"An Address to the Electors of the State"

The 1851 Indiana Constitution and How Constitutional Changes Continue to Shape State Jurisprudence

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Spurred by the state's debt crisis and forged in a period of reform, the "new" 1851 Indiana Constitution resulted from the challenges facing mid-nineteenth-century Hoosiers. The framers intended the constitution to be an Indiana document that would deal with the state's particular problems and improve constitutional protections for its people.[1]

In February 1851, the delegates to the Indiana Constitutional Convention released for publication "An Address to the Electors of the State," explaining why they considered a new constitution necessary and how

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[1]For the history of the 1851 constitution, see chapter 8 "Jacksonian Constitution of 1851," in Donald F. Carmony, *Indiana, 1815-1850: The Pioneer Era* (Indianapolis, Ind., 1998), 403-451.

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the newly composed document differed from the original.[2] Admitting that writing a new state constitution was a slow process, the delegates explained that "it would have been a culpable violation of duty, for the sake of ephemeral popularity, hastily, or without the fullest and most deliberate consideration, to pass upon great questions involving the dearest rights and most vital interests, not of the present generation alone but of the others that are to succeed."[3]

The Address laid out clear changes: the convention intended to protect Hoosiers from the legislature by increasing the state constitution's Bill of Rights protections beyond those already embodied in the U. S. Constitution. Reading the Address today, modern Hoosiers can understand what the framers intended to achieve through their constitutional changes. The Indiana Supreme Court's subsequent interpretation of those changes reveals some of the ways in which the 1851 constitution has affected the lives of Indiana citizens in the century and a half since its ratification.

The revisions enshrined in the 1851 Indiana Constitution have reverberated through the state's history. Prior to the late 1980s, the Indiana Supreme Court, when hearing and deciding cases which required interpreting the state constitution, looked to analogs in the U. S. Constitution and to the history of the interpretation of that document.[4] More recently, the court has looked to Indiana-specific history and to the intent of the men who framed the 1851 constitution. As the court wrote in its 2000 decision in *McIntosh v. Melroe Co.*:

> Proper interpretation and application of a particular provision of the Indiana Constitution requires a search for the common understanding of both those who framed it and those who ratified it. Furthermore, the intent of the framers of the Constitution is paramount in determining the meaning of a provision. In order to give life to their intended meaning, we examine the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions. In construing the

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[2]*Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana 1850*, 2 vols. (Indianapolis, Ind., 1850), 2:1729.

[3]"An Address to the Electors of the State (February 8, 1851)," in Charles Kettleborough, *Constitution Making in Indiana*, vol. 1: *1780-1851* (1916; Indianapolis, Ind., 1971), 413.

[4]See, e.g., *Reilly v. Robertson*, 360 N.E.2d 171 (Ind. 1977) (Fourteenth Amendment of the United States Constitution interpreted in the same manner as Indiana Constitution's art. 1, § 23).

> constitution, we look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief, and the remedy. The language of each provision of the Constitution must be treated with particular deference, as though every word had been hammered into place.[5]

The court recognizes the particular history and character of the document and has begun to interpret it in a way that is specific to the context in which it arose.[6] The 1851 Indiana Constitution is a unique document that conveys different rights upon the people, and imposes different restrictions upon the state government, than either the 1816 Indiana Constitution or the U. S. Constitution.

THE ADDRESS TO THE ELECTORS

In the early days of 1851, as the Indiana Constitutional Convention drew to a close, delegate Robert Dale Owen proposed "that a committee of one from each Congressional district be appointed by the Chair, to prepare an address to the electors of the State, embodying a brief statement of the changes proposed in the amended Constitution, and such other matters in connection therewith as may aid in securing its adoption."[7] It was not surprising that Owen was the one to propose the Address; he had been, in the words of his biographer Richard William Leopold, "from the moment he moved its first act…until he made the final report…the most diligent, prominent, and influential delegate in the convention."[8]

Owen intended to provide the electors with a tool for understanding the changes that the convention had made to the 1816 constitution. Owen believed that it was "of the greatest importance to the State, to say nothing of our own reputations, that the new Constitution, the result of all of this labor and expense, should not be rejected by the people," and thought that such an explanatory document would improve the new constitution's chances of

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[5]*McIntosh v. Melroe Co.*, 729 N.E.2d 972, 985–86 (Ind. 2000).

[6]See, e.g., *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994) (finding that Indiana is not bound by the federal precedent surrounding the Fourteenth Amendment when Indiana courts interpret the state's art. 1, § 23 and that this includes an Indiana court's right to interpret section 23 as conveying different rights from the Fourteenth Amendment).

[7]*Report of the Debates and Proceedings of the Convention…1850*, 2:1729.

[8]Richard William Leopold, *Robert Dale Owen: A Biography* (Cambridge, Mass., 1940), 269.

passing muster with Hoosier voters. He felt that it was particularly important to explain to the citizens, issue by issue, the changes which the convention had made, because "even we who have made them would be somewhat puzzled to sit down and enumerate them. Many persons, especially farmers living in remote and secluded spots, may not have the old Constitution by them when they receive a copy of that amended by us."[9]

Owen also made clear, however, that he was no apologist; he would not, he said, "propose…to introduce into this address anything like special pleading in defence [*sic*] of our work. Let it stand on its own merits. Let those who would examine arguments for or against any provision, look for these in our debates." But, he added, "now and then, it might not be out of place very briefly to give the reasons for a change, and to State the effects to result from it."[10]

Nearly three weeks later, on February 8, the unanimous committee presented its work to the convention, which concurred, accepting the Address as an accurate depiction of its work.[11] What changes had the delegates made that required such an explanation? And how has the Indiana Supreme Court interpreted these changes over the years?

