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IN THE
INDIANA SUPREME COURT

No. 21S-PL-518

Eric J. Holcomb, Governor of the State of Indiana, Appellant (Plaintiff below), v. **Rodric Bray, in his official capacity as President Pro Tempore of the Indiana Senate and Chairman of the Indiana Legislative Council; Todd Huston, in his official capacity as the Speaker of the Indiana House of Representatives and Vice-Chairman of the Indiana Legislative Council; and the Indiana General Assembly** Appellees (Defendants below).	Court of Appeals No. 21A-PL-2339 Appeal from the Marion Superior Court No. 49D12-2104-PL-14068 Hon. Patrick Dietrick, Judge

Amici Curiae Scholars of Indiana's Constitution Amicus Brief

Josh S. Tatum
jtatum@psrb.com
Andrea K. Townsend
atownsend@psrb.com
Yuning Tian
ytian@psrb.com
PLEWS SHADLEY RACHER & BRAUN LLP
1346 North Delaware Street
Indianapolis, Indiana 46202-2415
(317) 637-0700
Attorneys for Amici Curiae James H. Madison, William McLauchlan, and Elizabeth R. Osborn

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INTEREST OF AMICI CURIAE

Amici are three academic scholars who have done substantial work on Indiana history and government, including and especially its constitutions: James H. Madison, William McLauchlan, and Elizabeth R. Osborn.[1]

James H. Madison is the Thomas and Kathryn Miller Professor Emeritus of History at Indiana University. An award-winning teacher, Dr. Madison began teaching Indiana history in 1976. He is the author or coauthor of eleven books and editor of one. Of those, all but one feature histories of Indiana or Hoosiers. These span from 1982's *Indiana through Tradition and Change: A History of the Hoosier State and Its People, 1920–1945* to 2020's *The Ku Klux Klan in the Heartland*, as well as well-known Indiana histories *The Indiana Way: A State History* and *Hoosiers: A New History of Indiana* (2014). He is "proud, in a modest Hoosier way" that the Midwestern History Association recently honored him with the Frederick Jackson Turner Lifetime Achievement Award.

William McLauchlan, JD, PhD, MA served as Associate Professor at Purdue University in its Political Science department from 1973 to 2016 before retiring and obtaining emeritus status. He taught about American courts, constitutional law, and government. His book *The Indiana State Constitution: A Reference Guide* (1996) provides the only book-length analysis of the Indiana Constitution. It provides a history of the 1816 and 1851 constitutions and a clause-by-clause commentary of the text itself, including discussions of major decisions interpreting them. His other works include four other books, seventeen articles and book chapters, and twenty-three conference papers. His areas of research include the workload, policy, and

[1] Amici present their views in an individual capacity and express their own personal views. They are not representing the views of any of their current or former institutions.

processes of the United States Supreme Court, judicial process, the development of the common law in the United States, telecommunications, and data analysis.

Elizabeth R. Osborn, PhD, serves as Director of Education for Indiana University's Center on Representative Government. Since earning her doctorate from Indiana University's Department of History, she has spent her career in civic education, teaching college students, coordinating the Indiana Supreme Court's civic-education programs, and now training K–12 teachers in methods of integrating civics into their curriculum. Her 2004 dissertation, *The Influence of Culture and Gender on the Creation of Law in Antebellum Indiana, Ohio, and Kentucky*, contains one of the most in-depth studies of the political, cultural, and economic setting in which the 1816 and 1850–51 constitutional conventions were held.

Amici have spent decades studying the Indiana Constitution in their respective contexts. They seek to provide this Court a historical perspective on the current dispute. They provide scholarly insight into the challenges faced by each generation of framers. Each of them emphatically agrees with Governor Holcomb's position that at no time did those drafting or ratifying the constitutional provisions at issue here understand the language to extend to the General Assembly the power to call itself into an unscheduled, i.e. special, session.

SUMMARY OF ARGUMENT

Hoosiers have debated the relationship between their branches of government, including the authority to call a special session of the General Assembly, nearly continuously since Indiana became a state. Whenever that specific power was up for discussion, the conversation focused on the language and meaning of the Constitution. But in 2021, the Indiana General Assembly, apparently for the first

time, ignored this 200-year consensus and attempted to shift the balance between the executive and legislative branches on the allocation of power to call a special legislative session through a statute.

