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# Mr. Justice Tom C. Clark

C. B. Dutton

*Member, Indianapolis Bar*

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## MR. JUSTICE TOM C. CLARK

C. B. DUTTON\*

Tom C. Clark,<sup>1</sup> most-recent-but-one of President Truman's appointees to the Supreme Court,<sup>2</sup> is an easy man about whom to generalize, but a difficult one to study or predict in terms of specific issues. This was true at the time of his appointment and it is true today, after he has spent more than a year on the Court.<sup>3</sup>

Justice Clark came to the Supreme Court a well known political figure<sup>4</sup> but without prior judicial experience<sup>5</sup> and with little written record of his viewpoints except as evidenced by his frequent public speeches.<sup>6</sup> He has not been teacher or writer as have been several of his brethren and predecessors, and the customary literature is therefore not available for the speculative perusal of those who would predict his behavior as he is confronted with more and more of the hotly contested legal issues of the day.<sup>7</sup>

It is therefore somewhat difficult to find a background against which to review Justice Clark's first term. Moreover, the thirteen opinions which he authored during the 1949 term fail to constitute an entirely satisfactory medium through which to appraise the work and judicial philosophy of this newcomer to our highest bench; for, by accident or design of a friendly Chief,<sup>8</sup>

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\* Member of the Indianapolis Bar; former Assistant Professor of Law, Indiana University School of Law.

1. Who's Who, 1950 gives the Justice's name as "Thomas Campbell Clark." At least one biographer asserts that "Tom" is Justice Clark's entire first name. Current Biography 107 (1945). The latter appellation is used throughout the printed record of *Hearings Before Committee on the Judiciary, United States Senate, on the Nomination of Tom C. Clark, of Texas, to be an Associate Justice of the Supreme Court of the United States*, 81st Cong., 1st Sess. (1949) (hereinafter referred to as "confirmation hearings").

2. Justice Clark is the youngest man on the Court. He was born September 23, 1899. The next youngest Justice is Douglas, 52. Justice Jackson is 58. The remaining Justices are in their sixties, the oldest being Frankfurter, 68.

3. Justice Clark took the oath of office on August 24, 1949.

4. His career is uniformly regarded as "political," although it should be noted that he has never sought or held federal elective office. See Moley, *New Faces in the Cabinet*, Newsweek, June 4, 1945, p. 116.

5. Justice Clark for two years acted as Master in Chancery in Dallas County, Texas, following his return to private practice in 1932. Current Biography 107 (1945).

6. From the time of his appointment as Attorney General in 1945 to the present time, Justice Clark has been an energetic public speaker. Most of his addresses have been on non-controversial topics, but some, referred to subsequently herein, are believed to be significant indices of the views and philosophy of the new Justice.

7. For an interesting study of Justice Frankfurter's legal philosophy as indicated in his writings and work prior to appointment to the Supreme Court, see Hamilton, *Preview of a Justice*, 48 YALE L. J. 819 (1939); see also Fuchs, *Judicial Art of W. B. Rutledge*, 28 WASH. U. L. Q. 115 (1943).

8. It is generally conceded that Justice Clark owes most gratitude for his appointment to Chief Justice Vinson. See *Mr. Justice Clark*, Wall Street Journal, July 30, 1949; Drew Pearson, Indianapolis Star, Sept. 15, 1949; ALLEN & SHANNON, *THE TRUMAN MERRY-GO-ROUND* 388 (1950).

most of the cases assigned to Mr. Clark have been relatively uncontroversial and probably should not have been before the Court in the first place.

In this paper, it is proposed, accordingly, to examine the Justice through fieldglass rather than microscope. Instead of concentrating on his first term opinions, which, for paucity, if for no other reason, cannot reveal much, the inquiry will be whether there is enough record of any kind to permit one to say with confidence where Justice Clark stands with respect to certain classifications of issues which are almost certain to be before him in terms to come, and concerning which, sooner or later, he must speak.

The "evidence" available for examination consists of first term opinions, speeches and few writings, and the hearsay of advocates and detractors of the Justice. From such data we will observe what is displayed of his views on such matters as the judicial function, federal and state rights, civil liberties, and certain other illustrative fields. The objective is to note whether from such a study emerges a clear portrait of a judge, pleasing or not, or merely a blurred vision that can be brought into sharp focus only by passing time.

#### BACKGROUND AND EXPERIENCE

Tom Clark was born fifty-one years ago in Dallas, Texas, the son and grandson of successful lawyers. He took his law degree at the University of Texas and was admitted to the Texas bar in 1922. He entered private law practice with his father and brother, engaged in local political activity, and became a protegee of two Texas political notables, Senator Tom Connally and Representative Sam Rayburn.

He was aware of the political advantages of service in the district attorney's office and devoted five years to such work—during which he is reputed never to have lost a case. This early experience may have been the source of one of his often quoted, personal axioms, "A good lawyer doesn't file a case unless he's sure he'll win."<sup>9</sup>

Tom Clark returned to private practice in 1932, being associated with William McCraw from 1933 to 1935, during part of which time McCraw was Attorney General of Texas. Although he was financially successful in practice, Clark's sponsors urged him to go to Washington. He accepted an appointment to the Department of Justice under Attorney General Homer S. Cummings in 1937. From that time on he moved upward through this department with amazing velocity. He was successively a special assistant to the Attorney General in the Anti-trust Division, Chief of the West Coast offices of the Anti-trust Division, Coordinator of Alien Property Control of the Western Defense Command and Chief of the Civilian Staff for Japanese War

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9. *Clark: Cautious Trust Buster*, Business Week, May 26, 1945, p. 5; *The President's New Lawyer*, Saturday Evening Post, Sept. 29, 1945, p. 9.

Relocation, Chief of the War Frauds Unit of the Anti-trust Division, Assistant Attorney General in charge of the Anti-trust Division, Assistant Attorney General in charge of the Criminal Division, and Attorney General.

The Justice has never posed as an intellectual, a liberal, or a brilliant lawyer. He has demonstrated considerable legal talent, however, and his political astuteness and judgment are well recognized. He has the respect, and is a close friend, of the president, dating from war frauds work in conjunction with the so-called Truman Committee. Certainly he is a hard worker. As head of the Criminal Division of the Justice Department he occupied what has been described as the "hottest legal seat" in the country, and earned a reputation for calmness and balance. He argued some cases personally before the Court on which he now sits and did a creditable job.<sup>10</sup> Notwithstanding considerable vociferous opposition from extreme "liberal" elements,<sup>11</sup> and mild opposition from some conservative groups, his appointment was speedily confirmed.<sup>12</sup>

FIRST TERM STATISTICS

Justice Clark wrote twelve majority opinions during his first term, and added a special concurring opinion. This is good output for a new man on a court where the maximum number of opinions produced by any Justice was thirteen and several of his more experienced associates wrote far fewer.<sup>13</sup> He spoke for the Court in four tax cases,<sup>14</sup> two Federal Employer's Liability

10. For more detailed biographical data, see: Current Biography 107 (1945); Who's Who, 1950; *The President's New Lawyer*, Saturday Evening Post, Sept. 29, 1945, p. 9; Lerner in Holiday, February 1950, p. 120; Confirmation Hearings 3; biographical data on file with Librarian, U. S. Sup. Ct., dated April 25, 1949.

11. See Confirmation Hearings, testimony commencing at 32, 39, 72, 79, 85, 92, 100, 107, 126, 143, 166.

12. The vote of the Senate Committee on the Judiciary was 9-2. Wall Street Journal August 13, 1949. The nomination had been endorsed by labor and business leaders, former associates in the Department of Justice, four past presidents of the American Bar Association, and innumerable judges and lawyers. See report of Confirmation Hearings.

13. The number of opinions written for the Court by each Justice is as follows:

Black, Jackson	13
Clark, Minton	12
Vinson	10
Burton	9
Frankfurter	8
Reed	6
Douglas	4

The reason for the small number of opinions by Justice Douglas was, of course, his long absence due to injuries. He did not participate in seventy-five cases in which opinions were written. 18 U.S.L. WEEK 3346 (June 20, 1950).

14. *Treichler v. Wisconsin*, 338 U.S. 251 (1949); *Wilmette Park Dist. v. Campbell*, 338 U.S. 411 (1949); *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, etc. of N. J.*, 338 U.S. 665 (1950); *Brown Shoe Co. v. Commissioner*, 339 U.S. 583 (1950).

Act-Federal Safety Appliance Act cases,<sup>15</sup> two National Labor Relations Act cases,<sup>16</sup> a bankruptcy case involving responsibility of corporate directors and their families or associates,<sup>17</sup> a National Service Life Insurance case,<sup>18</sup> an eminent domain valuation case,<sup>19</sup> and a case involving the proper convening and procedure of military general courts martial.<sup>20</sup> His concurring opinion was written in a case involving discrimination against negroes in the selection of grand juries.<sup>21</sup>

The new Justice was expected to tip the Court's balance to the conservative side<sup>22</sup> and the reader of his opinions senses that this expectation has been fulfilled. He was also believed destined to be a "swing man,"<sup>23</sup> but this prophesy has not been clearly sustained.

In the opinions which he wrote for the Court, Justice Clark spoke for a clear majority exactly half of the time. In *United States v. Toronto, Hamilton & Buffalo Navigation Co.*,<sup>24</sup> *Hiatt, Warden v. Brown*,<sup>25</sup> and *Wilmette Park Dist. v. Campbell*<sup>26</sup> there were no dissents.<sup>27</sup> In *Brown Shoe Co. v. C. I. R.*,<sup>28</sup> *Treichler v. Wisconsin*,<sup>29</sup> and *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, Etc. of New Jersey*<sup>30</sup> there was only one dissenting vote, that of Justice Black.<sup>31</sup> Conceding that Justice Douglas, who did not participate in the latter two cases would have voted with Justice Black,<sup>32</sup> it could be said that Clark, together with the other newcomer, Minton, "swung" in these cases to the conservative side of the Court led by Justices Frankfurter and Jackson. Similarly in *Manufacturers Trust Co. v. Becker*,<sup>33</sup> in which the Court divided

15. *Carter v. Atlanta & St. Andrews Bay R.R.*, 338 U.S. 430 (1949); *Affolder v. N.Y.C. & St. L. R.R.*, 339 U.S. 96 (1950).

16. *NLRB v. Mexia Textile Mills*, 339 U.S. 563 (1950); *NLRB v. Pool Mfg. Co.*, 339 U.S. 557 (1950).

17. *Manufacturers Trust Co. v. Becker*, 338 U.S. 304 (1949).

18. *Wissner v. Wissner*, 338 U.S. 655 (1950).

19. *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396 (1949).

20. *Hiatt, Warden v. Brown*, 339 U.S. 103 (1950).

21. *Cassell v. Texas*, 339 U.S. 282 (1950).

22. *U. S. News and World Report*, August 5, 1949, pp. 20, 21.

23. *Mr. Justice Clark*, *Wall Street Journal*, July 30, 1949.

24. 338 U.S. 396 (1949).

25. 339 U.S. 103 (1950).

26. 338 U.S. 411 (1949).

27. The first two decisions were voted 8-0 and the last, 7-0.

28. 339 U.S. 583 (1950).

29. 338 U.S. 251 (1949).

30. 338 U.S. 665 (1950).

31. The votes, respectively, were 8-1, 7-1 and 7-1.

32. This is a safe concession in the *Treichler* case for in his dissent Justice Black sounded his familiar theme that the 14th Amendment does not give the Supreme Court the degree of control over state legislation that it asserts. Justice Douglas has indicated general accord with this proposition. The concession is not so clear in the *New Jersey Realty Title Insurance Co.* case.

33. 338 U.S. 304 (1949).

six to two, if both Clark and Minton had sided with Black and Burton the Court would have been evenly divided.

