

## PERSPECTIVES: STATE CHARACTER, TRADITIONS, AND PECULIARITIES

### INDIANA'S CONSTITUTION AS A DOCUMENT OF SPECIAL ASPIRATIONS

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Difficult as it is to identify the unique characteristics of a state made up of diverse populations, those outside the State of Indiana sometimes seek to sum up our character in a single word: “hoosier.” It is not always thought a compliment. Webster’s defines the word not only as an Indianan, but alternately as “an awkward, unhandy, or unskilled person; an ignorant rustic” and “to loaf on or botch a job,” as Senator Alfonse D’Amato once joked on the floor of the United States Senate.<sup>1</sup>

These definitions are too harsh, but Indiana residents sometimes do associate with quaint or rustic sensibilities. Still, most true Hoosiers live with a duality best expressed as a restless desire to hold onto our traditions and yet strive for progress. Our state constitution and its jurisprudence reflect this Ying and Yang. To understand Indiana’s constitutional jurisprudence, and how the state’s “spirit” shapes and is reflected in it, it is important to know something about how the present constitution and Hoosier “spirit” were shaped.

Much of Indiana’s present constitution derives from its 1816 original, but significant changes occurred after a convention in 1850–51, which was driven by the failure of a massive public works

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<sup>1</sup> WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1089 (1971). The larger context of the comment reflects another characteristic commonly assigned to Hoosiers, our love of basketball. Senator D’Amato and Indiana Senator Dan Quayle traded quips about the chances for success of the Indiana University men’s basketball team in the NCAA Finals. 133 CONG. REC. 7439–41 (1987).

scheme.<sup>2</sup> In 1836, twenty years after being admitted into the Union, Indiana was a state with a growing population and economy.<sup>3</sup> Recognizing the state's transportation infrastructure as inadequate to sustain economic growth, the Indiana legislature passed an act "to provide for a general system of Internal Improvements."<sup>4</sup> The Internal Improvements Act authorized the construction of major canals (including the Wabash-Erie), turnpikes, and railroads to serve as transportation arteries within the state.<sup>5</sup> The legislature sanctioned borrowing up to ten million dollars to finance the effort.<sup>6</sup>

The program failed miserably. Significant portions of individual projects were finished, but not even one was fully completed within the projected timeframe.<sup>7</sup> Moreover, as legislative investigations into the fiasco later revealed, mismanagement, overwork, and no small amount of corruption had rendered the program financially unsound.<sup>8</sup> By 1841 the state neared bankruptcy, unable to pay even the interest on the project's debt.<sup>9</sup>

This failure continues to have a profound effect on the people of Indiana. As the noted Indiana historian James H. Madison has argued, the frustration with the debacle "contributed generally to shaping a more conservative outlook in Indiana, a reluctance to venture actively into the public arena, a tendency of Hoosiers to prefer limited state government."<sup>10</sup>

Still, Indianans have never abandoned the optimism and aspiration for progress that originally brought them to the frontier. Hoosiers set high, sometimes idealistic, goals and they remain committed to achieving them through steady, practical, and reasonable efforts rather than through a single bold leap. Key elements of our constitution reveal the complexity and spirit of Indiana's people and her law.

## I. WE LIKE SMALL GOVERNMENT

Delegates to our last constitutional convention aimed to limit the

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<sup>2</sup> DONALD F. CARMONY, *INDIANA 1816-1850: THE PIONEER ERA* 405 (1998).

<sup>3</sup> See JAMES H. MADISON, *THE INDIANA WAY: A STATE HISTORY* 77-83 (First Midland 1990) (1986).

<sup>4</sup> 1836 Ind. Acts 6.

<sup>5</sup> *Id.* at 7-9.

<sup>6</sup> *Id.* at 10.

<sup>7</sup> MADISON, *supra* note 3, at 83; CARMONY, *supra* note 2, at 293.

<sup>8</sup> CARMONY, *supra* note 2, at 230-32.

<sup>9</sup> MADISON, *supra* note 3, at 83-84.