The 1816 Constitution[2] allowed the governor to convene the General Assembly "on extraordinary occasions." But as early as 1823 legislators identified both the governor's ability to call a special session and the General Assembly's power to fix the time and place of meetings as reasons for a second constitutional convention. The 1851 Constitution expressly authorized the governor to call a special session. Again in 1911 Indiana's political leadership sought to overhaul the Constitution. Although ultimately held invalid, the "Marshall Constitution" kept the power to call a special session limited to the governor. That attempted constitution also limited special sessions to thirty days and to topics for which they are called.

By the 1960s it became evident that the 1851 Constitution needed updating. Many cultural, political, and legal developments made the fundamental law inadequate for modern times. As shown by documents from that period and agreed by all parties here, the consensus remains that the 1851 Constitution did not allow for the legislature to call itself into a special session. Some considered this a shortcoming. In fact, some influential leaders proposed language that would have granted that power to the legislature. But that language did not make the amendment's final version. The resulting amendment ratified in 1970 did change the relevant provision, but it did not include the proposed language.

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[2] This brief refers to Indiana's first constitution, which remained unaltered the entire time it was in effect, as the "1816 Constitution." It refers to the second constitution as originally ratified as the "1851 Constitution." References to the current, amended constitution omit any year.

The debate about the broader relationship between the executive and the legislative included more than just constitutional changes. The role of the Lieutenant Governor in that office's relationship to the Indiana Senate was also changing. Around the same time that the 1970 constitutional amendments were ratified, the Lieutenant Governor lost the power to appoint committees, their chairs, and bills. In 1974, the Lieutenant Governor further lost independence and some prestige when the office converted from a separately elected position to the gubernatorial candidates' running mate. Indiana's leaders in government actively considered and reconsidered the appropriate and effective roles of each of these offices and chose not to shift responsibility related to special sessions.

Again in 1984 the legislature proposed revisions to the Constitution, this time to address technical and stylistic provisions that had become inconsistent or obsolete. These changes did not alter how government is structured.

Even though this has been a live debate for 200 years, this history—from the Constitution Elm to the present—shows only one instance where anyone presumed that the legislative branch had this particular authority under their contemporary constitution's text: the 2021 legislation.

ARGUMENT

Looking back nearly 200 years, one historian described Indiana residents in a way that would be familiar to the pioneer lawmakers of 1816. He wrote that Hoosiers "think instinctively about the interplay and adjustment of forces and have developed traditions, skills, and mental processes for doing so … ." Peter T. Harstad, "Indiana and the Art of Adjustment," in *Heart Land: Comparative Histories* 158 (James H. Madison, ed., 1990). This Hoosier penchant for the "art of adjustment" certainly showed itself in constitution-making. *Id.* at 167. In 1816 the

constitutional convention crafted a governing document from what Thomas D. Clark characterized as "the outline and details" of the second Kentucky constitution, a bill of rights from Ohio, and some general principles from the Declaration of Independence. *Id*. (quoting Thomas D. Clark, *Frontier America: The Story of the Westward Movement* 323 (1959)). Similarly, the 1851 Constitution implemented adjustments based on the first three decades of statehood, borrowing from states with similar outlooks and experiences at that time. Indiana's constitutions learned from local experience and adapted ideas from similar states. They "share most of their attitudes with the other midwestern constitutions of the nineteenth century." Patrick L. Baude, "Indiana's Constitution in A Nation of Constitutions," in *The History of Indiana Law* 24 (David J. Bodenhamer and Hon. Randall T. Shepard eds. 2006). Like their Midwestern counterparts, Indiana's constitutions differ from the U.S. Constitution, as well as earlier state constitutions in their concern about public debt, their prioritization of express social rights like education, and their embrace of the principle that "power should come from the bottom up, rather than be imposed from the top." *Id*. at 25.

Unlike the U.S. Constitution, which rarely gets amended and whose original text remains intact with amendments listed separately, state constitutions in general and Indiana's in particular have been treated as "works in progress, documents to be perfected to meet each state's changing needs." Osborn, Elizabeth R. *The Influence of Culture and Gender on the Creation of Law in Antebellum Indiana, Ohio, and Kentucky* 5 (PhD diss., Indiana University, 2004) (available at https://www.proquest.com/docview/305203016). States regularly amended their constitutions, in stark contrast to the federal document. Indiana began an ongoing discourse about changes to its constitutions shortly after adopting its first one.