By the same reasoning it can be shown that in other cases Justice Clark has swung to the liberal bloc. In two cases, *Wissner v. Wissner*<sup>34</sup> and *Affolder v. N.Y.C. & St. L. R.R.*,<sup>35</sup> in which the Court divided five to three, he may have cast the vote that prevented the Court from impasse, and carried the day against the Frankfurter-Jackson faction. Putting Justices Clark and Minton's votes together in a third case,<sup>36</sup> it can be said they "swung" the decision from a four to four deadlock to a six to two victory for the more liberal element led by Justice Black.

The falsity of the impression created by such statistics is that it leaves out the reasons why the Court voted as it did. For example, in four<sup>37</sup> cases where Clark, perhaps in conjunction with his fellow freshman, Minton, apparently used his vote to tip the scales in favor of the Black group, the dissents of the conservative minority were based not on substantive quarrels with the views of the majority but merely on the proposition that the writs of certiorari had been improvidently granted.

Of course there was at least one case wherein another member of the Supreme Court himself impliedly suggested that the newcomers, Clark and Minton, had changed the balance of the Court on an important civil liberties issue, that of the validity of searches without warrant.<sup>38</sup> But in this case the so-called blocs were mixed, for, along with Justice Frankfurter, Justice Black also dissented to the majority opinion written by Justice Minton,

The latter episode suggests the real reason why it is hard to say just where Justice Clark falls in this liberal-conservative, swingman speculation. Such terms premise strong and violent cleavages between definite factions on the court, which, indeed, apparently have existed in recent terms. The 1949-50 term showed a marked drop in cleavage in the court, however. Whereas there were thirty-six five to four decisions in the 1948-49 term, there were only two in the 1949-50 term. There were four, four to three decisions and nine, five to three.<sup>39</sup> This change may be accounted for in part by Justice Douglas' absence for much of the term;<sup>40</sup> but counting all these cases as in the category of the "sharply divided" court, the number is still less than

34. 338 U.S. 665 (1950).

35. 339 U.S. 96 (1950).

36. *Carter v. Atlanta & St. Andrews Bay R.R.*, 338 U.S. 430 (1949).

37. See dissents of Justice Frankfurter in *Affolder v. N.Y.C. & St. L. R.R.*, 339 U.S. 96, 101 (1950) and *Carter v. Atlantic etc. R.R. Co.*, 338 U.S. 430, 437 (1949) and of Justice Frankfurter, joined by Justice Jackson, in *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 570 (1950) (applicable also to *NLRB v. Pool Mfg. Co.*, 339 U.S. 577 (1950)).

38. See *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950); *Minton, Clark Target of Frankfurter Blast*, Indianapolis Star, February 22, 1950.

39. 18 U.S.L. WEEK 3345 (June 20, 1950).

40. See note 13 *supra*.

half that of the previous term. The number of dissenting votes cast decreased from 272 in the previous term to 126 in the 1949-50 term, and the percentage of opinions in which dissenting votes were noted fell off from 74 to 67.<sup>41</sup>

Also the composition of the dissenting groups has changed strikingly, which interferes with classifying Justice Clark with any of the heretofore familiarly opposed groups of Justices. Justices Black and Frankfurter often saw eye-to-eye as even did Justices Black and Jackson.<sup>42</sup> The truth seems to be that the more rampant "liberals" on the court have mellowed somewhat and the "conservatives" are not always that, nor nearly so staid as was suspected.<sup>43</sup> As one writer has expressed it, in prefacing his discussion of the pre-Clark Court's views on civil liberties ". . . the degree of concord . . . is much more important than the degree of discord, and the themes of discord are not . . . symmetrical."<sup>44</sup>

The most important statistics concerning Justice Clark are these:

- (1) He cast no dissenting vote whatsoever.<sup>45</sup>
- (2) He has shown an almost unbelievable unanimity of opinion with his Chief.<sup>46</sup>
- (3) He has been scrupulous about disqualification.<sup>47</sup>

41. Justice Black noted the most dissents, 32. If Douglas would have noted the same number had he been present the full term, the statistics would not be changed greatly.

42. Justices Frankfurter and Jackson still joined most frequently in dissents—nineteen times. However, Justices Black and Frankfurter teamed up ten times and Justices Black and Jackson were together in dissent six times. 18 U.S.L. WEEK 3346 (June 20, 1950).

43. Others have made this observation in less temperate mood and have expressed it differently. See ALLEN & SHANNON, *THE TRUMAN MERRY-GO-ROUND* 354-361 (1950).

44. FREUND, *ON UNDERSTANDING THE SUPREME COURT* 9 (1949).

45. See 18 U.S.L. WEEK 3346 (June 20, 1950). This may suggest that he is neither swing man nor person of strong views of any kind, but merely will go along with majorities otherwise determined. That Justice Clark has no strong views on economic issues, at least, has been suggested. *U.S. News & World Report*, August 5, 1949, p. 20. This pattern may be sharply changed in the 1950-51 term. Out of seven cases in which opinions have been reported as of this writing, Justice Clark has noted two dissents and has written opinions setting out his minority view. In *Missouri v. Mayfield*, 71 Sup. Ct. 1, 4 (1950) he was joined in dissent by Justices Vinson, Black and Douglas, and in *Snyder v. Buck*, 71 Sup. Ct. 93, 102 (1950) he was joined by Justice Black. Justice Frankfurter, joined by Justice Jackson, also dissented.

46. Since Justice Clark noted no dissents and Chief Justice Vinson noted only two, they were perforce together on all but two decisions. See 18 U.S.L. WEEK 3346 (June 20, 1950). One almost fantastic example of "follow the leader," if it does not result from a misprint, is indicated by the report of *Cohnstaedt v. Immigration and Naturalization Service*, 339 U.S. 849 (1950). Justice Clark is shown as joining Chief Justice Vinson's dissent (without opinion) even though Justice Clark had theretofore elected to disqualify himself. See same case, 338 U.S. 890 (1949).

47. As would be expected, in view of the large number of cases with which he was concerned during his years in the Attorney General's office, Justice Clark has disqualified himself in many cases for which there are only memorandum decisions. In addition he disqualified himself in sixteen cases in which opinions were written. 18 U.S.L. WEEK 3346 (June 20, 1950).

## ROLE OF THE SUPREME COURT: THE JUDICIAL FUNCTION

Turning now to the evidence on the specific matters referred to earlier, first, what is the viewpoint and philosophy of the new judge as to the *raison d'être* of the court on which he sits, and of the function of judges in general?

Justice Clark has written little on this subject, perhaps because his appointment came unexpectedly, perhaps because in the pell mell pace of his political career he never formed a judicial philosophy or never took occasion to express it. His first term writings have not served to fill in much of the gap.

Chief Justice Vinson, in a recent speech before the American Bar Association<sup>48</sup> has given us one of the best of modern statements of the purpose and function of the Supreme Court: "The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our prima facie impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. Those of you whose petitions for certiorari are granted by the Supreme Court will know, therefore, that you are, in a sense, prosecuting or defending class actions; that you represent not only your clients, but tremendously important principles, upon which are based the plans, hopes, and aspirations of a great many people throughout the country."

In view of his close adherence to the views of his chief, one would expect this also to be the approach of Justice Clark to questions involved in Supreme Court review of lower court work. Perhaps it is, but the record here is particularly cloudy. In two of his first term opinions he wrote for a majority of the court in reversing a court of appeals which had theretofore, and thereafter, adhered to the established general rule that the National Labor Relations Board is entitled to enforcement of its cease and desist orders, even long after their entry by the board, without further taking of evidence.<sup>49</sup> As was effectively pointed out in the dissenting opinion<sup>50</sup> here was no grave national issue, no principle of importance to the multitudes. The Court of Appeals simply had found exceptional circumstances justifying a slight deviation from

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48. September 7, 1949. For full text see 70 Sup. Ct. 13 (1949).

49. *NLRB v. Mexia Textile Mills*, 339 U.S. 563 (1950) and *NLRB v. Pool Mfg. Co.*, 339 U.S. 577 (1950).

50. 339 U.S. 563, 570 (1950).



usual practice. It seems patent that the Supreme Court might have spent its time and energies on matters of greater import.

Similarly, Justice Clark became himself too much involved in specific trivia in writing for the court in *United States v. Toronto, Hamilton & Buffalo Navigation Co.*,<sup>51</sup> involving an action to recover from the United States reasonable compensation for a Great Lakes car ferry requisitioned by the War Shipping Administration during World War II. The vessel involved had been built in 1916, was obsolete for its original use, and had been idle from 1932 to 1935 and again from 1937 until taken over by the government in 1942. There was no market for vessels of this type except perhaps for salt water use in the Florida area.

The Court of Claims had awarded claimant more than twice the amount of the original determination of value basing its award on the capitalization of earnings prior to 1932 less conversion cost, repairs, an allowance for reduced life in salt water, and certain other expenses. The Supreme Court reversed the Court of Claims, Mr. Clark writing an elaborate review of the factors entering into a condemnation award under these unusual facts. The actual decision of the court is undoubtedly sound, in that the Court of Claims, in making its determination of fair compensation, took into account some rather irrelevant factors.<sup>52</sup> However, it is out of keeping with the Supreme Court's function sharply to limit the lower courts' discretion in such matters and literally to dictate the valuation method to be followed.<sup>53</sup>

On the other hand, Justice Clark has indicated an awareness of the practical necessity of limiting the subject matter of review by the procedure adopted by a petitioner,<sup>54</sup> no matter how tempting the particular case may be as a stump from which to decry improper handling of important personal rights.

Although he has written for the Court in striking down state legislation that would have been fairly easy to sustain,<sup>55</sup> the Justice is not yet, at least, disclosed as a judicial legislator. If anything, the available evidence indicates his philosophy to point the other way: legislation means literally what it says; if it is constitutional that is that; if it is not, make no effort to save it or

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51. 338 U.S. 396 (1949).

52. For example, the vessel involved was obsolete, and had no current earnings' record, so the court took into account earnings prior to 1932. 338 U.S. 396, 403-404 (1949).

53. See 23 TEMP. L. Q. 425 (1950). Justice Clark suggested, rather pointedly, see 338 U.S. 396, 403-404 (1950), that the insurance valuation of the ship was highly significant. Notwithstanding the potential errors and injustice inherent in such method of valuation, the lower court apparently felt obliged to follow the suggestion. See 18 U.S.L. WEEK 2409 (March 14, 1950).

54. See *Hiatt v. Brown*, 339 U.S. 103, 109-111 (1950).

55. *Treichler v. Wisconsin*, 338 U.S. 251 (1949); *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, etc. of N. J.*, 338 U. S. 665 (1950).

improve it by interpretation.<sup>56</sup> This point of view was clearly a part of the federal authorities case in the Tidelands litigation which Clark spearheaded as Attorney General.<sup>57</sup> The government urged its position upon the Court notwithstanding clear evidence that great dislocations of control and administration would attend its acceptance,<sup>58</sup> contending that subsequent legislation would correct the inequities created.<sup>59</sup>

The Justice has indicated his belief that legislation and administrative action have supplanted judicial decision as the principal sources of the laws' growth and that he has no quarrel with this trend.<sup>60</sup> This does not mean, however, that judges should forfeit their responsibility to recommend and work for judicial improvement. He sees the most chance for improvement in our judiciary through better administrative organization<sup>61</sup> and the appointment to judgeship of lawyers with solid trial experience.<sup>62</sup>

#### FEDERAL V. STATE RIGHTS

Although he has declared himself to the contrary<sup>63</sup> Tom Clark is a federalist. This may be somewhat surprising in a Texan, but it is the clear result of an energetic and successful career in federal position holding. When the chips are down as between state law and federal, Justice Clark sides with the government that has made him what he is.

This shows up rather clearly in his several first term opinions wherein the states fared badly. He did not try at all to uphold the Wisconsin Emergency Tax on Inheritances,<sup>64</sup> even though his opinion, if not expressly, by necessary implication invalidates the state's normal and estate tax and casts

56. Cf. *Wissner v. Wissner*, 338 U.S. 655 (1950). As to whether this is good judicial technique, see FREUND, *ON UNDERSTANDING THE SUPREME COURT* 38-40 (1949).

