proceed through direct regulation. In fields such as worker safety, mining, and air and water pollution, even relatively conservative Hoosiers preferred local management of day-to-day activities, even if it meant entanglement with federal agencies. It did not hurt that some of the Nixon administration's new initiatives were especially popular with Hoosiers, grants to state and local law enforcement agencies to wage the "war on crime" being a prime example.

Even though obvious changes occurred only later, the Welsh momentum created an environment favorable to a host of constitutional reforms sent to the voters after he left office. Constitutional measures approved by the voters in 1970 and 1972 proved to be momentous shifts, altering in important ways the relative roles of the three branches. One clear result was an increase in the influence of the state's appellate judiciary, especially the supreme court.

In the first set of reforms, voters approved annual sessions of the legislature, which had been meeting only every other year since the adoption of the 1851 constitution.²¹ This amendment put the General Assembly in a position to make law more quickly than had previously been the case. To sustain this new role, the legislature created a permanent office of legislative services that vastly improved the drafting of proposed legislation, a necessary legal craftsmanship that resulted in technically sound bills. Annual sessions also gave legislative leadership a higher visibility in the public arena than had been the case in the days when the General Assembly was only in the capital for a few months every two years.

Also in 1970, voters agreed to abandon partisan contests for the appellate bench, even as they were selecting judicial candidates in the traditional manner. They approved a system modeled after the so-called Missouri Plan,

²¹Indiana Constitution of 1851, art. 4, sec. 9. The schedule for legislative sessions approved by voters as part of the amendment was removed by amendment in 1984.

in which the governor appointed appellate judges from a list fashioned by a constitutional commission of lawyers and nonlawyer citizen members. The governor's appointees were subject to periodic retention votes.²² This amendment led to dramatic changes in the courts as institutions. Because the referenda occurred only once every ten years, the average time in service by the state's appellate judges increased dramatically. Six of the ten longest-serving justices in Indiana Supreme Court history have served since 1970. This stability both raised the public profile of the appellate courts and made sustained judicial initiatives possible. Longer tenures also became the norm in the chief executive's office when voters agreed to permit the reelection of governors in 1972. Since this change, four of the state's elected governors—Otis Bowen, Robert Orr, Evan Bayh, and Frank O'Bannon—have won two terms.

These organic changes altered the roles of the players in developing Indiana law. A series of governors with longer tenure and larger political clout left landmark policy initiatives embedded in Indiana law—for example, the Bowen tax package designed to give property tax relief and the Orr “A+ Program” that increased spending and raised the level of accountability in education. The legislature became a more professional body in which members served multiple terms, thanks to skillfully gerrymandered districts. Myriad interim study committees emerged to consider legislative remedies for a wide variety of issues. The permanent legislative services staff and the members' own staffs soon outnumbered the senators and representatives.

The impact of these changes is evident in two ways that most voters rarely notice. First, the Indiana General Assembly regularly adopts statutes devised by the National Conference of Commissioners on Uniform State Laws, a body providing nonpartisan, well-drafted legislation that brings clarity and stability to state statutory law. Although some of these acts directly and frequently affect the lives of citizens (like Indiana's early adoption of the Uniform Dissolution of Marriage Act in 1973), they more often bring Indiana law into conformity with national economic and legal norms in ways that make the Hoosier economy a complementary part of the national enterprise without prompting any notice among the citizenry. Second, the Indiana General Assembly began a thorough and continuing examination of the form of the state's law when it adopted an official Indiana Code in 1971; since then it has sustained the effort through a routine and well-developed system of recodification. These important processes make for a sounder body of law but rarely reach public attention.

The most dramatic effect of the 1970 constitutional amendments has been in the role the state's judiciary plays as a source of law reform. When

²²Indiana Constitution of 1851, art. 7, secs. 9–11.

the Indiana Supreme Court adopted nearly wholesale the federal rules of civil procedure, the court and the legislature agreed that both bodies would adopt the same rules (one embodied in statute, the other by court order). The pace of such reforms has quickened in the intervening years. At the beginning of the 1970s, the justices took bar discipline under their wing and assumed greater authority over the rules of practice. Mandatory continuing legal education for lawyers followed, imposed by court rule. This action paralleled the development of a new institution under the court's umbrella, the Indiana Judicial Center, which bears responsibility for mandatory continuing judicial education and a host of voluntary programs aimed at strengthening the trial bench. By the 1990s, the supreme court deployed its rule-making authority for projects that seemed rather substantive. The court issued Indiana's first codified rules of evidence. It issued mandatory guidelines for the calculation of child support and then guidelines for "parenting time" in divorced families and paternity cases. By rule, it revised the conduct of jury trials.

The judiciary's appellate functions grew as the Indiana Court of Appeals expanded and as the supreme court shed most of its mandatory criminal jurisdiction, thus permitting more attention to developments in the civil law. More important, the judiciary became a branch that was "always open for business" as the appellate courts applied the techniques of legal reasoning to the substantial flow of disputes in fields such as corporate governance, collective bargaining, environmental cleanup, marriage and children—not to mention the old standbys of tort and contract. This collective outpouring of law and legal interpretation, bolstered by aggressive use of new electronic tools, became a leading source of law for practitioners and citizens.

Such aggressiveness brought increased public visibility, especially when the court forced action from the other two branches of government. In no instance was this more true than in the tax reassessment cases. At the turn of the millennium, newspapers regularly reported news of the ongoing political debate over how to handle what was usually called the "court-ordered reassessment crisis." During the previous decade, both the Indiana Tax Court and the Indiana Supreme Court had declared unconstitutional the system long used for assessing local property taxes. The early twenty-first century has witnessed a widespread alteration of values and a realignment of the state's budget to accommodate the new fiscal reality, both occasioned by the sweeping property tax decisions.

Whether these structural changes mark the emergence of a new moment in Indiana legal history, the judiciary has gained parity with the legislature and governor as one of the prime actors in the state's legal culture. In some ways, this shift seems inevitable, given the twentieth century's emphasis on national standards in law (and elsewhere) as seen in the

development of national law schools, uniform codes, and large law firms that practice far beyond the borders of their home state. Even countervailing forces in the nation's legal culture served to strengthen the role of the state bench: for example, the Rehnquist Court's rediscovery of federalism increased the visibility and role of state constitutions and supreme courts, including those of Indiana.

Whatever the outcome of recent changes, Indiana legal culture will continue to reflect the larger social and political culture of the state itself. Here the historical record is certain: moderation is the Indiana way. At times, the narrative of Indiana law has been remarkably progressive in its embrace of the highest ideals of American constitutionalism, whether in nineteenth-century criminal justice reforms or in the professional legal standards advanced by the judiciary in the late twentieth century. But as often as the dominant theme appears, a subterranean narrative surfaces in counterpoise. Localism, parsimony, and prejudice have all worked at various times to defeat the fullest expressions of constitutional mandates ratified by Indiana voters. This story, of course, unfolds in more places than Indiana. Indeed, it is an American story, one that Indiana, true to its motto, expresses as completely as any of its sister states.