FIXING THE SOURCE OF THE PROBLEM: THE UNBOUNDED LEGISLATURE

Advocating for a reduction in the number of representatives in the Senate and the House of Representatives, convention delegate William Sherrod denounced the plethora of laws in the state: "If there ever was a State under the canopy of Heaven, cursed by too much legislation," he proclaimed, "it is the State of Indiana."[12]

To the delegates at Indiana's Constitutional Convention, the state's General Assembly was wasteful, frivolous, petty, and selfish. Robert Dale Owen jibed that "more important discussions have taken place, and more varied and substantial business has been done here since we met, than in a dozen ordinary sessions of your Legislature." The delegates responded to this derision of their elected representatives with "loud applause." They also sought to distance their own actions from those of the legislature, so that Hoosiers would not regard the constitutional assembly as another

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[9]*Report of the Debates and Proceedings of the Convention…1850*, 2:1729.

[10]Ibid., 2:1730.

[11]Ibid., 2:2046.

[12]Ibid., 1:268.

wasteful congregation. Delegate William C. Foster Sr. was among those who supported the writing of the Address, believing the document to be necessary in order to explain to the people of the state why the delegates had met for several months when "the public anticipated that the Convention would not be in session longer than a few weeks." In particular, he hoped to have the Address done before the end of the convention, to avoid "the course which the Legislature had been in the habit of leading, viz: doing the greater part of their business during the last week of the session."[13]

The framers and ratifiers of the 1851 constitution knew that the only way they could remedy Indiana's fiscal maladies was to rein in the state's unrestrained legislators. The delegates accomplished this goal with two separate, but connected, restraints on the representative body: broadly, preventing the legislature from passing an extraordinary number of unnecessary laws; and specifically, preventing the legislature from incurring public debt.

UNNECESSARY LAWS AND THE SINGLE SUBJECT RULE

The restrictions imposed by the convention upon the General Assembly suggest that delegates saw the body as incapable of resisting the urge to pass a high number of expensive, yet narrowly applicable special-interest laws every time the legislators came into session. The delegates reacted to this out-of-control legislating by including a number of Indiana-specific restraints in the new constitution: requiring the legislature to read every bill in its entirety on three separate days, preventing the legislature from ever circumventing the final reading of a bill; mandating that a majority of elected members be present in order to vote (preventing a bill from being passed merely by a majority of representatives present); and disallowing any revision or amendment to a bill by referencing it only by title.[14] In addition, the convention, which viewed the legislature as a body incapable of self-moderation, insisted that the legislature meet only every other year instead of annually, as it had done previously.[15]

The convention's rationale was twofold: first, to save money (delegates estimated a savings of $20,000 per year); second, to give the legislators "some opportunity to become acquainted with the laws of one session

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[13]Ibid., 2:1731-32. Foster did express some concern about the expense of printing the Address but asserted that "a few dollars more or less would be but a drop in the bucket."

[14]Ind. Const. art. 4, § § 18, 21, 25 (1851).

[15]Ind. Const. art. 4, § 9 (1851). The governor could call a special session.

before these are followed by the amendments of the next."[16] For more than one hundred years, the Indiana General Assembly abided by the convention's restrictions; it was not until 1970 that the legislature returned to its annual meeting schedule.[17]

Significant as these restrictions must have been to a legislature used to having free rein over the state's law-making capacities, the convention was not yet finished. Article 4, Section 19 of the Indiana Constitution enshrines what is known as the Single Subject Rule. The article's provision that a bill can have only one "subject" resulted from an all-too common practice in which "two provisions, having no proper connection with each other, may, under the present Constitution, be embraced in the same bill, and be carried by a combination of their respective friends, though neither, in itself, has merit or strength enough to obtain the vote of a majority, and would fail, as it ought if voted upon singly."[18] Known as "log-rolling," this practice allowed bills to skate through the legislature with support from disparate groups, each supporting the bill for utterly disconnected purposes.

This provision has had a substantial impact on the General Assembly's procedures. While Indiana courts now allow the legislature leeway in determining what constitutes a single subject, the Single Subject Rule remains in full force. As far back as 1902, the Indiana Supreme Court stated:

> While this court has been liberal in the past in construing § 19, of article 4, of the Constitution, nevertheless, it has frequently held that when the title of an act is so special or limited as to include one particular only of some general subject over which legislation may be had, then, and under such circumstances, the body of the act must be limited or confined to the particular or special subject expressed in the title, and to matters properly connected therewith, and the act cannot deal with other particulars of such general subject.[19]

Ultimately, lawmakers must have a "reasonable basis" for putting several subjects in one bill.[20]

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[16]"An Address to the Electors of the State," in Kettleborough, *Constitution Making in Indiana*, 1:406.

[17]Ind. Const. art. 4, § 9 (1970).

[18]"An Address to the Electors of the State," in Kettleborough, *Constitution Making in Indiana*, 1:407.

[19]*State, ex rel., v. Commercial Ins. Co.*, 64 N.E. 466,467–68 (Ind. 1902).