57. *United States v. California*, 332 U.S. 19 (1947).

58. Interestingly enough, the federal legislation which was assumed to be applicable to permit regulation of the tidelands area held by the Court to be United States property, was ruled inapplicable by Mr. Clark as Attorney General. See 27 CONG. DIGEST 241 (1948).

59. This argument met vociferous resistance from some members of the Court. See *United States v. California*, 332 U.S. 19, 45 (1947) (dissenting opinion).

60. See Speech, *Legislative Responsibility for Judicial Reorganization*, prepared for delivery before the American Bar Association on September 19, 1950, printed in CONG. REC. A7192 (Sept. 22, 1950).

61. See Speech, CONG. REC. *supra* note 60, at A7193.

62. See speech before Bar Association of Tennessee printed in 19 TENN. L. REV. 150 (1946).

63. In a speech before the State Bar of Michigan, Grand Rapids, Michigan, September 18, 1947, he said, "I am a great believer in states' rights. The best government is that closest to the people." Portions of the speech including the quotation are printed in *Highlights from Addresses by Tom C. Clark, Attorney General of the United States*, privately printed. Mr. Clark also has argued that the best protection for civil rights is effective and proper law enforcement at local levels. Clark, *How Much do you Value your Freedom?*, American Magazine, Dec., 1946, p. 32.

64. *Treichler v. Wisconsin*, 338 U.S. 251 (1949).

doubt on the validity of many similar state laws.<sup>65</sup> He expressed little concern over the felt necessity to invalidate the New Jersey intangible property tax in view of the slight possibility that it might affect the marketability of federal government tax exempt securities.<sup>66</sup> Conversely, he worked very hard indeed to render holeproof his opinion that the federal government may tax admissions to a municipally owned, non-profit bathing beach.<sup>67</sup>

The most striking revelation of Clark's federal supremacy leanings is found, however, in the National Service Life Insurance decision of *Wissner v. Wissner*,<sup>68</sup> a case involving a California widow's action against her deceased husband's parents for one-half the proceeds of his national service life insurance policy. The widow's suit was based on the theory that since the policy was purchased out of her husband's army pay, one half of which was hers as California community property, one half of the proceeds of the policy belonged to her and was beyond his power to give away by naming his parents as beneficiaries.

Notwithstanding the Court's earlier recognition of the necessary effects upon federal law of the systems of property ownership existing in the so-called community property states,<sup>69</sup> and its history of enormous concern for the welfare of wives, divorced or otherwise,<sup>70</sup> Justice Clark found the congressional intent to protect the "soldier's choice" of beneficiary so compelling as to negate an entire line of cases recognizing a state's power to define the property rights of its domiciliaries.<sup>71</sup> He places his decision on what he finds as congressional intent<sup>72</sup> but one cannot find such intent without first having the end in view. The opinion is a clear case of voting that federal control shall be unaffected by theoretically conflicting state law.<sup>73</sup>

65. See 34 MINN. L. REV. 707 (1950).

66. *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, etc., of N. J.*, 338 U.S. 665 (1950). See Comment, 19 U. OF CIN. L. REV. 339 (1950).

67. *Wilmette Park Dist. v. Campbell*, 338 U.S. 411 (1949). The decision was, of course, foreshadowed by previous decisions, and the result is not questioned. Cf. *Helvering v. Gerhardt*, 304 U.S. 405 (1938); *Allen v. Regents*, 304 U.S. 439 (1938); *New York v. United States*, 326 U.S. 572 (1946).

68. 338 U.S. 655 (1950).

69. See *Poe v. Seaborn*, 282 U.S. 101 (1930); *Commissioner v. Harmon* 323 U.S. 44 (1944).

70. Cf. *Andrews v. Andrews*, 188 U.S. 14 (1903); *Haddock v. Haddock*, 201 U.S. 562 (1906); *Williamson v. Osenton*, 232 U.S. 619 (1913); *Estin v. Estin*, 334 U.S. 541 (1948).

71. See cases cited in note 69 *supra*; *United States v. Malcolm*, 282 U.S. 792 (1931); cf. *Schlaefler v. Schlaefler*, 112 F.2d 177 (D.C. Cir. 1940); See Note 11 A.L.R. 123 (1921). The dissenting opinion, written by Justice Minton, is little more satisfying in its recognition of the real issues in the case. See 338 U.S. 655, 661 (1949).

72. See 338 U.S. 655, 658-660 (1949).

73. The opinion may also reflect a "good man's" view that a mother is, of course, to be preferred over an estranged but undivorced wife, who since her husband was a soldier, was doubtlessly at fault. "Pursuant to the congressional command, the Government contracted to pay the insurance to the insured's choice. He chose his mother. It is plain

This feeling that the federal government, and Congress, shall have what it wants, is not new to Justice Clark. One could understand his official advocacy of the federal government's claim to ownership of the California continental shelf, as he was Attorney General at the time and as such supervised the litigation.<sup>74</sup> His advocacy did not stop there, however. He carried his defense of the government's position into the law reviews<sup>75</sup> and before Congressional committees.<sup>76</sup> It is interesting to note that he stated he did not consider this question to be one of federal vs. state supremacy, even if almost all other interested persons so recognized it. The supporters of the bills to revest title to the tidelands in the states were the officials of the 46 states, whereas the opposition came from federal officials, the National Grange, and applicants for federal licenses to exploit the underwater land.<sup>77</sup>

In the field of civil rights Justice Clark believes that the federal government should have power to move into local law enforcement levels when the states fail to give the protection needed, further evidence that in his opinion the national government can do successfully what the states fail to accomplish.

#### CIVIL LIBERTIES

It is in this area that most of the pre-confirmation criticism of Justice Clark occurred. He was denounced as anti-negro,<sup>79</sup> anti-labor,<sup>80</sup> the oppressor of unpopular political faiths,<sup>81</sup> a non-respecter of free speech,<sup>82</sup> the author of guilt by association<sup>83</sup>—in short as an enemy of the cause of civil rights.<sup>84</sup> A look at the record here is most revealing, if not entirely conclusive.

Justice Clark is not anti-negro. He voted with the majority in quashing a criminal indictment because negroes were discriminated against in selecting

to us that the judgment of the lower court, as to one-half of the proceeds, substitutes the widow for the mother, who was the beneficiary Congress directed shall receive the insurance money." 338 U.S. 655, 658-660 (1949).

74. *United States v. California*, 322 U.S. 19 (1947).

75. Clark, *National Sovereignty and Dominion over Lands Underlying the Ocean*, 26 TEX. L. REV. 140 (1948). This article shows ability in the arena of written advocacy. The skill displayed seems to outweigh the sheer weight of scholarship evidenced in an opposing article, Hardwicke, Illig, and Patterson, *The Constitution and the Continental Shelf*, 26 TEX. L. REV. 398 (1948).

76. See *Testimony on Tidelands Bill (Con)* 27 CONG. DIGEST 247 (1948).

77. 27 CONG. DIGEST 229ff (1948).

78. Clark, *A Federal Prosecutor Looks at the Civil Rights Statutes*, 47 COL. L. REV. 175 (1947).

79. Confirmation hearings 55, 87, 93, 104, 113, 115.

80. Confirmation hearings 36, "4", 47, 79, 88, 166.

81. Confirmation hearings 32, 55, 65, 85, 103, 126, 177.

82. Confirmation hearings 54, 73, 103, 108.

83. Confirmation hearings 39-45, 48, 74, 131, 144; Ickes, *Hysteria in the Justice Dept.*, *New Republic*, July 4, 1949, p. 14.

84. Confirmation hearings 56, 76-77, 86, 102.

grand jury panels,<sup>85</sup> and in outlawing color segregation in schools.<sup>86</sup> He disqualified himself in the dining car case.<sup>87</sup> As president of the Federal Bar Association, he demanded admission of negro lawyers.<sup>88</sup>

As to labor, it is true he managed the successful campaign to enjoin a labor union from perpetuating a national emergency.<sup>89</sup> This was, however, a special situation and was more the result of his job as Attorney General than evidence of deep rooted animosity to labor.. His first term opinions supporting the National Labor Relations Board<sup>90</sup> and favoring injured workmen<sup>91</sup> do not evidence antagonism to labor's cause.

Justice Clark, as Attorney General, has been extremely outspoken against communism and what he conceives to be subversivism;<sup>92</sup> and it is not denied that he compiled the first list of so-called subversive organizations, which in some cases has resulted in injustice and persecution. Certainly the manner of conducting the so-called loyalty board investigations in denial of the traditional safeguards of confrontation by one's accuser and cross-examination is shocking and out of keeping with the American system. To the extent of his responsibility for the system, he is open to censure; but the extent of his responsibility or participation is not established.<sup>93</sup>

Although Civil Liberties groups worried over the treatment of Japanese in the wartime relocation program, the indications are that Mr. Clark handled the program with humanity and consideration.<sup>94</sup> If there is not yet any real evidence that Justice Clark has a penetrating understanding of the subtleties of the civil liberties problem,<sup>95</sup> at least he is aware of the existence of the

85. *Cassell v. Texas*, 339 U.S. 282, 296 (1950) (Justice Clark filed a special concurring opinion.)

86. *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

87. *Henderson v. United States*, 339 U.S. 816 (1950).

88. *Current Biography* 107 (1945).

89. The litigation ended in the decision of *United States v. United Mine Workers*, 330 U.S. 258 (1947).

90. *NLRB v. Mexia Textile Mills*, 339 U.S. 563 (1950); *NLRB v. Pool Mfg. Co.*, 339 U.S. 258 (1947).

91. *Carter v. Atlanta & St. Andrews Bay R.R. Co.*, 338 U.S. 430 (1949); *Affolder v. N.Y.C. & St. L. R. Co.*, 339 U.S. 96 (1950).

92. See for example, *Justice: Fighting Red Hot*, *Newsweek*, July 8, 1946, p. 22.

93. The Senate Committee on the Judiciary found that Mr. Clark was not the author of the program. See *Confirmation Hearings* 75. The attack on Mr. Clark is therefore for his inaction in not inserting, or insisting upon, proper constitutional safeguards. There have been relatively few loyalty cases, if that is any justification. See *REP. ATT'Y GEN.* 11 (1947).

94. *Moley, New Faces in the Cabinet*, *Newsweek*, June 4, 1945, p. 116; *Current Biography* 107 (1945).

95. For an excellent discussion of civil liberties in the Supreme Court, and the many variations in thinking and result, see *FREUND, ON UNDERSTANDING THE SUPREME COURT* 9-36 (1949). Justice Clark's concurrence with the majority of the Court in approving the extended search without warrant under attack in *United States v. Rabinowitz*, 339 U.S. 56 (1950), for which he and Justice Minton were excoriated by Justice Frankfurter, is an

problem, and has warned against the upsurge in intolerance in a manner that indicates he will not lightly give approval to prescriptions of free speech: "Even the enemies of liberty and tolerance—our noisy pro-Fascists and race bigots—must be allowed free speech (but not freedom to intimidate). Granted that they would suppress our liberties if they could, that is no excuse for us to beat them to the punch by suppressing theirs first."<sup>96</sup> He has indorsed at least one project of the civil liberties groups, that of a federal civil liberties statute.<sup>97</sup>

In sum it is likely that Justice Clark's future activity on the Court will not substantiate the charges that the civil liberties campaigners have had an opponent thrust upon them. The guess is ventured that, in time, the Justice's record will indicate that the only proper lament of those who worry most vocally about loss of our civil liberties because of his appointment is merely that they failed to obtain a scale model replacement for their champion, former Justice Murphy.

#### THE COMMERCE POWER

Justice Clark has not yet written his views as to the lengths Congress may go in regulating business under its power over interstate commerce.<sup>98</sup> None of his first term votes were cast to restrict the power of Congress, however, and he voted on several occasions to extend federal control into new fields or to broaden its application.<sup>99</sup> This is, of course, in keeping with his profederal government inclination, noted earlier herein, and he can be expected to continue in this pattern.