Indiana's constitutional debate has been live for 200 years, and for nearly that long has included a conversation about the proper power relative to legislative

sessions. The novel aspect here comes from the General Assembly's attempted short circuit of that constitutional conversation. Like the 1816, 1851, and 1970 framers, as well as many debaters at other points, amici believe the Constitution has allocated authority to call a special session, and any adjustment must pass muster under Article 16's amendment process.

I. Indiana pioneers adapt neighbors' constitutions and react to territorial experiences.

On January 5, 1816, Congressman Jonathan Jennings reported a bill to the House to authorize Indiana to form a constitution and join as the newest state. *See* James A. Woodburn*, Constitution Making in Early Indiana: An Historical Survey*, 10 Ind. Magazine of History 237, 238 (Sept. 1914). On April 19, President Madison signed the bill into law. *Id.*

A convention of delegates elected by residents of the Indiana territory met in Corydon beginning on June 10 until, nineteen days later, "it completed its work and adjourned." *Id.* The product of that work borrowed heavily from Indiana's older sibling states and, despite the relatively short preparation time, "was not inferior to the State constitutions which were in existence" *Id.* at 239.

Comparing the 1816 Constitution to other states reveals how much Indiana learned from them, especially Kentucky's 1792 constitution and Ohio's 1803 constitution. *See Id.* at 240; Baude at 3. Pennsylvania and Tennessee also served as major sources. *See* John D. Barnhart, *Sources of Indiana's First Constitution*, 39 Ind. Magazine of History (March 1943). In fact, less than ten percent of the entire document consisted of original material. *See Id*. The convention's delegates selected provisions from other states that favored more democratic state government. *Id.* Somewhat contrary to this democratic spirit, the voters did not have a chance to directly ratify the constitution. *See* Woodburn at 239. Without that step, the state

government superseded the territorial government on November 7, and Congress formally admitted Indiana as a state on December 11, 1816. *Id*. at 240.

One of the most important and interesting characteristics of the 1816 Constitution is the absence of any provision for amendment. Instead, it required putting to the voters whether to call a new convention at least every twelve years. 1816 Constitution art. VIII, § 1. This embodied the Jeffersonian Republican philosophy that the people have a right to change the government and that each generation should reconsider its foundational law. *See* Donald F. Carmony, *Indiana 1816–1850: The Pioneer Era* 2 (1998); *see also* Osborn at 5.

Under the 1816 Constitution, the General Assembly convened on the first Monday in December unless called into special session. 1816 Const. art. III, § 25. The governor could "call special sessions of the assembly and submit information and recommendations for its consideration." Carmony at 4. This power was outlined in Article IV, section 13:

> He may, in extraordinary occasions, convene the General Assembly at the seat of Government, or at a different place, if that shall have become, since their last adjournment, dangerous from an enemy, or from contagious disorders, and in case of a disagreement between the two houses with respect to the time of adjournment, adjourn them to such time as he shall think proper, not beyond the time of their next annual Session.[3]

Of course, the need for an "extraordinary" session would be much less likely under a structure in which the General Assembly met annually for a time without

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[3] The full text of the 1816 Constitution is available online here: https://www.in.gov/iara/services-for-government/laws-rules-and-policies/collections-state-constitutions/full-text-of-the-1816-constitution/ (last accessed Jan. 5, 2022).

constitutional limit, as was the case with this constitution. And a special session would be particularly cumbersome when the entire House of Representatives served one-year terms, meaning they stood for election every year, along with about a third of the Senate. 1816 Const. art. III, §§ 3, 5.

Although the 1816 Constitution established three separate branches of government, "the General Assembly was much the strongest department of state government. The legislative power of the General Assembly, only partly indicated by the constitution, was enormous and varied." Carmony at 2; *see* 1816 Const. art. II. This imbalance would prove unwieldy, leading Hoosiers to start to call for a convention—the only means of change available under the 1816 Constitution—to adjust that balance soon after statehood.

II. Hoosiers begin to seek a new convention early on in statehood.

Perhaps predictably given the Jeffersonian prioritization of the people's power to shape and reshape the structure of government, the urge to call a convention to replace the 1816 Constitution began early. *See* Woodburn at 241. Not even four years into statehood in January 1820, a lawmaker introduced the first resolution proposing a convention. Charles Kettleborough, *Constitution Making in Indiana: A Source Book of Constitutional Documents with Historical Introduction and Critical Notes*, Vol. I 1780–1851 139 (1916) (available at https://indianamemory.contentdm.oclc.org/digital/collection/ISC/id/1897) . The legislature approved votes on conventions in 1823, 1828, 1840, 1846, and, finally, 1849. *See* William P. McLauchlan, *The Indiana State Constitution: A Reference Guide* 5–6 (1996). Those advocating for changing the constitution often focused on various ways to adjust the balance among the government branches and between those branches and the people.