[20]*Loparex*, 964 N.E.2d 806 (Ind. 2012).

Determining whether an act violates the dictates of the Single Subject Rule, however, is another matter. The Enrolled Act Rule demands that courts'

> inquiry into whether an act violates Art. 4, § 19 ends upon review of the final act itself. It is settled law in this state that, when an enrolled act is authenticated by the signatures of the presiding officers of the two houses, it will be *conclusively presumed* that the same was enacted in conformity with all the requirements of the Constitution, and that the enrolled bill contains the act as it actually passed, and it is not allowable to look to the journals of the two houses, or to other extrinsic sources, for the purpose of attacking its validity *or the manner of its enactment*.[21]

Thus, Indiana courts are prevented from looking behind the scenes to determine whether the legislature complied with the demands of the constitution. The legislative process is beyond the scope of judicial inspection, but the final result must comply with the constitution.

In *Bayh v. Indiana State Building and Construction Trades Council*, the State Building and Construction Trades Council challenged the Prevailing Wage Act on the grounds that it violated Article 4, Section 19's Single Subject Rule.[22] Finding the Prevailing Wage Act to be an independent act, not a revision of a different bill, the Indiana Supreme Court noted its "inquiry into whether an act violates Art. 4, § 19 ends upon review of the final act itself."[23] The Enrolled Act Rule, the court reaffirmed, maintains the essential separation of powers.[24] Once the court has determined that the bill concerns just one subject, "there is little room for judicial inquiry into legislative motivations, intentions, and political maneuverings."[25] After all, "what one person might see as evil logrolling, another might view as simple give and take. The single subject provisions of the Constitution and the enrolled act rule are designed to promote fair practice in legislating without much judicial intervention."[26]

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[21]*Bayh v. Indiana State Bldg. & Const. Trades Council*, 674 N.E.2d 176, 179 (Ind. 1996) [quoting *Roeschlein v. Thomas,* 280 N.E.2d 581, 587 (Ind.1972) (*quoting State v. Wheeler,* 89 N.E. 1, 2 (1909)] (emphasis in original).

[22]*Bayh v. Indiana State Bldg. & Const. Trades Council*, 674 N.E.2d 176 (Ind. 1996).

[23]*Id.* at 179.

[24]*Id.*

[25]*Id.*

[26]*Id.*

What the Address described as "the most important restriction imposed on the legislative branch," however, was the provision that prevented the legislature from passing "special laws." "More than two-thirds of our legislation," the framers contended, "and the most confusing and most mischievous portion of it—is cut off by this single provision." The convention felt that "independently of the intrinsic benefits of such a change, the saving thereby effected of expense, both as regards the time of the legislature and the cost of printing our laws, will be great." [27]

The constitution lays out not only this broad rule, but also a list of specific issues that the legislature may not pass as special laws, including granting divorces, punishing crimes, changing peoples' names, and providing change of venue in civil and criminal cases, all of which now seem unimaginable as problems to be handled by the legislature.

THE LEGISLATURE AND THE CREATION OF PUBLIC DEBT

With the legislature's procedural practices contained, the convention then turned to preventing the legislature from doing what it had specialized in over the past several decades—incurring state debt in order to fund any, and every, initiative that the legislators desired.

When he proposed the creation of a committee to compose the Address, Owen, reflecting on the 1816 Constitutional Convention, declared:

> If, during that entire session, they had, in addition to their three week's labor, done but one act, namely, to add to the Constitution we have been living under, six lines—six lines which find a place in the Constitution as amended by us, providing that the Legislature shall not have power to contract a public debt, nor engage the State as a stockholder in any corporation, nor to loan its credit to any individual or association; if, I say, during a session thus protracted and expensive, they had made but that single amendment, the expense incurred by their labors would have been the best money ever expended by the State, or paid by the people.

Upon the conclusion of these remarks, the delegates exploded with "enthusiastic applause."[28] In response, the convention enacted a strik-

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[27]Ind. Const. art. 4, § 22 (1851); "An Address to the Electors of the State," in Kettleborough, *Constitution Making in Indiana*, 1:407.

[28]*Report of the Debates and Proceedings of the Convention…1850*, 2:1730.

ing provision that prevents the state from taking on debt.[29] Article 10, Section 5 states: "No law shall authorize any debt to be contracted, on behalf of the State, except in the following cases: to meet casual deficits in the revenue; to pay the interest on the State debt; to repel invasion, suppress insurrection, or, if hostilities be threatened, provide for the public defense."[30]

The Address reiterates Owen's sentiments: "Had this provision, brief and simple as it is, been inserted in the Constitution of 1816, it would have saved the State from a loss of six millions of dollars." The interest that the state was paying on that debt could have funded "such a Convention as that which has been engaged, for the last four months, in framing a constitution, which shuts out for the future, all possibilities of similar folly."[31]

This strict provision held sway until the mid-twentieth century. Starting in the late 1950s, the Indiana Supreme Court approved a plan that allows the state to take on debt through a corporation. In *Book v. State Office Building Commission*, a concerned taxpayer attempted to prevent the State Office Building Commission from continuing construction on the State Office Building.[32] One of Book's contentions, among many others, was that the act and the commission's resolution allowing for the building's construction violated Article 10, Section 5 of the state constitution.[33] The court found, first, "that the State Office Building Commission is a separate corporate body created as an instrumentality of the State for a public purpose, but it cannot be considered as the State of Indiana in its corporate sovereign capacity."[34] "Since the Commission is a corporate body separate from the State of Indiana in its corporate sovereign capacity," the justices continued, "the purchasers of the proposed debentures must rely upon the revenues derived from income from rentals of the building for the payment of interest and the retirement of the bonds as they become

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[29]Ind. Const. art. 10, § 5 (1851).