#### BUSINESS LAW

Several of his first term writings indicate that the Justice may come into his own in dealing with the problems of American business. His opinion in

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example of failure to support the passive rights of freedom which Professor Freund notes is fairly common on the Court. See FREUND, *supra*, at 22-24.

96. Clark, *How Much Do You Value Your Freedom*, American Magazine, Dec. 1946, p. 32. See also Clark, *Civil Rights: The Boundless Responsibility of Lawyers*, 32 A.B.A.J. 453 (1946).

97. Clark, *A Federal Prosecutor Looks at the Civil Rights Statutes*, 47 COL. L. REV. 175 (1947).

98. U.S. CONST. Art. I, § 8, Ch. 3.

99. He voted with the majority in subjecting an intrastate gas company to jurisdiction under the Natural Gas Act, *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464 (1950); in classifying munitions production as commerce under the FLSA, *Powell v. United States*, 339 U.S. 497 (1950); in striking down the Michigan Labor Mediation Law as in conflict with the LMRA and federal power over commerce, *International Union, etc. v. O'Brien*, 339 U.S. 454 (1950); and in sustaining the non-communist affidavit requirement of the LHRA, *American Communications Ass'n. v. Douds*, 339 U.S. 382 (1950). It is somewhat surprising, on the other hand, to find Justice Clark voting with the majority to permit state taxation of interstate carriers. *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950).

*Manufacturers Trust Co. v. Becker*<sup>100</sup> is a nicely balanced analysis of the delicate problem of the responsibilities of and requisite good faith owed by directors to their corporation.<sup>101</sup> He refused to respond to the urgings of petitioner and the Securities and Exchange Commission<sup>102</sup> to hold directors accountable as trustees in purchasing at discount the obligations of their technically insolvent company which was nevertheless still a going concern.<sup>103</sup> In doing so he reached an eminently practical result without breaking down the requirements of loyalty and fair dealing to which directors necessarily must answer. Although he did not express it, Justice Clark undoubtedly sensed, as any business man would, that there are circumstances when it is desirable for directors to be allowed to buy their ailing corporation's liabilities at a discount, thereby relieving it of pressure from creditors and giving it a chance to recover its financial footing.<sup>104</sup>

In reversing a decision denying depreciation deductions for donated assets and inclusion of contributions in a corporation's equity capital,<sup>105</sup> Justice Clark recognized the business necessity of taking depreciation on assets that wear out and must be replaced, notwithstanding the absence of original cost to the taxpayer. The practical business problem involved had escaped the tax-minded Commissioner and Court of Appeals who could not see the difference between actual contributions to corporate assets and the payment for connecting utility lines by rural electricity buyers.<sup>106</sup>

Also, although he became involved in detail unbecoming to a Supreme Court Justice in defining proper valuation technique in a ship condemnation case<sup>107</sup> Justice Clark showed very real ability in recognizing and dealing with

100. 338 U.S. 304 (1949).

101. The Court treated the case in its most unfavorable light to respondents, in discussing it from the standpoint of a director's duty of good faith. Respondents were the wife and mother of a director, and his office associate.

102. *Amicus curiae*.

103. The Supreme Court has consistently rejected the trust fund theory as to assets of an insolvent corporation. *Hollins v. Brierfield Coal & Iron Co.*, 150 U.S. 371 (1893); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). Justice Burton, joined by Justice Black, dissented to Justice Clark's opinion and urged application of the strict trust theory as did Judge Hand, dissenting to the Court of Appeals decision, 173 F.2d 944, 951 (2d Cir. 1949).

104. Patently, there is great risk in purchasing such obligations. To attract buyers, therefore, even among the directors, the prospect of more than usual profit is necessary. The dissent assumes that such purchases create a conflict of interest, on the further assumption that the directors will be over-anxious to liquidate their claims. Query, isn't it the more reasonable assumption that ownership of obligations purchased at a discount encourages directors to work to save the company, thereby permitting the larger profit involved in repayment at face value? Most of the reviewers approved the decision. See 48 MICH. L. REV. 1194 (1950) 23 So. CAL. L. REV. 392 (1950); 62 HARV. L. REV. 1191 (1949). *Contra*, 25 IND. L. J. 208 (1950).

105. *Brown Shoe Co. v. Commissioner*, 339 U.S. 583 (1950).

106. *Cf. Detroit Edison Co. v. Commissioner*, 319 U.S. 98 (1943).

107. *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396 (1949).

practical business considerations in fixing forced-sale prices. Similar ability to take hold of an unfamiliar and technical subject and handle it practically and sensibly is demonstrated in his article on governmental liability for wartime use of patented inventions.<sup>108</sup>

#### ANTITRUST

It may be some time before former Attorney General Clark can set forth judicially his views on the antitrust laws. He has been associated in one capacity or another with most government suits since 1938 and it will be years before suits initiated after he left the Attorney General's Office come before the Supreme Court. In the meantime court protocol requires him to disqualify himself in these cases.<sup>109</sup> He need not, of course, disqualify himself in private treble damage suits which are unrelated to former government suits.

The Justice's views on monopoly are fairly easily discovered, and may be interesting to note. As head of the Antitrust Division of the Department of Justice and as Attorney General, he was conservative by comparison with some of his militant predecessors. He filed a relatively small number of prosecutions, but achieved a high rate of convictions.<sup>110</sup> He has a healthy respect for the great contributions to our society which have been made by American business,<sup>111</sup> but believes that the monopoly laws are necessary and desirable equipment for keeping productive genius unfettered. To Tom Clark "The Sherman Act is but the traffic law of business."<sup>112</sup>

He has demonstrated a willingness to work with business men in developing an effective administration of the antitrust statutes,<sup>113</sup> and is impressed with the need of small business for protection.<sup>114</sup> Among other matters, he is credited with practical and effective handling of the extremely complex and troublesome motion picture industry litigation,<sup>115</sup> and with putting an end to lumber price fixing on the West Coast.<sup>116</sup>

108. Clark, *Government Responsibility for Use of Patented Inventions*, 20 TEMP. L. Q. 1 (1946).

109. See *Mr. Justice Clark*, Wall Street Journal, July 30, 1949; U.S. News & World Report, Aug. 5, 1949, p. 20. Justice Clark's scrupulous record on disqualification already has been noted.

110. See *Clark, Cautious Trust Buster*, Business Week May 26, 1945, p. 5. The biographical data furnished by the Librarian of the U. S. Supreme Court indicates that of 414 cases presented to the Court by the Attorney General's Office during Clark's term of office, the government prevailed in 314, lost in 100.

111. REP. ATT'Y GEN. 7 (1947).

112. Speech before Nebraska State Bar Association, printed in 25 NEB. L. REV. 79 (1945).

113. See speeches before Bar Associations of Tennessee and Nebraska printed, respectively, in 19 TENN. L. REV. 150 (1946) and 25 NEB. L. REV. 79 (1945).

114. While Attorney General, Mr. Clark re-established the Small Business Unit of the Antitrust Division. REP. ATT'Y GEN. 8 (1947).

115. Moley, *New Faces in the Cabinet*, Newsweek, June 4, 1945, p. 116

116. Current Biography 107 (1945).



Justice Clark, in other words, believes that the federal government can preserve and restore competition through proper use of the antitrust laws. He believes in strict but fair enforcement, based on proper investigation and sound knowledge of the facts involved.<sup>117</sup> He does not believe in attacks on long established, publicly known practices that have been approved by attorneys acting in good faith.<sup>118</sup> When violations of the laws are found, he considers the most effective remedy to be that of divestiture.<sup>119</sup>

#### CRIMINAL LAW

Justice Clark's success as a criminal prosecutor already has been commented upon. He has not been content merely to prosecute, however, but has given much time to developing public awareness of the problems of enforcing our criminal sanctions, and to the rehabilitation of criminals.<sup>120</sup> He has been particularly concerned with the problem of juvenile delinquency.<sup>121</sup>

#### CONCLUSION

What has been said above is as far as one can go, with any degree of objectivity, in examining Justice Clark "on the record," for the present. It must be conceded that his judicial portrait is not yet very clear.

One is somewhat inclined, therefore, to sum up the Justice in negatives—no strong liberal convictions, no anachronistic conservatism, no deep-seated philosophy or idealism, no impracticable theories, no impressive scholarship, no flaming prose, no trenchant wit, etc.—thereby leaving a very large question of whether, with so much ruled out, there is enough left to permit the people to feel they have been given the kind of man they have a right to expect on our highest court.

On the other hand, it should be true that even a Supreme Court Justice is entitled to his chance to prove himself. The review attempted in this paper indicates that there is much evidence that Tom Clark may prove to be a good working judge, even if, thus far, he has cast no perceptible foreshadow of greatness or immortality.

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117. He has advocated the making of investigations by the Federal Bureau of Investigation rather than by the lawyers of the antitrust division. See speech before Bar Association of Tennessee, printed in 19 TENN. L. REV. 150 (1946).

118. Speech cited note 116 *supra*.

119. See REP. ATT'Y GEN. 8 (1947). Justice Clark was the author of the plan for the disposal of the Alcoa aluminum plants. Current Biography 107 (1945).

120. See Clark, Foreword to *Symposium on Fitting the Punishment to the Criminal*, 31 IOWA L. REV. 191 (1945); Address before University of Texas Institute on Corporation Law, p. 8 (1950) (text available through Librarian, U. S. Sup. Ct.).

121. See speech before Bar Association of Tennessee, printed in 19 TENN. L. REV. 150 (1946); Address before National Conference on Catholic Youth Work, May 21, 1947 (available through Librarian, U.S. Sup. Ct.). In his reorganization plan for the Attorney General's Office, Mr. Clark included the opening of a Bureau of Juvenile Delinquency.

# MODERNIZING INDIANA'S CONSTITUTION

LOUIS E. LAMBERT\* AND E. B. McPHERON†

The ancient Greek philosopher, Heraclitus, insisted that nothing is permanent except change. The maxim is readily applicable to government. For if governmental institutions, including constitutions, are not revitalized and adapted to meet changed social conditions, they will die as surely as did the dinosaurs.

Birthdays are traditional times for weighing successes and failures and for planning for the future. The people of Indiana might well begin such weighing and planning now, for on November 1, 1951, their state constitution will have been in effect 100 years. It is the thesis of this article that a revision and adaptation of the constitution is in order.

A brief glance at the Indiana of 1850 sharpens the contrast with the present. The 1850 population was slightly less than a million; the 1950 population was almost 4 million.<sup>1</sup> The agricultural society of the 1850 Hoosiers had become primarily urban-industrial by 1950. A constitution drawn to provide a suitable government for the society of our forebearers would not likely meet the needs of a greatly changed era.

Of the forty-nine constitutions in the United States, only nine are older than Indiana's. Eight of them, state constitutions, have been modernized—some quite extensively—since the Indiana Constitution was ratified.<sup>2</sup> In fact, many state constitutions have been recently revised: three have been adopted in the last five years and in 1947 sixteen states were in various stages of con-

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\* Assistant Professor of Government, Indiana University.

† Director, Bureau of Government Research, Indiana University.

1. The contrast, however, is reflected more clearly by the following county populations:

<i>County</i>	<i>1850</i>	<i>1950</i>
Allen	16,919	182,903
Lake	3,991	366,113
Marion	24,103	549,047
St. Joseph	10,954	204,740
Vanderburg	11,414	158,363

All population figures for 1850 were taken from the SEVENTH CENSUS OF THE UNITED STATES; the 1950 figures are preliminary census figures from the Bureau of the Census.

2. The New Hampshire constitution of 1874 had revisions in 1876, 1889, 1902, and 1912. Vermont had a revision of its 1793 constitution in 1869, and Ohio, through the adoption of a number of amendments in 1912, actually revised its constitution. The 1870 Massachusetts constitution, though not revised since 1821, has been amended seventy-nine times; Maine's 1820 constitution has been amended sixty-four times, while California takes "first prize" with the amazing total of 312 amendments. The Wisconsin 1848 constitution, though only three years older than Indiana's, has been amended fifty-one times. COUNCIL OF STATE GOVERNMENTS, BOOK OF STATES 1950-1951, 88-94. Also see volumes I-VIII of the same work for the year 1941-1942.

stitutional reform.<sup>3</sup> Of the state constitutions, Indiana's, with its fifteen amendments, appears to be the oldest, basically, in existence.