<sup>10</sup> *Id.* at 86.

size and potential invasiveness of state government, in particular, its ability to spend money and conceal legislative actions.<sup>11</sup> Many blamed the financial chaos caused by the Internal Improvements Act on legislative log-rolling. As Delegate Zenor said:

I was here when the “mammoth internal improvement bill” was fought through . . . . That bill was got through both Houses, not upon its merits, not because a majority of the people wanted it, but by a system of “log rolling,” which bore down all opposition. One member voted for the bill on condition that his constituents should have a portion of the benefit, and so on until enough votes were secured to pass the bill through both branches.<sup>12</sup>

As one measure to stem the process of log-rolling, many delegates advocated a prohibition against deficit spending. One delegate made this passionate plea:

Sir, the right of the Legislature of a State . . . is to levy taxes for the purposes of State government, and for the purposes of repelling invasion or self-preservation, and for the faithful administration of the laws; and beyond this, they should not be permitted to go. Whenever they go beyond this, and contract debts for other purposes, they virtually appropriate the revenues and resources of those who are to come after us, and, I contend, take that which does not belong to them. Sir, their duty is to transmit to posterity a government free from incumbrances—unclogged with debts or liabilities—her revenues unappropriated—her resources untrammelled.<sup>13</sup>

The 1851 framers thus added provisions limiting debt. Article 10, section 5 prohibits state indebtedness except “[t]o 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.”<sup>14</sup> The state later restricted municipal debt to two percent of the assessed value of the local property.<sup>15</sup> Article 11, section 12 prohibits the state from holding stock in any corporation or association and from backing the credit

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<sup>11</sup> See 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA, 1850, at 673 (Indiana Historical Collections Reprint 1935) (1850).

<sup>12</sup> *Id.* at 675.

<sup>13</sup> *Id.* at 672.

<sup>14</sup> IND. CONST. art. 10, § 5.

<sup>15</sup> IND. CONST. art. 13, § 1.

of any person, association, or corporation.<sup>16</sup>

The prohibition on holding stock flowed from the legislature's decision in 1834 to charter a State Bank that "enjoyed a virtual monopoly."<sup>17</sup> It authorized the state to buy half the bank's stock.<sup>18</sup> Although the bank was successful (notwithstanding its role in financing the Internal Improvements), it faced substantial opposition from those who favored a privately held banking system.<sup>19</sup> This faction prevailed in 1850 by obtaining a prohibition against the state holding stock in any bank.<sup>20</sup>

Eventually, it became difficult for the state and municipalities to do business entirely on a pay-as-you-go basis. Indiana courts assented to this practical reality and countenanced devices designed to avoid the limits.

In 1923, for example, the city of Bicknell acquired a waterworks plant by issuing bonds repayable solely from the plant's income, without pledging any other city property.<sup>21</sup> The Indiana Supreme Court rejected a claim of constitutional subterfuge, noting that the purchase of the water plant was being accomplished not only at a reasonable price, but more importantly without resort to taxation.<sup>22</sup>

In 1958, the court condoned new state borrowing.<sup>23</sup> The state government was then badly in need of office space and paying nearly half a million dollars a year for rented facilities.<sup>24</sup> The legislature created a state office building commission to issue revenue debentures, build a new central office building, and lease space to various state departments.<sup>25</sup> The court rejected a challenge to this scheme, saying, "It is never an illegal evasion of a constitutional provision or prohibition to accomplish a desired result, which is lawful in itself, by discovering or following a legal way to do it."<sup>26</sup>

Indiana courts have been equally pragmatic about the stock ownership provision. When the legislature passed a law in 1980 allowing deposit of public funds in savings associations, the Indiana

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<sup>16</sup> IND. CONST. art. 11, § 12.

<sup>17</sup> See *N. Ind. Bank & Trust Co. v. State Bd. of Fin.*, 457 N.E.2d 527, 529 (Ind. 1983).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> IND. CONST. art. 11, § 12.

<sup>21</sup> *Fox v. Bicknell*, 141 N.E. 222, 223 (Ind. 1923).

<sup>22</sup> *Id.*

<sup>23</sup> *Book v. State Office Bldg. Comm'n*, 149 N.E.2d 273, 288 (Ind. 1958).

<sup>24</sup> *Id.* at 288 n.11.

<sup>25</sup> *Id.* at 278-79.