[30]Ind. Const. art. 10, § 10 (1851). The word "dept" has been changed to "debt" in accordance with the modern constitution for ease of reading.

[31]"An Address to the Electors of the State," in Kettleborough, *Constitution Making in Indiana*, 1:410.

[32]149 N.E.2d 273, 277–8 (Ind. 1958).

[33]*Id.* at 279. The complaint reads: "That the Act, as amended, violates Art. 10, § 5 of the Constitution of Indiana in that it purports to permit agencies or departments of the State to enter into agreements with the Commission that would commit such agencies or departments to obligations which would constitute a debt of the State of Indiana; (l) That said Act, as amended, would further violate such Art. 10 § 5 by purporting to authorize the Commission to issue revenue debentures for the purpose of financing the proposed State Office Building."

[34]*Id.* at 282.

due."[35] A statute created the commission and "under its provisions bondholders, in case of default, have no recourse against the State of Indiana in its corporate sovereign capacity, or against any State fund."[36]

An important aspect of this scenario is that the corporation, not the state, owes the money. Thus, a debtor would sue the corporation, not the state's treasury, to recoup past-due funds. This, the court believed, was sufficient to enforce the wishes of the 1851 framers that the state not take on debt.

THE BILL OF RIGHTS

To the mid-nineteenth-century Hoosiers who penned the 1851 constitution, neither the protections of the 1816 constitution nor the assurances of the U. S. Constitution sufficed to ensure the liberty of Indiana's citizens. The delegates wanted to ensure that Indiana citizens were protected by their government, against their government. It is in this realm, particularly, that one sees the Indiana-specific nature of the 1851 changes to the state constitution. The convention enacted these changes to protect Indiana citizens from specific infringements upon their rights.

PRESERVING PROPERTY RIGHTS

In what the Address describes as "an important change," the framers of the 1851 constitution added a provision that ensured that those Hoosiers whose land was to be taken by the government but used by a private entity for the public good would be paid before the entity could take possession of their land.[37] As the Address states,

> In the old Constitution the provision as to the taking of private property for public use, is that it shall not be taken "without just compensation being made therefor;" but it is not declared whether or not this property shall be assessed and be paid, before it is taken. The provision in the new Constitution is, that when property is

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[35]*Id.* at 284.

[36]*Id.*

[37]"An Address to the Electors of the State," in Kettleborough, *Constitution Making in Indiana*, 1:405; Ind. Const. art. 1, § 21 (1851). In 1851, Ohio amended its constitution to bar the practice of offsetting the imputed benefits of a project against the loss suffered by the individual property owners whose land was taken. James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (New York, 2008), 78.

> taken (except in the case of the State) compensation shall be "first assessed and tendered." This is an important change. As the law now stands, an incorporated company, constructing a railroad or other public improvement, may take a man's property first, and pay for it afterwards. The change proposed requires, that, before taking any property, a tender should first be made of its assessed value. If that tender be rejected by the owner, and he seek his remedy by appeal, the property may be taken; so that one man may not be able, by unreasonable obstinacy, to arrest for months or years, a work of public importance.[38]

This provision has had a significant impact on decisions in this realm: the Indiana Supreme Court has long interpreted the corresponding provision in Article 1, Section 21 precisely as the framers intended. In *Lake Erie v. Kinsey*, a railroad company sought to invoke eminent domain to obtain possession of civilian land. The railroad gained possession of the civilian's land through the proper governmental channels, paid the owner fifty dollars, and started building its railway.[39] However, within ten days, the owner of the land filed an appeal.[40] The jury found that the civilian landowner had incurred damages of $790.[41]

The Indiana Supreme Court disagreed with the railroad's claim that paying the civilian an amount determined by appraisers would satisfy Article 1, Section 21.[42] The court found that title to the land could not pass until a jury had determined the land's worth, and the railroad had tendered that value to the civilian—even if that resulted in the company having to wait through lengthy court proceedings to determine the appropriate amount owed before the railroad could possess the land.[43] In light of the U. S. Supreme Court's, and most other governments', leniency and conciliation toward railroads and corporations in the late nineteenth century, the Indiana Constitution's steadfast stance in opposition to this abuse of power is remarkable.[44]

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[38]"An Address to the Electors of the State," in Kettleborough, *Constitution Making in Indiana*, 1:405.

[39]87 Ind. 514.

[40]*Id.* at 514–15.

[41]*Id.* at 515.

[42]*Id.* at 514, 517.

[43]*Id.* at 517–18.

[44]See, e.g., *Baltimore & O.R. Co. v. Goodman*, 275 U.S. 66 (1927) (finding that a person approaching a railroad crossing must stop, listen, and perhaps exit his vehicle to look for trains, a pro-railroad decision which imposed requirements on civilians to avoid liability).