The federal constitution is older, but its framers drew a generally worded document. Unlike the Indiana Constitution it does not provide for many elected officials, and its terms are susceptible of a wide latitude of interpretations.

In Indiana there has been some agitation for reform. The Indiana Municipal League has been vehement, if vague, for "home rule." The Indiana State Teachers Association with simple clarity has called for a State Superintendent of Public Instruction to be appointed for a term longer than the constitution now permits. Other groups have urged that the Superintendent's office be taken out of politics, i.e., filled by appointment. Many citizens are dissatisfied with the biennial legislative session that is constitutionally (but not actually) limited to sixty-one days. The failure of the legislature for the past twenty-eight years to carry out its constitutional duty of re-districting the state for the apportionment of legislative representatives has been the cause of frequent unfavorable comment. Recently Governor Henry F. Schricker announced that he favored modernization of the Indiana Constitution. In an editorial comment on the speech, the Indianapolis Star said, "For decades it has been clear that revisions of basic law could cure many ills of Indiana Government and equip the state to meet modern conditions." Again, when addressing the 1951 General Assembly, Governor Schricker called for the "creation of a competent non-partisan committee" to study Indiana's state and local government. Interest in constitutional modernization is widespread; and the need to revise the constitution is pressing.

In constitutional revisions in other states reform has centered on the following problems:

1. Amending provisions, which in some states make it virtually impossible to change the fundamental law.
2. Severe strictures on the legislature as to composition, length of sessions, procedures and powers.
3. Disintegrated and irresponsible state executive and administrative organizations.
4. Court systems condemned for being administratively inefficient and politically partisan.
5. Detailed limitations upon local government which prohibit or hinder the development of home rule and at the same time saddle the voter with the long ballot.
6. Miscellaneous subjects which vary in importance from state to state but which include financial clauses, additions to Bills of Rights and Merit provisions.

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3. New Jersey, Georgia, and Missouri have recently revised their constitutions. New York made some notable changes in 1938. The following states have recently taken formal or legal action toward constitutional revision: California, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, New Hampshire, North Carolina, and Oklahoma.

In these areas, we shall point out some of Indiana's constitutional weaknesses, consider the problems connected with change, and offer some suggestions.

#### THE AMENDING PROCESS

The amending provision of a constitution is the doorway to change. To be effective the amending procedures must be definite and not too restrictive. In some states the door is virtually closed while in others it seems constantly ajar. For example, Tennessee has had no amendments whatever to its 1870 constitution while California has had 312.

To propose amendments, fourteen states, including Indiana, require the action of two successive legislatures. Some require a majority, others two-thirds approval by the members of each house for the two consecutive sessions. The most liberal state, California, permits proposals by two-thirds of the members of one session of the legislature, by initiative, or by convention.<sup>4</sup> Popular ratification is necessary in most states.

A number of states, including Indiana, have no express provision for calling a constitutional convention, but some are mandated to call conventions at periods ranging from seven to twenty years.

Indiana conservatism towards constitutional change was evident in the 1816 constitution as well as in the present document. While the existing charter provides for change only by amendment, the constitutional fathers of 1816 relied solely on the mandatory convention method. A brief summary of efforts to change each constitution will show that considerable confusion and difficulty resulted from both methods.

The 1816 constitution stated: "Every twelfth year . . . there shall be a poll opened in which the qualified electors of the State shall express by vote, whether they are in favor of calling a convention or not. . . ."<sup>5</sup> Its ambiguity indicates that some of the framers had considered this provision a defect. Did it mean that only at twelve-year periods a convention could be called, or did it permit more frequent polls? As a matter of fact, the question was submitted in 1823, '28, '39, '46, and '49. Unsuccessful attempts were made to call a convention fifteen other times between 1820 and 1847.

In 1846 a majority of those voting on the question favored calling a convention, but less than a majority of the total votes cast were favorable. Was this a proper majority? The constitution provided for the election of delegates "if there should be a majority of all the votes given at such election in favor of

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4. CALIF. CONST. ART. XVIII, § 2, ART. V, § 1.

5. IND. CONST. ART. VII, § 1 (1816).

a convention." The debates were spectacular but no conclusion was reached.<sup>6</sup> The election of 1849 resolved the question in favor of a convention.<sup>7</sup>

The Constitution of 1851 went into effect November 1st of that year, and for about three decades the question of interpretation of the amending clause did not arise. The first amendment, disclaiming state liability for indebtedness of the Wabash and Erie Canal, was ratified at a special election with but little opposition in 1873. However, a group of amendments was voted upon in 1880, and received a majority of votes cast on the amendments but failed to receive a majority of those voting in the election. The Indiana Supreme Court in *State v. Swift* declared that ratification by a "majority of said electors" meant a majority of those voting in the election and not a majority of those voting on the amendments.<sup>8</sup> The court, while willing to accept the proposition that "silence gives consent" when applied to those qualified voters who did not choose to participate in the election, was not willing to grant the proposition as to those who cast ballots in the election but chose to ignore the amending proposals.<sup>9</sup> Thus the problem of securing ratification of an amendment became so difficult that no further amendment was adopted until the woman suffrage clause in 1921.<sup>10</sup>

Dissatisfaction with the amending process led to attempts at circumvention. In 1911, the General Assembly submitted a proposed new constitution, created by legislative act, to the people for ratification. This procedure was held unconstitutional.<sup>11</sup> The court said that if the act of 1911 be considered

6. I & II KETTLEBOROUGH, CONSTITUTION MAKING IN INDIANA (1916).

7. The reasons which lay back of the success of 1849 were cumulative, in part peculiar to Indiana and in part shared with the nation. Nationally, there were generally depressed conditions in the '40's, and the spirit of Jacksonian democracy expressed itself on the questions of internal improvements, state banks, limitations on government, particularly as to enactment of special legislation and creation of indebtedness. Perhaps most importantly, the wave on constitutional change brought the long ballot and short terms of office.

8. *State v. Swift*, 69 Ind. 505 (1880).

9. The 1880 proposals were resubmitted at a special election in 1881 and were adopted. They were:

ART. II, § 2 (Extending suffrage)

ART. II, § 5 (Restriction upon negro suffrage repealed)

ART. II, § 14 (Changing time of general election)

ART. IV, § 4 (Enumeration of males over 21)

ART. IV, § 22 (Grading pay of local officers)

ART. VII, § 1 (Power to create additional courts)

ART. XIII, § 1 (2% debt limitation)

10. At the general election of November, 1900, two amendments were submitted, but neither received a majority of the votes cast at the election. The Indiana Supreme Court decided in *In re Denny*, 156 Ind. 104, 59 N.E. 359 (1900), that the amendments had neither been adopted nor rejected, and were therefore still pending and obstructed further amendment. *In re Boswell*, 179 Ind. 292, 100 N.E. 833 (1912), modified this decision to state that an amendment which had been voted on and failed to receive a majority of the votes cast in the election was rejected and the way was clear for future amendment.

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

the draft of a new constitution such an act was beyond the power of the General Assembly which has only the "power to make, alter, and repeal laws"; and that if the act was merely a series of amendments it violated the procedure established by the constitution for amendment.<sup>12</sup>

The 1917 General Assembly called a constitutional convention by virtue of a law enacted during that session without first submitting the question to the people. The court held this act unconstitutional in *Bennett v. Jackson* on the grounds that the question had not been presented to the people for approval or disapproval since 1914, when a previous proposal for a convention had been defeated.<sup>13</sup>

The *Bennett* decision however did acknowledge the validity of the convention as a means of changing the Indiana Constitution. Though the convention method is not mentioned in Article 16, the court relied on Section 1 of the Bill of Rights which states that ". . . the People have, at all times, an indefeasible right to alter and reform their government." The court further declared that "the people's power over constitutional amendments is supreme, subject, however, to the condition that no new form of Constitution can be established without some action . . . of the representatives of the old . . ."<sup>14</sup>

A major change in interpretation of the amending article resulted from *In re Todd* in 1935.<sup>15</sup> This decision overruled *State v. Swift* and interpreted the phrase "majority of the electors" to mean a majority of those voting on a proposed amendment and not a majority of those voting in the election. The ruling simplified the problem of securing amendments but the question still existed as to what effect the decision had on three prior amendments which, though failing, had received a majority of votes cast on the amendment. Finally *Swank v. Tyndall*<sup>16</sup> held that *In re Todd* was not retroactive in effect.<sup>17</sup>

In 1947, a bill was introduced in the Senate to submit a proposal to the people for the calling of a convention but failed to pass.

12. The bulk of the Marshall Constitution was submitted to the General Assembly as amendments in 1913 and defeated in the 1915 session.

13. *Bennett v. Jackson*, 186 Ind. 533, 116 N.E. 921 (1917).

14. *Id.* at 539, 116 N.E. at 923. The most recent referendum on the calling of a constitutional convention was held at the general election of 1930. It was defeated 439,000 to 355,000. YEARBOOK OF INDIANA 46 (1930).

15. 208 Ind. 168, 193 N.E. 865 (1935).

16. 226 Ind. 204, 78 N.E.2d 535 (1948).

17. Thus, three important provisions which were generally accepted as parts of the state constitution for some thirteen years are now deleted. The original provisions of ART. XV, § 2, are restored and the significant phrase ". . . nor shall the term of office or salary of any officer fixed by this Constitution or by law be increased during the term for which such officer was elected or appointed" is not in effect. ART. VII, § 2 and ART. X, § 8 are void.

An appraisal of the amending process in Indiana clearly indicates that a change in our fundamental law is not easily come by.<sup>18</sup> While some state constitutions have fewer amendments, the Indiana document would seem to belong to a group of seven or eight which are least amenable to change.<sup>19</sup> In Indiana, 453 bills proposing amendments to the 1851 constitution had been introduced through 1949 with 15 being ratified. It is unfortunate, however, that so vital a part of the constitution should be the source of so much uncertainty and confusion. There seems to be agreement that something should be done to clarify the Article on Amendments.

The least that might be done would be to rewrite the article so as to clearly state the requirement that ratification must have the approval of a majority vote on the question and to expressly state the procedure for calling a convention. However, Indiana might well go further and adopt a better amending clause. One of the three states with the newest constitutions, Missouri, provides that amendments may be proposed either by a majority of all members in one session of the legislature or by an initiative petition signed by eight per cent of the legal voters in at least two-thirds of the congressional districts. Ratification of any proposal requires a majority of the votes cast on the amendment. Also, the question of calling a convention must be submitted to the voters of Missouri every twenty years; majority approval on the question is required in order to call a convention.<sup>20</sup>

#### LEGISLATIVE REVISION

As the most democratic element in our government, legislatures must perform their jobs adequately or our democratic system, to some degree, fails. In this section, we will concern ourselves primarily with what we consider the chief problems of the legislature in Indiana: the length and frequency of session, reapportionment and redistricting. No consideration is given to unicameralism, though the single-chambered legislature of Nebraska seems to have lived up to the glowing promises made for it.<sup>21</sup> No attention is given to the powers of the legislature or the constitutional restrictions placed upon

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18. Four amendments, ratified in 1940, and the Sheriff's amendment, ratified in 1948, complete the list of amendments to date. Three proposals awaiting action by the General Assembly will probably be successful since they are as non-controversial as the last five amendments adopted.

19. Compared to the United States Constitution, however, the amending process in Indiana would not seem to be too restrictive. When the 81st Congress was adjourned, 4391 proposals for amendments had been introduced since 1789 with only 21 amendments being finally ratified. *Proposed Amendments to the Constitution of the United States*, Government Printing Office (1947); *The Congressional Index, 80th and 81st Congresses*, Commerce Clearing House, Inc. (1948 & 1950).