<sup>26</sup> *Id.* at 288.

Bankers Association invoked this prohibition in an effort to eliminate this competition.<sup>27</sup> The Indiana Supreme Court held that the constitution sought “to prevent the State from ever again being a partner in speculation.”<sup>28</sup> Because the statute at issue authorized only federally insured deposits, the court concluded that this was not the type of hazardous transaction convention delegates had feared.<sup>29</sup>

Though the debt restrictions of 1851 stand weakened today, they still color discussions about borrowing and make borrowing rather difficult. It leaves us with a Ying and Yang: declarations against debt and contemporaneous measured borrowing.

## II. NOW, WE CALL IT “TRANSPARENCY”

In an 1848 message to the General Assembly, Governor James Whitcomb lamented that “while the amount of our general legislation has for the last five years remained nearly stationary, that of local and private character has, within the same period, advanced more than three hundred and fifty per cent.”<sup>30</sup> Governor Whitcomb was dead on: by the 1849 and 1850 legislative sessions, over ninety percent of the laws passed by the General Assembly dealt with local or special subjects.<sup>31</sup>

For example, the 1849 General Assembly passed: an act allowing one Betsy Ann Simpson to file for divorce in the Lagrange Circuit Court without needing to prove she had been a resident of Indiana for one year;<sup>32</sup> an act to change Abraham Moore’s name to Cyrus Moore Dunham;<sup>33</sup> and an act “to incorporate the Marion County Horse Company, for the detection and apprehension of horse thieves, and others charged with crime.”<sup>34</sup>

Delegates considered such detailed work beneath the legislature’s dignity and a waste of state resources at a time when the state faced broader policy concerns.<sup>35</sup> Thus, the convention adopted article 4, section 22, forbidding enactment of local or special laws covering

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<sup>27</sup> See *N. Ind. Bank & Trust Co. v. State Bd. of Fin.*, 457 N.E.2d 527, 528 (Ind. 1983).

<sup>28</sup> *Id.* at 530.

<sup>29</sup> *Id.*

<sup>30</sup> CARMONY, *supra* note 2, at 416–17.

<sup>31</sup> Frank E. Horack, *Special Legislation: Another Twilight Zone*, 12 IND. L.J. 109, 115–16 (1936).

<sup>32</sup> 1849 Ind. Acts 22–23.

<sup>33</sup> 1849 Ind. Acts 73.

<sup>34</sup> 1849 Ind. Acts 103.

<sup>35</sup> See CARMONY, *supra* note 2, at 416–19.

seventeen listed subjects, such as laws regulating court practices, granting divorces, or assessing and collecting local taxes.<sup>36</sup> The delegates also adopted article 4, section 23, which requires that laws “be general, and of uniform operation throughout the State,” whenever possible.<sup>37</sup> These restrictions produced an immediate decline in local legislation.<sup>38</sup> The practice has never entirely died out, though, and judicial enforcement of these restrictions has been uneven.<sup>39</sup>

Some special statutes have been upheld as inescapably unique. In 1871 for example, the question arose whether the General Assembly could accept a county board’s \$50,000 pledge in return for locating Purdue University in Tippecanoe County.<sup>40</sup> The court observed that the law could not have been made general since “[t]he college could have but one location.”<sup>41</sup>

A recent similar case dealt with casino gambling, which the legislature chose to allow only on riverboats.<sup>42</sup> Challengers argued that this approach excluded most Indiana counties and called it an impermissible local law.<sup>43</sup> We concluded that the decision to permit only riverboat gambling was a legitimate selection among various forms of gaming and not a subterfuge for evading the bar against special laws.<sup>44</sup>

In the absence of unique geographical justification, the legislature frequently wrote statutes in terms of population size. This led to occasionally inconsistent disposition in the courts. In 1936, Indiana University School of Law Professor Frank Horack and a graduate student named Matthew Welsh described special legislation as a “twilight zone” of Indiana law.<sup>45</sup> They cited by illustration two statutes applying only to counties with populations between 250,000

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<sup>36</sup> IND. CONST. art. 4, § 22 (amended 1984). This article was amended in 1984 to remove a provision regulating the jurisdiction and duties of justices of the peace and constables. *Id.*

<sup>37</sup> IND. CONST. art. 4, § 23.