In 1823, just seven years into statehood, the legislature first put a convention call to the voters. Notably, in that first debate about whether to call a second convention, those advocating for a convention pointed to the "governor's authority to call a special or emergency sessions of the legislature" as a reason to support the call. *Id*. at 5. Relatedly, they sought to change the legislature's sessions from annual to biennial and to permit the General Assembly to fix the time and place of its meetings. *Id*.

Also as early as the first convention debate, Indiana leaders sought to reduce the legislature's influence by advocating direct election of supreme court and other judges. *Id.* This movement picked up steam as "repeated quarrels arose between the State senate and the chief executive over the appointment of the supreme court judges" and "abuses in appointments." Woodburn at 241. Convention advocates increasingly pointed to the legislature's unwieldy role in local and personal matters. The phenomenon grew to the point where "local laws became six or seven times more voluminous than the general laws." *Id.* at 241–42.

Finally, the problems calling for reform became so unbearable that the people agreed that they justified the expense of a convention. Governor James Whitcomb had recommended moving forward with the convention vote in his annual message to the General Assembly on December 6, 1848, shortly before he resigned to become a U.S. Senator. *See Id.* at 245; *see also* Ind. Historical Bureau, *James Whitcomb*, https://secure.in.gov/governorhistory/2370.htm (last visited Jan. 5, 2022). The reasons he provided for calling the convention included the following: "(1) The growing burden of local and private legislation. (2) The increasing demand for biennial instead of annual sessions of the General Assembly. (3) The necessity of prescribing restrictions on the creation of public debt. (4) The desirability of requiring a two-thirds vote in each house in appropriating public funds to private individuals. (5) The universal desire for amendment." Woodburn at 242. A year

later, his successor, Paris C. Dunning, pointed to the legislature's obligation to implement the voters' call for a convention by drawing districts for electing convention delegates. Woodburn at 245.

III. The 1850–51 convention delegates adjust the balance of powers.

Like its predecessor, the 1851 Constitution reflects Hoosier gradualism, adjustment, and adaptation. It adjusted the powers and duties of the three branches in various ways, including with its specification about the governor's authority to call a special session.

The movement to hold another constitutional convention was not new, but a few developments finally convinced Hoosiers to revisit their three-decade-old governing document in 1849. First, the legislature's annual meetings had proven expensive and cumbersome, and the General Assembly was involved in some of the most intimate details of citizens' lives. Second, massive, underfunded, and poorly administered infrastructure projects, namely an incomplete canal, left the state in terrible financial shape. Third, the Jacksonian trends called for several changes to governmental structure, including elections for judges. Fourth, the 1816 Constitution's lack of any means of amendment short of a convention meant the need for adjustments had accumulated over the first thirty-three years of statehood.

All of these elements presented themselves in the midst of economic, political, and cultural transformations. *See* Osborn at 24–72. Transportation and a commercial atmosphere friendly to distant suppliers made Indiana very different in mid-century from pioneer days a generation earlier. The fiasco of the "system of 1836," as it was called, reinforced many Hoosiers' notions about the undesirability of direct government involvement in economic matters and dominated the political discussion of the late 1830s and 1840s.

The constitutional convention of 1850–51 lasted over ten times the length of its 1816 counterpart, from October 7, 1850, to February 10, 1851. Woodburn at 246. In addition to changes whose need had become apparent over the early years of statehood, the framers drew a great deal from constitutions in Illinois and Wisconsin. *See* Baude at 3. But the framers were also still constrained and guided by the requirements of the 1787 Northwest Ordinance. *Id*.

As one would expect based on the repeated calls for adjusting the balance of government authorities, the 1851 Constitution contains several revisions related to the separation of powers and reflects the Jacksonian trends toward greater direct democracy. The 1851 Constitution's Article 4 continued the bicameral legislature, with "all the powers necessary for a branch of the Legislative department of a free and independent State." Art. 4 § 16. Around the nation at the time, a "serious debate" existed about whether to include language granting such explicit power in state constitutions. *See* Baude at 26. The debate focused on whether a legislature had inherent powers that needed no express vesting. Indiana's inclusion of this provision therefore places it in a more libertarian tradition, consistent with the state's "roots of opposition to powerful government." *Id.*