20. Mo. CONST. ART. XII, § 3.

21. Senning, *Unicameralism Passes Test*, NAT. MUNIC. REV. 58-65 (July, 1944).

it, since there seems to be little dissatisfaction with these aspects of Indiana's constitution.

The close of the 1949 legislature provoked considerable criticism and one legal action when the sixty-one day session stretched to sixty-four calendar days. The clock, of course, was stopped before midnight of the sixty-first day, and the journals showed three actual days work to have been accomplished on the sixty-first day. The legislature is forced to such antics by the constitutional limit set in 1851 on the length of sessions.

About the strongest argument against the sixty-one day session is that if it were reasonable in 1851 it is, on the face of it, unreasonable now. A hundred years ago the economy was simple and so was government at all levels. Our present complex society has brought about a large increase in governmental services and expenditures; legislative decisions have become more difficult and more important. To do a roughly adequate job the legislature needs more time. There seems to be no reason for a limit upon the length of legislative sessions; there is none in twenty-two states.<sup>22</sup>

A further move to strengthen the legislature in Indiana would be to provide for annual sessions. As in California, the session in the even-numbered years could be limited to budget, revenue and tax matters.

One of the immediate improvements that would come from annual sessions is that of budget preparation and appropriation of funds. In this state the budget presented to the legislature in January or February is prepared during the fall. The assumptions on which it is erected must be made in the summer and early fall. In say October of 1950, the Budget Committee must forecast the revenues and expenditures up to June 30, 1953. If the last twelve months of this thirty-three month period were lopped off, a more nearly realistic appraisal of future income and expenses might be made.

Under an annual appropriation system the legislature could more quickly correct errors. Unforeseen situations often arise and if financial arrangements must remain static for eighteen or twenty months, the condition can become damaging and expensive. To a degree such developments can be handled by contingency funds, but the legislature should, if possible, exercise the policy determination. Of course, if the length and frequency of legislative sessions were to be altered by amendment, the pay of legislators would have to be increased.

Indiana's enumeration and reapportionment problem has become increasingly bitter. Like a disreputable relative, it is disregarded; since 1921,

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22. Seventeen states have 60 day sessions and only two states have substantially shorter sessions than Indiana. In Oregon, only the legislator's pay, a niggardly eight dollars a day, is legally stopped at the end of fifty days.



the legislature has neglected to obey the constitutional command to redistrict the state for legislative seats:

The General Assembly shall, at its second session after the adoption of this constitution, and every sixth year thereafter, cause an enumeration to be made of all the male inhabitants over the age of twenty-one years.

The number of Senators and Representatives shall, at the session next following each period of making such enumeration, be fixed by law, and apportioned among the several counties, according to the number of male inhabitants, above twenty-one years of age.<sup>23</sup>

No complete enumeration has been made since 1919, although partial enumerations were reported by the Auditor of State in 1931 and 1937. In 1943 the Marion Circuit Court enjoined the public officers "from taking an enumeration solely of the male inhabitants" and prohibited the expenditure of public funds for such a purpose. The likelihood of such enumerations by township assessors also appears dim.

This provision of the Indiana Constitution is open to serious criticism. Why should it be necessary to "cause an enumeration to be made?" The decennial census of the United States is available, and it could supply all necessary data. The statistics are as nearly accurate as can be obtained. This body of official information costs nothing. Moreover, the census is made at the stipulated time, something that cannot be said of the Indiana enumeration.<sup>24</sup>

A new apportionment provision certainly should abolish the present requirement that only "male inhabitants of twenty-one years of age" should be counted for representative purposes. Besides serving no useful purpose, this provision affronts the women of Indiana. Though the dislocation probably is not great, the districts with comparatively more women voters are correspondingly under-represented under the present apportionment system.

But the gathering of the necessary population figures, of course, is the smallest part of the task. Getting the legislature to enact a redistricting act remains. Redistricting is one of the skeletons in the closet of American politics, and has been through most of our history.

Before the Indiana problem is considered, it may be worthwhile to note that the picture is pretty dark elsewhere. At the Conference of Mayors in 1941 it was charged that 60 per cent of the population is urban; that they

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23. IND. CONST., ART. IV, §§ 4, 5.

24. In 1861 the idea of using the Federal census as a basis for apportionment was considered. The Judiciary Committee of the lower house reported that, in its opinion, the measure was not prohibited by the constitution. The section providing for the taking of an enumeration was, according to the committee, merely a way for the legislature to obtain necessary information. ". . . It [making an enumeration] is merely directory in its character and may be neglected when the information it contemplates can be obtained in any other legal and reliable way." House Journal 307 (Ind. 1861).

produce 75 per cent of the national income; that they pay 90 per cent of the taxes; but that they have only 25 per cent representation in the state legislature.

Some states have their legislative districts fixed, largely, if not completely, by their constitution, thus reapportionment can be achieved only by constitutional amendment. Population is necessarily disregarded as a basis for representation where such a system is used. In most New England states, where the town is the unit used for representation, some tremendous inequalities result. The towns of Colebrook and Hartford each have two representatives in the House in Connecticut; Colebrook has a population of 547 and Hartford has 166,000.<sup>25</sup>

The same result, i.e., gross under-representation, is frequently achieved, however, by statutory action. The cities of Los Angeles and San Francisco together have forty-eight per cent of the state's population but have only five per cent of the representation in the California upper house.<sup>26</sup> The 1950 census will undoubtedly show that the situation has become worse. In Georgia, Fulton County, with approximately 400,000 population, has three representatives; Echols county with less than 3,000 elects one representative. Dozens of examples nearly as bad could be cited. Under-representation is typical, not unusual, in state legislatures.

One of the most effective ways that such under-representation of urban areas may be effected is by the failure or refusal of the state legislature to carry out the constitutional mandate. Indiana is in this group of states, but it is not a leader.

The population shift to the cities of Indiana leaves the state with some grossly under-represented areas. But, like a man with a badly sprained ankle who looks at a person who has lost both legs, Indiana can look at some other states and say, "I could be a lot worse."<sup>27</sup> Still, the sprain can slow progress.

Correcting this violation of the constitution will be difficult. It would probably be politically inexpedient to include a reapportionment amendment as part of a modernization of the Indiana Constitution, for to do so would gravely imperil the whole program. New Jersey's constitutional revision could be attained only by putting reapportionment outside the scope of change.

Assuming however, that a new reapportionment method is desirable, one might consider what form it should take. At present, apportionment for both houses is based theoretically on population (and actually on the geographic

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25. In Maryland, a citizen of Baltimore has a vote that is worth only one-seventh as much as a citizen of Calvert County in the election of a state legislator.

26. Alpine county with a population of 322 elects one senator, thus making a vote there 351 times as valuable as in Los Angeles county which is also allowed one senator.

27. Reapportionment in the following states is previous to Indiana's: Connecticut—1870; Mississippi—1892; Kentucky—1893; Tennessee—1905; Illinois—1909; Oregon—1910; Minnesota—1913. While many others, particularly Florida, Michigan and Kansas, have reapportioned since Indiana, they are still badly out of date.

unit determined by the 1921 reapportionment). It could be based on population, territory, local governing units, singly or in combination.

Much can be said for using population as the basis for apportionment for both houses. If the utmost in democracy were the goal, multiple-member districts with proportional representation would be the method of achieving it. On the other hand, some writers question using a single basis for representation in a bicameral legislature:

Bicameralism presupposes that there will be two distinct representative bases for its construction and utilization. Indeed it is almost axiomatic that there must be this duality of base or bicameralism is smitten with the fat of Siamese coupling: the twins are two, yet one in structure and interconnection.<sup>28</sup>

Since the simple democratic method established by the 1851 Constitution is not implemented by Indiana legislatures, it seems that a more nearly acceptable plan must be advanced. The "federal system," embodied in a bill introduced by Senator Anness in 1949, has received favor. This bill would not change the method of apportioning representatives, but the representative basis for the Senate would be changed drastically. Under this plan, counties would be the primary units of representation. The six most populous counties would be allowed one senator; the other eighty-six counties would be formed into forty-three two-county senatorial districts.<sup>29</sup>

The Anness plan offers one solution to the urban-rural struggle in both houses by giving the rural areas complete dominance in the Senate and allowing the urban areas dominance in the House. If the goal is to give the legislators from the rural areas a check on legislative action that might harm their constituents, this method should provide it. The lower house, however, would retain a strong position for bargaining and compromise. Since all units of government, rural as well as urban, are dependent upon the state for financial aid, the Senate could not become too arrogant in crushing the legislative wishes of the lower house.

Yet, even if this plan were adopted, the problem of insuring redistricting for the lower house as population shifted would remain. In California and South Dakota if the legislature fails to enact a reapportionment act at the session required by law, the reapportioning power goes to a board composed of state officers. The theory back of this arrangement is that the legislature, knowing that a reapportionment will be carried out even if it evades its duty,

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28. Shull, *Reapportionment: A Chronic Problem*, 30 NAT. MUNIC. REV. 74 (Jan., 1941).

29. Marion and Lake counties, already under-represented, would lose a number of senators by the adoption of such a plan; they in turn would gain representatives in the House. Nothing equivalent to the California situation would result in this state, but a Marion County vote for senator would have less than one-tenth the weight of a vote in the Park-Clay senatorial district.

will redistrict the state. Failure of the secondary apportionment group to act can be overcome by mandamus.

In South Dakota in 1947 the legislature passed an apportionment act, but failed to redistrict. The previous apportionment was reenacted. In Indiana such a tactic could be met by an appeal to the courts. In *Parker v. State ex rel. Powell*<sup>30</sup> the supreme court held that reapportionment is judicial and not political. The court stated that apportionment acts to be constitutional must be equitable. In any event, a constitutional provision might well subject the redistricting and reapportioning to judicial review.

#### THE EXECUTIVE

Reorganization of the executive branch of both the national and state governments has been of persistent interest in this country. The cost of government has skyrocketed: in 1913 the disbursements of the state of Indiana totaled \$9,100,000; by 1947 the figure had risen to \$259,000,000.<sup>31</sup> The tremendous expansion of governmental services, with an attendant increase in taxes, forced people, in and out of government, to try to increase the efficiency and economy of administrative operations.

The reform movement of the first decade brought into being the Taft Commission on Economy and Efficiency to improve operation of the federal government. In Indiana the Marshall amendments failed. The only positive gain of the period was the Public Depository Law<sup>32</sup> and the law establishing the State Board of Accounts.<sup>33</sup> After the creation of both federal and state budgeting agencies in 1921, the drive for improvement of the executive branch waned.<sup>34</sup>

The depression of the thirties', with the consequent expansion of governmental activities and expenditures, reawakened interest in executive reform. A fairly elaborate reorganization of the state administrative machinery was achieved in 1933.<sup>35</sup> (Incidentally, Indiana had not been a leader in the reorganization movement. Sixteen other states had acted before 1933.)

The reorganization act provided for eight departments (another was added in 1935). Though students of public administration approved the integration that the departmentalization had brought, the reorganization caused much controversy. Officers in the administration stated that only a paper departmentalization had resulted, leaving the former independent agencies to operate as in the past. Others charged the Governor with becoming a czar.

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30. 133 Ind. 178, 33 N.E. 119 (1893).

31. State Board of Accounts, *Statistical Report*, State of Indiana 17 (1948).

32. IND. ACTS, 1907, c. 222, pp. 391-404. This act has since been repealed and some of its provisions embodied in new legislation.

33. IND. STAT. ANN. 60-210, 60-251 (Burns Repl. 1943).

34. IND. STAT. ANN. 60-412, 60-421 (Burns Repl. 1943).

35. IND. ACTS, 1933 c. 4 §§ 1-32.

Following reorganization, the Governor appointed a committee to study the operation of the executive-administrative branch. This committee, headed by Dean Gavit, made some excellent recommendations. In the main, they were never enacted by the General Assembly.