<sup>38</sup> Under the first legislature after the new constitution took effect, special legislation fell to forty-four percent of the total legislation. Horack, *supra* note 31, at 115. It remained at about that percent through the turn-of-the-century, and then fell to twenty-two percent by 1925 and down to twelve percent by 1935. *Id.*

<sup>39</sup> *See id.* at 116.

<sup>40</sup> Marks v. Trs. of Purdue Univ., 37 Ind. 155, 156–57 (1871).

<sup>41</sup> *Id.* at 163.

<sup>42</sup> Ind. Gaming Comm’n v. Moseley, 643 N.E.2d 296, 298 (Ind. 1994).

<sup>43</sup> *See id.*

<sup>44</sup> *Id.* at 301.

<sup>45</sup> *See* Horack, *supra* note 31, at 109. Welsh eventually became Governor of Indiana. Indiana Ind. Historical Bureau, Governor Matthew E. Welsh, <http://www.statelib.lib.in.us/www/ihb/govportraits/welsh.html> (last visited Jan. 10, 2005).

and 400,000, which consequently applied only to Lake County.<sup>46</sup> One withstood constitutional challenge and the other did not.<sup>47</sup> The authors described the conflicting results as “illustrative of the confusion and specious distinction which befogs with judicial wisdom the constitution lore of special legislation.”<sup>48</sup>

Despite such protestations, this approach to statutory classification has withstood most challenges. Its best use was a law reorganizing Indianapolis and Marion County, the state's largest local governments.<sup>49</sup>

Another approach to limiting special benefits for individual constituencies was a constitutional requirement that legislative acts be limited to a single subject.<sup>50</sup> The 1850 delegates were obviously fearful that special interests might again produce results like the Internal Improvements Act. As one delegate said, “[n]othing could be easier than in the haste of legislation, and at the close of a session, to smuggle some trifling section into the most necessary and, perhaps, important law of the session.”<sup>51</sup> A related protection sought transparency by regulating the titles of acts.<sup>52</sup> Delegate Dobson expressed the view that:

The title of a bill should be clear and explicit. But under the system of log-rolling, which prevails in the Legislature, it has become, in fact, like a nick name, conveying no true idea of what it purports to indicate. . . . [A] law should not sail under false colors. It is a duty we owe to the people that every law that is passed should be expressed in plain and simple language, in order that the people may understand it; and it should have its proper title—like a finger-board—so that the people may know where it leads to; or like a sign, so that a man may know its object.<sup>53</sup>

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<sup>46</sup> Horack, *supra* note 31, at 109 (citing 1933 Ind. Acts 153; 1931 Ind. Acts 108–13).

<sup>47</sup> See *Groves v. Bd. of Comm'rs*, 199 N.E. 137, 141 (Ind. 1936) (“The court holds that the act in question is so worded and is broad enough to receive within its operation all counties possessing the population and conditions designated, and that no legal reason has been pointed out for the condemnation of the act.”); *Heckler v. Conter*, 187 N.E. 878, 880 (Ind. 1933) (“The classification cannot stand the test [of article 4, section 23]. The law is clearly local and special.”).

<sup>48</sup> Horack, *supra* note 31, at 109.

<sup>49</sup> See *Dortch v. Lugar*, 266 N.E.2d 25, 30–32 (Ind. 1971).

<sup>50</sup> See IND. CONST. art. 4, § 19.

<sup>51</sup> 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA, 1850, at 1115 (Indiana Historical Collections Reprint 1935) (1850) [hereinafter 2 DEBATES AND PROCEEDINGS].

<sup>52</sup> See IND. CONST. art. 4, § 19 (amended 1974).

<sup>53</sup> 2 DEBATES AND PROCEEDINGS, *supra* note 51, at 1086.

Advocates for constraining legislative processes prevailed. Article 4, section 19 as originally passed required that enactments other than recodifications be confined to one subject, with a title expressing the subject matter.<sup>54</sup> The single-subject provision remains in effect today,<sup>55</sup> and the legislature still plays close attention to the titles of bills.