RIGHT TO TRIAL BY JURY

The framers and ratifiers of the Indiana Constitution were convinced that the right to a jury trial should be available to anyone who wanted one, whether the trial be civil or criminal. Thus, the convention altered the arrangement of the 1816 constitution under which a case worth less than twenty dollars did not warrant a jury trial, nor, on the criminal side, did petit misdemeanors.[45]

In *Songer v. Civitas Bank*, the Indiana Supreme Court reiterated its dedication to the right to trial by jury.[46] In the years leading up to the decision, the court felt that "recent practice and case law has inclined toward denying a request for trial by jury whenever a complaint joins claims in law and equity on the theory that any claim in equity 'draws the whole lawsuit into equity.'"[47] If a plaintiff makes a claim in law, he is seeking monetary damages; if he seeks a claim in equity, he is hoping to obtain "equitable relief," meaning a restraining order, an injunction, or some other form of non-monetary relief. Historically, and still today, a jury is only available to a party making a claim in law (money damages), but not in equity.[48]

This, in the court's view, "narrows the right to trial by jury as guaranteed by the Indiana Constitution."[49] Though the court ultimately held that the case did not warrant a trial by jury because it was essentially an equitable claim,[50] the court insisted that "the right to a jury trial holds a special place in the system of justice, and we guard it against encroachment."[51]

While the Indiana Constitution does not alter the traditional relationship between law and equity, it does ensure the right to a trial by jury in either a civil or a criminal case, regardless of the monetary amount requested.

UNEQUAL PRIVILEGES AND IMMUNITIES

Perhaps the most interesting provision of the 1851 Indiana Constitution is Article 1, Section 23, which states that "the General Assembly shall

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[45]"An Address to the Electors of the State," in Kettleborough, *Constitution Making in Indiana*, 1:405; Ind. Const. art. 1, § 5 (1816).

[46]*Songer v. Civitas Bank*, 771 N.E.2d 61 (Ind. 2002).

[47]*Id.* at 62.

[48]*Id.* at 63.

[49]*Id.*

[50]*Id.* at 69.

[51]*Id.* at 63.

not grant to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."[52] While this provision seems to confer similar rights as the Equal Protection and Privileges and Immunities Clauses in the Fourteenth Amendment to the U. S. Constitution, the 1851 Indiana provision pre-dates the Fourteenth Amendment by more than fifteen years.[53] Textually, it differs in significant ways from the Fourteenth Amendment's familiar guarantee:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws.[54]

Section 23 evolved in remarkably different circumstances from the Fourteenth Amendment, which was passed after the Civil War to ensure the rights of the recently freed African American slaves. Section 23 had none of those racial overtones. In fact, as the Indiana Supreme Court observed in the late twentieth century, the tone at the convention during the debates over Section 23 was one of commercial egalitarianism and anti-big business privilege.[55] Convention delegate Daniel Reed invoked Andrew Jackson, the great hero of "everyman" democracy:

> Unless you become more watchful in your States, and check this spirit of monopoly and thirst for exclusive privileges, you will, in the end, find that the most important powers of government have been given or bartered away, and the control over your dearest interests has passed into the hands of these corporations.[56]

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[52]Ind. Const. art. 1, § 23 (1851). For further discussion of equality in the Indiana Constitution, see Michael John DeBoer, "Equality as a Fundamental Value in the Indiana Constitution," *Valparaiso University Law Review* 38 (Spring 2004), 489-575.

[53]Ind. Const. art. 1, § 23 (1851); U. S. Const. amend. XIV.

[54]U. S. Const. amend. XIV.

[55]*Collins v. Day*, 644 N.E.2d 72, 76–78 (Ind. 1994).

[56]*Id.* at 76 (quoting *Report of the Debates and Proceedings of the Convention…1850*, 1:221–22).

Reed's quotation was later used by the Indiana Supreme Court when it found that Section 23 provided different protections than the Fourteenth Amendment.[57]

The history of Section 23 has been complicated. In the late nineteenth century, not long after the enactment of both federal and state provisions, the Indiana Supreme Court and the U. S. Supreme Court refused to give the provisions the egalitarian reading they receive today. In 1874, for example, the Indiana Supreme Court decided *Cory v. Carter*, in which an African American man, Mr. Carter, sued his local school district after his children and grandchildren were turned away solely on account of their race.[58] The court concluded that the framers and ratifiers of the Indiana Constitution had intended Section 23 to apply only to citizens of Indiana; in 1851, African Americans were not citizens of the state.[59] The court further concluded that the framers and ratifiers had not intended for Article 8, Section 1, providing for the common school system, to include African Americans—to whom that same group of framers also denied essential rights of citizenship, including voting and serving on juries and in public office.[60]

With regard to the federal assurances of the Fourteenth Amendment, the Indiana Supreme Court found that the Privileges and Immunities Clause "does not refer to citizens of the states. It embraces only citizens of the United States."[61] The court's interpretation is that "it places the privileges and immunities of citizens of the United States under the protection of the Federal Constitution, and leaves the privileges and immunities of citizens of a state under the protection of the state constitution."[62] The court found that "equality of rights does not involve the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school. Any classification which preserves substantially equal school advantages is not prohibited by either the state or Federal Constitution, nor would it contravene the

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[57]*Id.* at 76.

[58]*Cory v. Carter*, 48 Ind. 327, 329–30 (1874).

[59]*Id.* at 341.

[60]*Id.*

[61]*Id.* at 349–50.