In 1940 the Republicans gained control of both houses of the legislature and won every state office except that of governor. The 1933-35 reorganization acts were repealed,<sup>36</sup> and a new executive organization was created.<sup>37</sup> The new law provided that the appointing power be shared with the Lieutenant Governor. For ordinary administrative functions, a "board of department" was given directive powers; each board was composed of the Governor and two officers of the opposing political party. When his veto of these acts was overridden, Governor Schricker caused the Attorney General to initiate a suit to test their constitutionality. The supreme court held them unconstitutional because they conferred part of the Governor's appointing power on administrative officers; such power was vested in the Governor exclusively.<sup>38</sup> This decision returned the administrative machinery of the state to its condition prior to the 1933 reorganization. With the exception of the Financial Reorganization Act of 1947,<sup>39</sup> that is where it remains.

Meanwhile on the national level a renewed interest in executive reorganization developed.<sup>40</sup> The publication of the Hoover Commission's twenty-three Task Force Reports and eighteen Reports to the Congress revived the drive for state reorganization. Twenty-three states and two territories established commissions to study the executive branch of their state governments. Indiana alone of the North Central states took no action. Such Hoosier complacency is not based upon existing superiority of executive organization.

Any group charged with recommending organizational improvements must first determine what changes should be made in the constitution and what should be left to statutory action. In Indiana at present several administrative officers are elected. The constitution provides:

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36. IND. ACTS, 1940 c. 4, p. 809; c. 13, p. 132; c. 40, p. 124.

37. *Id.* at c. 13, pp. 31-48.

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

39. The following excerpts reveal the belief that administrative reorganization was needed. "Whereas, during the past thirty years, the functions of the administrative branch of state government have multiplied many times, and . . . Whereas, the Legislature by its enactment of laws which authorized these many additional functions did provide for the administration and management of each of them, they did not, however, provide a uniform plan but provided many different plans of procedure which have made the administration and management of the fiscal affairs of the state government very difficult for the executive and administrative branches of the government of the State. . . ." IND. ACTS, 1947, c. 279, pp. 138-39.

40. A commission to study the executive branch of the federal government was created by 5 U.S.C.A. § 133 (1947).

There shall be elected, by the voters of the State, a Secretary, and Auditor and a Treasurer of the State, who shall, severally, hold their offices for two years. They shall perform such duties as may be enjoined by law; and no person shall be eligible to either of said offices more than four years in any period of six years.<sup>41</sup>

In addition, the Superintendent of Public Instruction is a constitutional officer;<sup>42</sup> the Attorney General is a popularly elected statutory officer.<sup>43</sup>

These officers are responsible to the voters, not to the Governor. Yet administrative theory leans heavily on the idea of granting the Governor authority commensurate with his responsibility. The first report of the Hoover Commission states:

Responsibility and accountability are impossible without authority—the power to direct. The exercise of authority is impossible without a clear line of command from top to bottom, and a return line of responsibility and accountability from bottom to top.<sup>44</sup>

The committee headed by Dean Gavit in 1935 expressed the same attitude.<sup>45</sup> This also is the position of the Model Constitution,<sup>46</sup> prepared by the National Municipal League, and the 1947 Constitution of New Jersey.<sup>47</sup>

41. IND. CONST. ART. VI, § 1.

42. IND. CONST. ART. VIII, § 8.

43. IND. STAT. ANN. 49-1920 (Burns Supp. 1949).

44. THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOVERNMENT, GENERAL MANAGEMENT OF THE EXECUTIVE BRANCH 1 (1948).

45. "In order that officials may do things they must be given *power*. Power may be abused. To prevent the abuse which might come from unrestricted one-man power, *control* must be set up. Formerly two devices were used to control the use of power:

1. Power was scattered among several people.
2. A system of checks and balances was set up. The result was a sacrifice of strength, vigor, and promptness. Also responsibility for wrong doing or not doing could not be fixed, i.e., it permitted buck passing. A system of checks intended to check bad acts will also check good ones just as quickly with the result of loss of efficiency.

"More recently it has been found that the best way to get satisfactory results promptly is:

1. To confer ample power on some single person with sufficient subordinate assistance.
2. To hold that person directly responsible for getting results.

"The substitute for the old devices for controlling the use of power is to fix direct responsibility for every act on some one person. Persons are held to their responsibility through the possibility of removal and through budgetary control."

REPORT OF THE INDIANA STATE COMMITTEE ON GOVERNMENTAL ECONOMY 42 (1935).

46. MODEL STATE CONST. ART. V, § 503 (4th ed. 1941).

47. "Each principal department shall be under the supervision of the Governor. The head of each principal department shall be a single executive unless otherwise provided by law. Such single executives shall be nominated and appointed by the Governor, with the advice and consent of the Senate, to serve at the pleasure of the Governor during his term of office and until the appointment and qualification of their successors, except as herein otherwise provided with respect to the Secretary of State and the Attorney General.

The Secretary of State and the Attorney General shall be nominated and appointed by the Governor with the advice and consent of the Senate to serve during the term of office of the Governor." N.J. CONST. ART. V, § 4.

Power of appointment of top administrators should be given by constitutional grant.<sup>48</sup> An Auditor of State, elected to a four-year term, seems to the present writers a sufficient check on the Governor.

A grant of authority without the means to apply it is, at best, only an empty gesture. Two plans have ordinarily been used in state reorganizations of the executive branch to implement the authority granted to the Governor. These changes should be statutory, not constitutional. The first plan provides for a departmentalization of the administration. Indiana at present has 105 departments, bureaus, boards, commissions, and offices, not counting the educational, penal and benevolent institutions.<sup>49</sup> A departmentalized system, enacted by legislation, would draw these agencies together, primarily on the basis of function, into from eight to twenty-two departments. An administrator responsible to the Governor would head each. The department under the Auditor of course would not be subject to the same control as the others.

There is no acceptable formula available to determine how many departments should be created. Considerable variation exists in the proposals made by the various groups who have studied reorganization recently.<sup>50</sup> The Arizona group recommended eight; Connecticut and New Jersey, fourteen; Ohio, fifteen; Oklahoma, nine; Virginia, eleven.<sup>51</sup> If the number is too large, the Governor will not be able to keep abreast of program developments and problems. If the number is too small, as was probably so in the Indiana reorganization of 1941, the tasks undertaken by the sub-units of the department are so diverse that the department head will be incapable of providing the proper administrative leadership and direction.

The second plan used to give the Governor administrative authority is to provide him with sufficient staff assistance. He should be provided with at least an advisory aide and a personal secretary. The housekeeping functions of state government should be under the immediate control of the Governor.<sup>52</sup> So that he can better exercise control, several bureaus within the office of the

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48. The recommendation of making the Secretary of State, Treasurer, Attorney General and Superintendent of Public Instruction appointive rather than elective has been made in Connecticut, Ohio, Michigan, Minnesota (excepting the Attorney General), Nevada and Idaho. COUNCIL OF STATE GOVERNMENTS, REORGANIZING STATE GOVERNMENT 107-110 (1950).

49. *Roster of State and Local Officials, State of Indiana* 3-20 (1949).

50. "All executive and administrative offices, departments, and instrumentalities of the State Government . . . shall be allocated by law among and within not more than twenty principal departments . . ." N.J. CONST. ART. V, § 4. New York's constitution likewise sets twenty as the maximum number allowable.

51. COUNCIL OF STATE GOVERNMENTS, REORGANIZING STATE GOVERNMENT 96-103 (1950).

52. In some states the housekeeping functions have been drawn together into a Department of Administration under the Governor. In Minnesota this development has been reported on very favorably. Henderson, *How a State Can Be Managed*, 35 NAT. MUNIC. REV. 524 (Nov., 1946). New Hampshire, Washington, and Ohio groups have recommended that such a plan be adopted in their states.

Governor should be created by legislative action. These should include Bureaus of the Budget,<sup>53</sup> Procurement,<sup>54</sup> Reporting and Information,<sup>55</sup> and Planning.

Personnel administration in Indiana also needs overhauling. Sound programs of recruitment and examination, classification, efficiency rating, compensation, and retirement are highly desirable for purposes of morale and efficient operation. Though Indiana's merit system has existed for nearly ten years, the merit idea has been accepted somewhat gingerly. Large areas of administration including the staff of the Auditor of State, the Department of Revenue, the Department of Conservation, and the State Highway Commission are operated on an out-and-out spoils system. Though the bi-partisan merit system of the State Board of Accounts and the State Police seems to work satisfactorily, the necessary political adjustment works an undesirable complication in administration. A non-political merit provision in the Constitution would put efficient public service above political reward. The New York provision might well serve as a model: "Appointments and promotions in the civil service of the state and all of the civil divisions thereof . . . shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive. . . ."<sup>56</sup>

Since liaison between the Department of Law and the Office of the Governor should be closely maintained, a legal assistant should be permanently assigned to the Governor.

In reorganizing the executive branch of government, Indiana might well revise the veto powers.<sup>57</sup> The increasing complexity of legislation requires the Governor to make a thorough study of a bill before he takes action. The three days allowed to study bills submitted while the legislature is in session should be increased to seven or ten. The five days to act on bills after the legislature has adjourned seems even less adequate. The New York Constitution allows the Governor thirty days; the New Jersey Constitution permits forty-five. Also, the simple majority now required to override a veto could well be increased to two thirds.

The recommendations made here express orthodox principles and theories in public administration. Orthodoxy, however, should not be taken to imply

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53. The abolition of our present legislative-executive system of budgeting is indicated by this recommendation. Such a change would be in keeping with orthodox budgeting theory. It would be quite possible, however, to retain our present system if that were desired.

54. This staff agency would make purchases for all the departments, would maintain all state-owned or rented space, would supervise all state construction.

55. This bureau would digest the various reports submitted to the Governor's office and keep the Governor and the public currently informed on the condition of the state's business.

56. N.Y. CONST. ART. V, § 6.

57. IND. CONST. ART. V, § 14.



unanimity. Strong and vigorous dissent has been expressed on some of these ideas.<sup>58</sup>

### JUDICIAL REFORM

Improvement of the judicial branch of state government has been much discussed by the legal profession.<sup>59</sup> If salary considerations are set aside as a matter to be determined by statute, the basic problems are the method of selection of judges and term to be allotted to the office. The arguments for and against election or appointment are too well known to be warmed over here. The Model State Constitution idea, adopted by Missouri in its 1945 constitution, combines the two methods. Selection is made by the executive from one of three names submitted to him by a non-partisan judicial commission. After a probationary period of twelve months in Missouri, two years in California, and four years under the Model Constitution, the judge runs unopposed on his record. A majority popular vote, registered on a separate ballot with no party label, determines if the judge retains his place on the bench. The idea behind the system is that better judges can be selected initially and can be retained longer. In the vast majority of such elections in Missouri the judges have retained their seats. Only vigorous opposition from bar associations has been able to unseat judges who were unsatisfactory.

The term of office for judges varies among the states from two years to life. The six-year term of Indiana is shared by sixteen other states; thirty allow seven or more years, half of them providing terms of ten or more.<sup>60</sup> Indiana tenure should be lengthened. Also the constitutional limitation of four years for legislatively created judicial offices<sup>61</sup> might well be abolished.

Article 7, Section 14, which provides for a competent number of Justices of the Peace to be popularly elected in each township could also be dropped. A system of magistrate's courts might be established by statute, or the Justices of the Peace could be retained where necessary under statutory enactment.

### LOCAL GOVERNMENT

In Indiana local governmental units are creatures of the state legislature. The constitution has relatively little to say concerning how local government shall be organized, what functions shall be performed locally, or what powers

58. See WALDO, *THE ADMINISTRATIVE STATE* 130-191 (1948); Hyneman, *Administrative Reorganization: An Adventure into Science and Theology*, *JOURNAL OF POLITICS* 62 (February, 1939); Finer, *The Hoover Commission Reports*, 64 *POL. SCI. Q.* 405-419, 579-595 (Sept., Dec., 1949).