Indiana courts have interpreted the single-subject provision by requiring a “rational unity” rather than a “metaphysical singleness.”<sup>56</sup> Thus, for example, the Indiana Supreme Court upheld an 1852 act that covered both the election of highway supervisors and the assessment of a road tax.<sup>57</sup> As Horack and Welsh might have predicted, we uphold some laws and not others. In 1981, we upheld a statute with twenty-seven sections covering the operation and jurisdiction of various Indiana courts, and a twenty-eighth section imposing a ten-year statute of repose for certain product liability claims.<sup>58</sup> In 2003, we invalidated a provision that altered, for South Bend only, the general statute on municipal annexation.<sup>59</sup>

Judicial oversight of these provisions is necessarily limited by notions of separation of powers. Still, they have tended to focus the legislative debate on big picture items.

### III. CONFERRING THE RIGHT TO AN EDUCATION

Recognizing that education is essential to building a humane, industrial state, Indiana’s framers have long emphasized support for schools and colleges.

The education article of 1816 said that the legislature would provide “for a general system of education . . . from township schools to a state university, wherein tuition shall be gratis, and equally open to all.”<sup>60</sup> It added qualifying words, “as soon as circumstances will permit,”<sup>61</sup> and failed to specify the source of funds. As Caleb

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<sup>54</sup> IND. CONST. art. 4, § 19 (amended 1974).

<sup>55</sup> A 1974 amendment to article 4, section 19 eliminated the provision requiring the title of the act to reflect its subject. *Id.*

<sup>56</sup> *E.g.*, *State ex rel. Test v. Steinwedel*, 180 N.E. 865, 868 (Ind. 1932).

<sup>57</sup> *Bright v. McCullough*, 27 Ind. 223, 225–27 (1866). Though satisfying article 4, section 19, the court nevertheless held that the tax violated article 10, section 1 of the constitution. *Id.* at 230.

<sup>58</sup> *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207, 213–15 (Ind. 1981).

<sup>59</sup> *City of South Bend v. Kimsey*, 781 N.E.2d 683, 697 (Ind. 2003).

<sup>60</sup> IND. CONST. of 1816, art. IX, § 2.

<sup>61</sup> *Id.*



Mills, founder of Wabash College, wrote, the prospect of totally free education, though “highly honorable both to the heads and hearts of its framers,” was impossible to attain.<sup>62</sup>

The 1851 Constitution eliminated the temporal loophole and shifted the focus to primary and secondary schools, with no references to post-secondary education.<sup>63</sup> The shift resulted from: the “underdevelopment of public education” in 1851; Indiana University’s continued existence since 1817, prompting less need for attention here; and the population’s need “for basic education rather than higher education.”<sup>64</sup>

The revised educational goal was thus more modest than that of the first constitution. Elementary instruction had to flourish before high schools and colleges could thrive. As Delegate Bryant said:

Sir, we do not realize the true condition of our State, in regard to education. What is it? In 1840, by the census then taken, this State, which we boast of here, as being the fifth State in the Union, in size and population, was clearly proven to be the most ignorant of all the free States, and far, very far, behind many of the slave States.<sup>65</sup>

The 1851 Constitution directed the General Assembly “to provide . . . for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.”<sup>66</sup> Caleb Mills devised a new financial scheme, “the Common School fund,” “a perpetual fund” drawing from many sources and “inviolably appropriated to the support of Common Schools, and to no other purpose whatever.”<sup>67</sup>

Establishing this fund had an immediate and dramatic effect. Between 1852 and 1857, Indiana built more than 2,700 school-

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<sup>62</sup> 2 JOHN D. BARNHART & DONALD F. CARMONY, *INDIANA: FROM FRONTIER TO INDUSTRIAL COMMONWEALTH* 105 (1954).

<sup>63</sup> Delegate Bryant moved to delete “as soon as circumstances will permit,” saying: “I will say that this clause was inserted inadvertently by the committee. . . . We certainly did not intend to insert anything that would have the effect of preventing or postponing the establishment of free schools.” 2 DEBATES AND PROCEEDINGS, *supra* note 51, at 1858. Article 8, section 7 of the constitution, which reads, “[a]ll trust funds, held by the State, shall remain inviolate, and be faithfully and exclusively applied to the purposes for which the trust was created,” assured the continued existence and viability of Indiana University. IND. CONST. art. 8, § 7.