[62]*Id.* at 350.

provisions of either."[63] With this reading of Section 23, the separate but equal doctrine became embedded in Indiana law.[64]

During the 1970s, the Indiana Supreme Court interpreted Section 23 to convey the same rights as its federal counterpart.[65] The U. S. Supreme Court, however, has interpreted the Fourteenth Amendment expansively, finding many doctrines and policies in its scope that have turned the provision into a basis for many judicial decisions. Would Indiana courts take on all of that precedent as its own state doctrine, in addition to those guarantees by the nation's Supreme Court?

In 1994, the Indiana Supreme Court found that Indiana state precedent, relying on Section 23, would not be bound by the expansive precedent surrounding the Fourteenth Amendment.[66] The court found that "there is no settled body of Indiana law that compels application of a federal equal protection analytical methodology to claims alleging special privileges or immunities under Indiana § 23 and that § 23 should be given independent interpretation and application."[67] According to the decision:

> From all available indications, we conclude that at the time of the adoption of Section 23 and its ratification as part of the 1851 Indiana Constitution, the principal purpose was to prohibit the state legislature from affirmatively granting any exclusive privilege or immunity involving the state's participation in commercial enterprise. Section 23 does not appear to have been enacted to prevent abridgement of any existing privileges or immunities, nor to assure citizens the equal protection of the laws.[68]

DECREASING RELIGION'S ROLE IN PUBLIC LIFE

Perhaps one of the clearest changes intended by the convention to protect the individual rights of Indiana citizens was to repair and secure

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[63]*Id.* at 357.

[64]*Id.* at 362.

[65]*Reilly v. Robertson*, 360 N.E.2d 171, 175 (Ind. 1977) (finding "that the rights intended to be protected by [§ 23] of the Indiana Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution are identical").

[66]*Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).

[67]*Id.* at 75.

[68]*Id.* at 77.

the crumbling wall between church and state. In the words of the Address, the convention placed these more stringent assurances of religious liberty into the new constitution: "In addition to the guarantees which find a place in the old Constitution, to secure the rights of conscience and prevent the imposition, on the citizen, of any tax to support any ministry or mode of worship against his consent." Specifically, the convention added Article 1, Sections 6 and 7, to the existing assurances of religious liberty. The Address noted that two of Indiana's sister states—Michigan and Wisconsin—had already enshrined similar protections in their state constitutions. [69]

The changes made to the Indiana Constitution in 1851 came in addition to the guarantees of the U. S. Constitution. As the Supreme Court of Indiana found in a landmark religious liberty case in the twenty-first century:

> When Indiana's present constitution was adopted in 1851, the framers who drafted it and the voters who ratified it did not copy or paraphrase the 1791 language of the federal First Amendment. Instead, they adopted seven separate and specific provisions, Sections 2 through 8 of Article 1, relating to religion. Clearly, the religious liberty provisions of the Indiana Constitution were not intended merely to mirror the federal First Amendment. We reject the contention that the Indiana Constitution's guarantees of religious protection should be equated with those of its federal counterpart and that federal jurisprudence therefore governs the interpretation of our state guarantees.[70]

Embodied in Article 1, Section 6 is the provision that has, since its adoption, had the larger influence of the two on Indiana jurisprudence. Section 6 provides that "no money shall be drawn from the treasury, for the benefit of any religious or theological institution."[71] In fact, under the old 1816 constitution, the use of public funds to support religious schools had been common. There were very few schools in mid-nineteenth-century Indiana, so public funds were pragmatically divided up

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[69]"An Address to the Electors of the State," in Kettleborough, *Constitution Making in Indiana*, 1:404-405; Ind. Const. art. 1, § § 6-7 (1851).

[70]*City Chapel Evangelical Free Inc. v. City of S. Bend ex rel. Dep't of Redevelopment*, 744 N.E.2d 443, 445–46 (Ind. 2001).

[71]Ind. Const. art. 1, § 6 (1851).

among whatever schools did exist.[72] The delegates at the convention thus intended to protect further "the rights of conscience" by reaffirming their commitment to the separation of church and state.[73]

In the modern era, even after the 1851 addition of Article 1, Section 6, the Indiana Supreme Court has interpreted the provision to have constructed a wall with some holes: the court has found that while a religious institution may benefit substantially from public funding, it cannot benefit *directly*.[74] The court has supported this interpretation of the 1851 provision by relying on the statements in the Address and a comparative analysis with the constitutions of Wisconsin and Michigan in order to understand more fully the intention of the 1851 ratifiers.[75] By way of illustration, in *Meredith v. Pence*, the Supreme Court of Indiana found that the so-called "school voucher" program does not violate Article 1, Section 6 because families and the students, not the parochial schools themselves, are the direct beneficiaries of the state's money.[76] Serving the state's citizens is an acceptable initiative for the state's money. The court refused to accept that the framers of the 1851 constitution wished to prevent any public money from aiding, in any way, religious organizations: "We first find it inconceivable that the framers and ratifiers intended to expansively prohibit any and all government expenditures from which a religious or theological institution derives a benefit—for example, fire and police protection, municipal water and sewage service, sidewalks and streets, and the like."[77]

EDUCATION REFORM

> The principal change…is the abolition of county seminaries, and the application of the funds to common schools…wherein tuition shall be free.[78]

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[72]*Embry v. O'Bannon*, 798 N.E.2d 157, 163 (Ind. 2003).

[73]"An Address to the Electors of the State," in Kettleborough, *Constitution Making in Indiana*, 1:404.