59. See *e.g.*, Bomberger, *Book Review*, 26 *IND. L.J.* 124 (1950).

60. California, 12; Colorado, 10; Delaware, 12; Louisiana, 14; Maryland, 15; Massachusetts, life; Missouri, 12; New York, 14; North Dakota, 10; Pennsylvania, 21; Rhode Island, life; South Carolina, 10; Utah, 10; Virginia, 12; West Virginia, 12; Wisconsin, 10.

61. "But the General Assembly shall not create any office, the tenure of which shall be longer than four (4) years. . . ." *IND. CONST. ART. 15, § 2.*

shall be exercised. Article 4, Section 22, prohibits passage of special laws on county and township government and fees and salaries, and Article 15 prohibits the reduction of counties to an area of less than 400 square miles. Article 6 provides for the election and term of office of certain county officers, and all local corporations are subject to the two per cent debt limitation. But township, city, and town governmental organization is provided for mostly by implication.

The paucity of constitutional provisions concerning local government might be deemed a blessing in as much as more flexibility in creation and organization is theoretically possible. But most critics now condemn the lack of suitable constitutional provisions concerning the structure, organization, and powers of local units. More specifically, most advocates of better local government recommend that home rule or optional charters be provided for in a constitution. Our hydra-headed county government and inefficiently organized city government might still persist, but, if given a choice, undoubtedly many counties and cities would take advantage of the opportunity to improve by selecting the kind of governmental machinery fit to do the job. At least that has been the story in most other home rule states.

The term "home rule" has been considerably abused and misused. To some local officials, it seems to mean a guarantee of all the rights and privileges of local government, particularly the "right" of more state financial aid, with none of the obligations of local government. The American Municipal Association has defined the term as follows:

Broadly speaking, municipal home rule is the power of local self-government, whether such power is conferred by constitutional or statutory grant, or by the electorate of a community through the adoption of a charter authorized by state organic law. Since statutory home rule can be rescinded by the state legislature, real home rule is usually considered as emanating only from a state constitution. Home rule includes the power of a municipality to determine the form of its government by adoption of a charter, to define the nature and scope of municipal services, and to conduct all local activity by officers selected by it, acting in its own right with respect to the enforcement of municipal ordinances and as an agent of the state in the enforcement of state laws and concerns.<sup>62</sup>

Since 1875, when Missouri adopted constitutional home rule, nineteen states have chosen this method of changing the pattern of state-local relations from one of complete subservience to one of partial independence. In three of the constitutional home rule states, the legislature has never placed the principle into operation or has limited it to one city. In others, notably Minnesota, Ohio, and Texas, as much as ninety per cent of the urban population govern themselves under home rule.<sup>63</sup>

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62. INTERNATIONAL CITY MANAGERS' ASSOCIATION, MUNICIPAL YEAR BOOK 92 (1945).

63. MOTT, HOME RULE FOR AMERICA'S CITIES 62 (1949).

Another type of local government which gives a choice of charters is the optional law system now permitted by a number of states. Under this system, the legislature authorizes several alternative plans of government, such as mayor-council, council-manager, or commission form, from which cities and towns may choose. Still another plan varies the governmental forms for different classes of cities.<sup>64</sup>

The history of municipal home rule shows that the principle is a sound one. Home rule, and to a lesser extent the optional charter system, relieves the legislature of much detailed and burdensome work. Since 1929, from 28 to 39 per cent of the acts of the General Assembly have dealt with local governmental units and affairs. A much larger number of bills on local affairs are introduced each session; many are arbitrary or whimsical. Home rule gives a much greater flexibility to the administration of local government by providing municipalities a means of selecting the best tools to fit particular needs. And the practice of responsible self-government within the local communities certainly strengthens democracy.

Home rule, however, has neither proved an unmitigated blessing nor a panacea for all municipal ills. Two major problems have accompanied it. The first problem has been framing the constitutional amendment to grant the substance of home rule as well as the form. The grant of charter-making power in which citizens may choose their form of government but have little discretion on what services may be undertaken or how such services shall operate is only the shadow of self-government.

To give a broad grant of self-government as in Ohio, where municipalities "have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws," has resulted in the necessity of much judicial interpretation.<sup>65</sup> The decisions have, in general, tended to restrict the powers of home rule units.

But to enumerate specifically the powers of home rule or to attempt to define too closely what shall be subject to municipal control presents the second danger: inflexibility. What is strictly a municipal matter today may become a matter of statewide concern tomorrow. As examples, the fields of finance, sewage disposal and public utilities were at one time subject only to local control but today are generally subject to state regulation.<sup>66</sup>

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64. INTERNATIONAL CITY MANAGERS' ASSOCIATION, MUNICIPAL YEAR BOOK 528 (1950).

65. See MCGOLDRICK, LAW AND PRACTICE OF MUNICIPAL HOME RULE (1933); Schoup, *Constitutional Problems of County Home Rule in Ohio*, WESTERN L. REV. (Dec. 1949).

The home rule amendment contained in the Model State Constitution attempts to effect a compromise by giving both broad general powers and nine classes of more specific powers. *Art. VIII, § 804.*

66. MCGOLDRICK, *op. cit.* *supra* note 65 at 342.

There have been several attempts in the past to give Indiana local units a measure of self-government. The 1921 session of the General Assembly enacted an optional charter law giving cities a choice between council-manager and commission forms of government. Michigan City subsequently adopted a council-manager charter, but when Indianapolis chose to do so, the action was challenged. The Indiana Supreme Court held the act invalid on the ground that it was physically impossible for the clerk to check 19,000 signatures, twenty per cent of the voters in the last election, within a period of five days as required by the statute. Since the act could not apply to the city of Indianapolis, it was no longer a general law and therefore violated the prohibition against special legislation.<sup>67</sup> The decision has effectively prevented the passage of new optional charter laws.

Stymied on an optional charter system, a Governor's City Manager Study Commission recommended a self-executing home rule amendment to the 1941 General Assembly. The amendment passed the 1941 session but died during the 1943 Assembly. It was again submitted in 1949 but was not widely championed; it again failed.

#### MISCELLANEOUS PROVISIONS

The Indiana Constitution forbids state indebtedness except for war, disaster, or to meet casual deficits, but certain state agencies are not bound by its provisions. Municipal corporations may not contract indebtedness to exceed two per cent of the assessed valuation.

The two per cent clause has been aptly called a "rubber yardstick." Two methods of evasion have been generally used in Indiana as well as in other states with constitutional or statutory limits on indebtedness. The first is to decrease or increase the assessed valuation in order to decrease or increase the bonding limit. Since the 1949 reassessment on a 33 1/3 per cent basis has reduced the assessed valuation in some counties, it can be readily understood why many local units, especially school townships, find it so difficult to finance much needed expansion. A low valuation, together with a statutory limitation on the tax rate, may please overly tax-conscious citizens but it seems a short-sighted policy.

The second method of evasion has been the creation of new and overlapping governmental units. The 1939 Indiana Tax Study Commission reported that there were 633 out of 1636 units of government over the two per cent limit of direct indebtedness because of the overlapping debt burden.<sup>68</sup>

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67. *Keane v. Remy*, 201 Ind. 286, 168 N.E. 10 (1922).

68. Nine cities and fourteen towns had indebtedness of more than ten per cent. REPORT OF THE INDIANA TAX STUDY COMMISSION 37 (1939).

The technique of forming special units of government as a means of increasing the debt margin may no longer be successful, however. The Indiana Supreme Court in the *Rappaport* case seems to have outlawed the special district as a "borrowing machine,"<sup>69</sup> but the scope of the decision remains yet undetermined. Even if this is the effect of the case, an attempt to remove the debt limit in a new constitution or by amendment would probably provoke much objection.

Many authorities now favor administrative control of local indebtedness rather than reliance upon a flat limitation by either statute or constitution. The North Carolina Local Government Commission, for example, seems to have worked quite well in keeping local indebtedness within bounds in that state.<sup>70</sup> The Indiana State Board of Tax Commissioners exercises a similar function through its petition and review procedure.

Another financial provision of the Indiana Constitution which has tended to place a handicap on financial administration is Article 10, Section 1, which requires that taxes be levied on a uniform basis. All classes of property, both tangible and intangible, must be taxed at the same rate. The provision has produced widespread evasions and inequities when enforced.

Several state constitutions permit direct popular legislation in one form or another, but there seems little prospect that the initiative movement would be considered in Indiana or other states not now permitting direct democracy.<sup>71</sup>

Also, there seems little agitation for change in Indiana's Bill of Rights. It is interesting to note however that the Bill of Rights of the New Jersey Constitution of 1947 was extended to guarantee collective bargaining, absentee voting by servicemen and non-discrimination on the basis of race, color, or sex.

#### CONVENTION, COMMISSION, OR COMMITTEE

An effort to revise the Indiana Constitution would necessarily be prefaced by consideration of the method to be used. Of course, the convention has been the traditional method of constitution making. The constitution ratified by New Jersey in 1947 was drafted by an elected convention. The commission form of revision was used as early as 1852; one is making a study of the Minnesota constitution at the present time. In California, a joint legislative committee was authorized to draft a revised constitution in 1947. Still another

69. *Rappaport v. Dept. of Public Health and Hospitals*, 227 Ind. 508, 87 N.E.2d 77 (1949). But see *Dept. of Public Sanitation of City of Hammond v. Solan*, 97 N.E.2d 495 (Ind. 1951).

70. KILPATRICK, *STATE SUPERVISION OF LOCAL FINANCE* (1941); Fesler, *North Carolina's Local Government Commission* 30 NAT. MUNIC. REV. 327-334 (June, 1941).

71. Crouch, *The Initiative and Referendum in Cities*, 37 AM. POL. SCI. REV. 500-501 (June, 1943).

variation is being tried in Louisiana where the Louisiana State University Law Institute has been commissioned to draft a new basic law.<sup>72</sup>

Each method of constitutional study and revision has certain advantages and disadvantages. The fact that a more select group of delegates are chosen for convention than are elected to a legislature favors the convention method. A convention also allows concentration of both the members and the public upon a specific purpose rather than the division of interest that would accompany the legislature acting as a convention. Some disadvantages of a convention are the expense (New York's 1938 convention cost \$1,300,000 for four months' work) and the formal procedures are not well adapted to constitution making.

Since the legislature is already organized, it is claimed that a legislature acting as a convention will save money. Since the legislative process is used anyway, proponents of this method insist that the initial draft might well be done by the legislature. The disadvantages of legislative drafting are that not enough time can be devoted to constitutional framing nor can enough public and legislative interest be concentrated on the task.

The commission or legislative interim committee method has found more favor recently on the ground that such methods are efficient because the group is small and better able to discuss technical problems, and that more able men will accept appointment than will seek election. The commission is also supposed to be more independent of pressure groups and less expensive. The commission, however, is supposedly less representative of the public and legislative approval of its work may be hard to obtain.<sup>73</sup>

Whatever method of constitutional revision is used, the first and foremost requirement is an awakened and educated public before, during, and after the revision is undertaken. Interest in constitutional revision in Indiana is not intense at the present. But as the authors have attempted to point out in this brief survey, several serious constitutional problems do exist. These problems promise to become more critical in the future and it seems particularly appropriate that during this Centennial year a thorough study be made. Such a study might well be part of the task of a "little Hoover Commission."

While change for its own sake is not desirable, neither should we allow our constitution to become encrusted with age merely because of ancestor worship. As Thomas Jefferson is oft-quoted:

Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant—too sacred to be touched. They ascribe to the men of the preceding age a wisdom more

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72. Much of the above is taken from COUNCIL OF STATE GOVERNMENTS, BOOK OF STATES 81-98 (1950).

73. See Keith, *Methods of Constitutional Revision*, BUREAU OF MUNICIPAL RESEARCH; DODD, *THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS* (1910); Rich, *Convention or Commission*, 37 NAT. MUNIC. REV. 133-136 (March, 1948).

than human, and suppose what they did to be beyond amendment . . . [but] . . . laws and institutions must go hand in hand with the progress of the human mind . . . and keep pace with the times.