<sup>64</sup> WILLIAM P. McLAUHLAN, *THE INDIANA STATE CONSTITUTION: A REFERENCE GUIDE* 13 (1996).

<sup>65</sup> 2 DEBATES AND PROCEEDINGS, *supra* note 51, at 1889–90.

<sup>66</sup> IND. CONST. art. 8, § 1.

<sup>67</sup> IND. CONST. art. 8, § 3; *see also* IND. CODE ANN. § 21-1-1-1 (LexisNexis 2005) (listing funds that source the Common School fund); 2 BARNHART & CARMONY, *supra* note 62, at 105–12 (discussing the establishment of the common-school system).

houses at a cost of \$1.1 million.<sup>68</sup> Public schooling in Indiana had its foothold.<sup>69</sup>

The question soon arose whether the Common School fund was the only source of funds for Indiana schools. The Indiana Supreme Court's first ruling on article 8 seemed consistent with the vision of a uniform state system. It invalidated an 1852 law permitting local voters to adopt school assessments beyond those provided for under the Common School fund.<sup>70</sup> The court held that allowing such local taxing efforts would inhibit the goal of a uniform system, and therefore only the state could assess school taxes.<sup>71</sup>

Popular reaction to this decision prompted efforts to revise the article to allow for local taxes, but after the General Assembly readopted the unconstitutional 1852 statute,<sup>72</sup> new local taxes sprang up and a subsequent court condoned them.<sup>73</sup> Today, local taxes still contribute to schools.<sup>74</sup>

State constitutional guarantees have recently prompted litigation in which a number of state supreme courts have invalidated disparate levels of local spending.<sup>75</sup> Indiana's litigation has been less dramatic, as demonstrated by a pending case questioning whether a school district's twenty-dollar "activity fee" imposed on every student violates the state constitutional requirement that "tuition shall be without charge."<sup>76</sup>

Even without big league constitutional litigation, the 1851 education clause has helpfully focused the state government's attention on its obligation to prepare the population for a prosperous future.

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<sup>68</sup> 2 BARNHART & CARMONY, *supra* note 62, at 126.

<sup>69</sup> A "meddlesome Legislature and a querulous judiciary" obstructed the development of the Indiana School system. *Id.* For example, between 1858 and 1864, the public high schools in Indianapolis were closed. *Id.* at 127. Public schools in Terre Haute were closed from 1854 to 1860 and again from 1861 to 1864. *Id.*

<sup>70</sup> *Greencastle Twp. v. Black*, 5 Ind. 557, 561–63 (1854), *overruled by* *Robinson v. Schenck*, 1 N.E. 698, 707 (Ind. 1885).

<sup>71</sup> *Greencastle Twp.*, 1 N.E. at 563–64.

<sup>72</sup> 1867 Ind. Acts 30–31.

<sup>73</sup> *See Robinson*, 1 N.E. at 706–07.

<sup>74</sup> IND. CODE ANN. §§ 6-1.1-2-3, 6-1.1-19-1.5 (LexisNexis 2003 & Supp. 2005).

<sup>75</sup> *See* Kristen Safier, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993, 1009–12 (2001).

<sup>76</sup> IND. CONST. art. 8, § 1; *see* *Nagy v. Evansville-Vanderburgh Sch. Corp.*, 808 N.E.2d 1221, 1223–25 (Ind. Ct. App. 2004), *trans. granted*, 822 N.E.2d 977 (Ind. 2004).

## IV. PROMOTING HUMANE INSTITUTIONS

A. *Reformative Penal Code*

The framers of the 1816 Constitution embraced forceful provisions on the penal laws and on benevolent institutions.