[74]*Meredith v. Pence*, 984 N.E.2d 1213, 1227 (Ind. 2013).

[75]*Embry,* 798 N.E.2d at 161–62.

[76]*Meredith*, 984 N.E.2d at 1228–29.

[77]*Id.* at 1227.

[78]"An Address to the Electors of the State," in Kettleborough, *Constitution Making in Indiana*, 1:410.

Changing the fundamental nature of education in Indiana, the 1851 Indiana Constitution provided for the establishment of tuition-free public schools.[79] Embodied in the constitution's Article 8, Section 1, this alteration would open doors for students across the state.[80] The convention took the public money that had previously been used to fund county seminaries and instead used it to support a system of common schools. With this gesture, the convention emphasized its new focus: reinvigorating the constitutional protection dividing church and state while simultaneously encouraging the rights of the common citizen to access what had previously been the privileges of the few. In these schools "wherein tuition shall be without charge, and equally open to all," the constitution states: "Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement."[81]

The new public school system would have a state superintendent of public instruction, the first of whom was Caleb Mills. Mills was an especially fitting first choice, having founded Wabash College in 1833 and worked tirelessly to promote the cause of free public education in Indiana.[82]

The Indiana Supreme Court's interpretation of this provision creating free and equal public education, however, has a checkered past. In *Cory v. Carter*, the court held that the framers and ratifiers of the 1851 Indiana Constitution had not intended Article 8, Section 1 to include African Americans when the delegates wrote in the constitution that the common schools would be "equally open to all."[83] The case gave the court's stamp of approval to the idea of "separate but equal" schools; it was even cited by the U. S. Supreme Court in *Plessy v. Ferguson*.[84]

Outside the issue of desegregation, the court's interpretation of Article 8, Section 1 has steadfastly upheld the dictates of the 1851 addition. What

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[79]Ind. Const. art. 8, § 1 (1851).

[80]*Id.*

[81]*Id.*

[82]Ind. Const. art. 8, § 8 (1851); George T. Patton Jr., "Caleb Mills: Advocate for Public Schools," *Wabash Magazine* (Winter 1999), http://www.wabash.edu/magazine/1999/winter/features/endnotes.htm; Val Nolan Jr., "Caleb Mills and the Indiana Free School Law," *Indiana Magazine of History* 49 (March 1953), 81-90.

[83]48 Ind. 327 (1874); Ind. Const. art. 8, § 1 (1851).

[84]*Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

does it mean for public education to be "without charge"?[85] The Address insisted that public education would be "free" and the Supreme Court has held the same.[86] In 2002, the Evansville-Vanderburgh School Corporation began imposing a twenty-dollar student services fee.[87] The school district used the fee to pay for a variety of school activities and functions in an effort to overcome its large budget deficit.[88] Two parents sued the district claiming, in part, that the charge violated Article 8, Section 1 of the Indiana Constitution.[89]

The Supreme Court struck down the twenty-dollar fee, basing its analysis entirely on the wording of the constitution. While this seems like a logical approach, the wording of the Address clouds the court's analysis. The Address provides that "tuition shall be free" in the newly formed public schools.[90] The constitution states that "tuition shall be without charge."[91] The Supreme Court stated that the Court of Appeals' opinion, while coming to the same result, "sweeps a little too broadly."[92] The Supreme Court found:

> The framers of Indiana's constitution were careful not to provide for a free school system. Rather, at most the framers provided that tuition would be free, or more precisely "tuition shall be without charge." This is a subtle distinction, but a significant one that we believe the framers made intentionally. A free public school system implies a level of educational subsidization that the framers at least did not endorse and at most rejected outright.[93]

While the text of the constitution offers the final word over outside sources, if the framers wrote the Address in order to explain to the people

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[85]Ind. Const. art. 8, § 1 (1851).

[86]"An Address to the Electors of the State," in Kettleborough, *Constitution Making in Indiana*, 1:410; *Nagy ex rel. Nagy v. Evansville-Vanderburgh School Corp.*, 844 N.E.2d 481, 482 (2006).

[87]*Nagy*, 844 N.E.2d 481 (2006).

[88]*Id.*

[89]*Id.* at 482–83.

[90]"An Address to the Electors of the State," in Kettleborough, *Constitution Making in Indiana*, 1:410.

[91]Ind. Const. art. 8, § 1 (1851).

[92]*Nagy* 844 N.E.2d at 484 (2006).

[93]*Id.* at 485.

the changes that they had made, it seems odd that they would not say exactly what they had intended for those changes to mean. Telling the people that school would be "free" for their children seems misdirected if it would actually be "without charge," if those terms have different ramifications.

IMPROVEMENTS IN THE PRACTICE OF LAW AND THE LEGAL SYSTEM

Particularly interesting in the unique development of the Indiana Constitution were the two major reforms made by the convention delegates to modernize and improve the state's legal system: the delegates altered the requirements to practice law and simultaneously streamlined the legal system of pleadings and courts.[94]

Article 7, Section 21 of the 1851 constitution provided that "every person of good moral character, being a voter, shall be entitled to admission to practice law in all Courts of justice."[95] This section placated Jacksonians, who had feared that requirements barring common people from being attorneys would lead to lawyers becoming a ruling class. By the second decade of the twentieth century, however, Indiana was the only state in the country that did not have requirements to practice law, and the people repealed this section of the constitution in 1932.[96]

During their debates, the delegates came to an agreement on the need for a well-structured legal system:

> The object of law is to do justice between man and man. In order that it may be reverenced and obeyed, it should be simple and uniform, and its truth and reason made apparent. Law is intended for the good of all who live under it, and as such, its truth and reason should be apparent so that all could see, read, and understand. But are our laws easily understood and found? Certainly not; for the law boasts of its "glorious uncertainty."[97]

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[94]"An Address to the Electors of the State," in Kettleborough, *Constitution Making in Indiana*, 1:409.