One such provision declares, “[i]t shall be the duty of the general assembly, as soon as circumstances will permit, to form a penal code, founded on the principles of reformation, and not of vindictive justice.”<sup>77</sup> While this section does not grant any rights or liberties, it does set out a philosophical statement that has no counterpart in the U.S. Constitution, a sign of Indiana’s progressive view toward justice.<sup>78</sup>

While criminal defendants have regularly cited this section in challenging individual sentences, the Indiana Supreme Court has held that the similar provision in the 1851 Constitution “applies to the penal code *as a whole*” and the philosophy behind the penalties, but does not sustain “fact-specific challenges.”<sup>79</sup>

B. *Mandating of Benevolent Institutions*

From its founding, Indiana declared an ambition for humane treatment of the misfortunate. The 1816 Constitution said:

It shall be the duty of the general assembly, as soon as circumstances will permit . . . to provide one or more farms to be an asylum for those persons who, by reason of age, infirmity, or other misfortunes, may have a claim upon the aid and beneficence of society, on such principles that such persons may therein find employment and every reasonable comfort, and lose by their usefulness the degrading sense of dependence.<sup>80</sup>

The 1851 Constitution expanded this vision. One section

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<sup>77</sup> IND. CONST. of 1816, art. IX, § 4. A similar 1851 provision appears in IND. CONST. art. I, § 18.

<sup>78</sup> One 1851 delegate’s remarks suggest the basis for continuous support of this provision. Delegate Bryant stated: “I am persuaded that if [the state of our prisons] had been spread before the public, such a deep disgrace to the character of Indiana would long since have been swept away by the fierce indignation of the people.” 2 DEBATES AND PROCEEDINGS, *supra* note 51, at 1903.

<sup>79</sup> *Ratliff v. Cohn*, 693 N.E.2d 530, 542 (Ind. 1998).

<sup>80</sup> IND. CONST. of 1816, art. IX, § 4.

established institutions for the deaf, mute, blind, and insane.<sup>81</sup> Another section established institutions for juvenile offenders.<sup>82</sup>

When considering the establishment of an institution for juvenile offenders, Delegate Lockhart argued, “there is no question that can be presented for the consideration of this Convention, that is of more importance than this.”<sup>83</sup> Delegate Bryant lamented on the state of juveniles within the prisons:

There is one case where, as late as 1840, two brothers, one *fourteen* and the other *eleven* years of age, were sent to the State prison. Sir, what is the object of all punishment? It is two-fold: the prevention of crime and the reformation of the offender. How do you propose to diminish crime, or to reform offenders, by this system of sending the children of the State, perhaps the victims of dissolute parents and neglected education, to this school of vice and infamy, where they cannot fail by means of the associations into which you thrust them, to be irretrievably ruined?<sup>84</sup>

Bryant also cited a study showing that over one-eighth of the state prison inmates were under twenty-one, with some as young as eleven.<sup>85</sup> Clearly, the juvenile justice system in the mid-nineteenth century was deplorable, and the delegates plainly intended to accommodate reformation of juveniles by separating them from hardened criminals who are purportedly not as susceptible to redemption. This provision provoked remedial action. By the 1860s, Indiana had new, separate facilities for boys and for girls.<sup>86</sup> By the 1990s, the state could count a whole network of juvenile centers.<sup>87</sup>

## V. CONCLUSION

Tugged by her historical experience and committed to building a bright future, Indiana finds her way by reference to a constitution

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<sup>81</sup> IND. CONST. art. 9, § 1.

<sup>82</sup> *Id.* § 2. Article 9, section 3 weakened the 1816 provision for asylum farms, relegating the assignment to counties and making it voluntary. *Id.* § 3.

<sup>83</sup> 2 DEBATES AND PROCEEDINGS, *supra* note 51, at 1903; *see Ratliff*, 693 N.E.2d at 535.

<sup>84</sup> 2 DEBATES AND PROCEEDINGS, *supra* note 51, at 1903.

<sup>85</sup> *Id.*

<sup>86</sup> These developments are more fully described in Randall T. Shepard, *Conrad Baker*, in *GOVERNORS OF INDIANA: A BIOGRAPHICAL DIRECTORY* (Linda C. Gugin & James E. St. Clair eds., 2006).

<sup>87</sup> RANDALL T. SHEPARD, “JUSTICE SHALL BE ADMINISTERED FREELY”: STATE OF THE INDIANA JUDICIARY 1988–2004, at 31–32 (2004).

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that lifts up certain of her aspirations: modest and honest government, good schools, and humane treatment for the least fortunate. Most Hoosiers would endorse this list even if we were writing the constitution today.