[95]Ind. Const. art. 7, § 21 (1851).

[96]Colleen Kristl Pauwels, "Hepburn's Dream: The History of the *Indiana Law Journal*," *Indiana Law Journal* 75, issue 1 (2000), ii-iv, vii, at http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2083&context=ilj.

[97]*Report of the Debates and Proceedings of the Convention…1850*, 2:1738.

As delegate Horace Carter stated: "Of all the questions which have agitated our people and which have operated as a reason for the call of this Convention, there is not one in which so much interest has been felt, not one reform which has been so loudly demanded" as the reform of the state's legal system.[98]

The federal legal system, like Indiana's, was based on the English system under which two distinct courts existed: a court of law and a court of equity.[99] Courts of law adjudicated cases in which the remedy was monetary, and courts of equity handled cases with equitable, non-monetary claims. By 1851, the Indiana convention delegates were dissatisfied with this bifurcated arrangement. With one sweeping constitutional provision, the delegates unified the courts: "The General Assembly is required, at its first session, to appoint three commissioners, whose duty it shall be to revise and simplify the practice and forms of the courts. They are to abolish the separate forms of action now in use; and to provide for a uniform mode of pleading, without distinction between law and equity." In addition, the constitution empowered the legislature to instruct those same commissioners to simplify Indiana statutory law "into a systematic code."[100]

The convention had two goals in unifying the state's system of pleadings. First, a simple error could prevent an aggrieved party from obtaining judicial relief: "As the law now is, a man may prosecute a perfectly just claim, but if he commence suit on what an arbitrary rule calls the wrong side of the court, he cannot recover."[101] Under the old system, a party who—accidentally or because of misinformation—brought a claim seeking monetary relief in the court of equity was out of luck. The delegates, including Horace Carter, found this antiquated, unjust, and bifurcated system to be a relic of an age of trickery and elitism.[102]

In addition, the old system created unnecessary duplication of trials rather than one proceeding adjudicating all of the claims. The Address offered this example:

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[98]Ibid.

[99]See, e.g., *Songer*, 771 N.E.2d at 63.

[100]"An Address to the Electors of the State," in Kettleborough, *Constitution Making in Indiana*, 1:409; Ind. Const. art. 7, § 20 (1851).

[101]"An Address to the Electors of the State," in Kettleborough, *Constitution Making in Indiana*, 1:409.

[102]*Report of the Debates and Proceedings of the Convention…1850*, 2:1738.

> A man may have various demands for money against a neighbor, all of which could naturally and conveniently be set forth in the same declaration; but ancient practice has declared that there are some ten or twelve different forms of action; and he may have to bring a separate suit, with its separate expenses, for each demand though varying very slightly in their character. A remarkable example is this: If a man hold two promissory notes against another, payable in current bank paper, the one being sealed and the other not sealed, he must bring a separate suit upon each.[103]

The delegates concluded that "no reason but a purely arbitrary one, founded on antiquated usage, can be given for such vexatious and cost-increasing distinctions."[104]

With this seemingly simple change, the convention pulled the Indiana judicial system out of the recesses of America's colonial past and into the future, where the merits of a litigant's claim, not technicalities, decide that claim's fate.

How has this change impacted the Indiana Supreme Court's holdings since its implementation? Some cases are still decided on what many would deem "technicalities." Whether one is entitled to a jury trial still depends on whether the case sounds in law or in equity.[105] It is left to the particular court as to whether it would rather have the law and equitable claims tried in the same or separate trials, but a complaint will no longer be dismissed for being filed in the "wrong" court.[106]

In "An Address to the Electors of the State," the framers and ratifiers of the 1851 Indiana Constitution provided later generations with a unique document that delineates the changes made to the 1816 constitution and reveals some of the goals for the delegates' modifications. Considering the subjects discussed in the Address alongside a representative selection of cases decided in the last two decades by the Indiana Supreme Court, legal

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[103]"An Address to the Electors of the State," in Kettleborough, *Constitution Making in Indiana*, 1:409.

[104]Ibid., 409-410. The Address also informed voters that "the legislature is authorized to establish courts of conciliation, for the speedy decision of cases that may be voluntarily submitted to them, without the tedious and expensive process of law."

[105]See, e.g., *Songer v. Civitas Bank*, 771 N.E.2d 61, 63 (Ind. 2002) ("Drawing as we do from the English common law roots and England's symbiotic system of law courts and equity courts, it is a well-settled tenet that a party is not entitled to a jury trial on equitable claims.").

[106]Ind. Trial R. 38 (A).

scholars and historians can gain a deeper understanding of the evolution of state constitutional history. As the justices of the Indiana Supreme Court have increasingly come to recognize the state's constitution as a work specific to Indiana, they have issued many important decisions based upon their interpretations of that constitution as a document separate and distinct from its federal counterpart.