Confirming that bent, the rest of Article 4 "contains significant procedural limits on legislative power." *Id*. Limits like these, including a prohibition against special laws and a requirement that laws address only one subject, had become nearly universal in the United States. *See Id*. They responded to an "emerging populist sensibility" and rampant corruption. *Id.* They also emulate an overall theme of reining in Indiana's legislature. The first and perhaps most apparent step back from legislative power was the inclusion of an express statement of the separation of powers. Although the overall structure of the 1851 Constitution "bears an obvious family resemblance to that of the federal government," important distinctions exist. *Id*. at 4. The 1851 Constitution's first structural provision,

carried over in substance from 1816, contains an express statement of the separation of powers. "Although the federal Constitution is understood to be based on that principle, the constitution itself does not state it explicitly and leaves it to inference. And nothing in the federal Constitution obligates the states to follow the principle. Such explicit provisions are fairly common in state constitutions." *Id. See also* McLauchlan at 71–73. Article 3, section 1 provides,

> The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

This provision remains unchanged since ratification in 1851.

As one scholar put it, "There is no more reason for a lockstep jurisprudence in interpreting the structural provisions of state constitutions than a lockstep jurisprudence in interpreting their rights guarantees." G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. Ann. Surv. Am. L. 329, 330 (2003) (citing Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 Val. U. L. Rev. 421 (1995)). The same author notes that Indiana's separation-of-powers provision is "representative" and that its language "suggests that for each branch of government there is a corresponding identifiable function; powers are not quasi-legislative or quasi-judicial, but legislative, executive, or judicial." *Id.* at 338.

A second step to rein in the legislature took the shape of limiting the frequency and length of its sessions. The 1851 Constitution switched from annual sessions (and elections) to biennial. The language governing this in 1851 also included the governor's authority to call a special session. The 1850–51 convention solidified the governor's power and broadened executive discretion to call special

sessions of the legislature. As ratified in 1851, Article 4, section 9[4] provided as follows:

> The sessions of the General Assembly shall be held biennially at the capital of the State, commencing on the Thursday next after the first Monday of January, in the year one thousand eight hundred and fifty-three, and on the same day of every second year thereafter, unless a different day or place shall have been appointed by law. But if, in the opinion of the Governor, the public welfare shall require it, he may at any time by proclamation, call a special session.[5]

This version of the governor's authorization to call a special session differed from the 1816 version in five ways. *First*, the second set of framers placed this provision in Article 4, the article governing the General Assembly. They grouped it in the same section as that setting the frequency, time, and place of legislative sessions. But their forebears had placed this power along with the governor's powers, in Article IV.

Second, rather than limiting the governor's authority to call a special session to "extraordinary occasions," the 1851 version allowed for special sessions "at any time" the governor concluded "the public welfare" required it. Broadening the circumstances under which a special session would be appropriate served to

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[4] One interesting if minor change made between the 1816 and 1851 constitutions was the numbering of articles. The 1816 Constitution uses roman numerals, while the 1851 Constitution uses Arabic numerals.

[5] The original text of the 1851 Constitution is available here: https://www.in.gov/history/about-indiana-history-and-trivia/explore-indiana-history-by-topic/indiana-documents-leading-to-statehood/constitution-of-1851/article-16-amendments/ (last accessed Jan. 5, 2022).

counterbalance the adjustment from annual, unlimited regular sessions to biennial sessions limited to sixty-one days. *See* 1851 Constitution art. 4, § 29.

Third and relatedly, because the 1851 Constitution limited regular sessions to sixty-one days and special sessions to forty days, it had no reason to authorize the governor to adjourn the General Assembly "in case of a disagreement between the two houses with respect to the time of adjournment," as was the case in the 1816 Constitution.

Fourth, unlike the 1816 Constitution, the newer version did not expressly allow the governor to select an alternative location if the state capital "shall have become, since their last adjournment, dangerous from an enemy, or from contagious disorders."

Fifth, the 1851 version added the requirement that the governor's call to a special session must be "by proclamation."

A third shift in power from 1816 to 1851 occurred through generally bolstering the executive branch. The new constitution expanded the governor's term from three to four years. *Compare* 1816 Const. art. IV, § 3 to 1851 Const. art. 5, § 1.

But Indiana's scheme held on to the state's overall weak executive. The new constitution carried over the simple-majority veto override, a rather unusual aspect of Indiana's structure. *Compare* 1816 Const. art. IV, § 22 *with* 1851 Const. art. 5, § 14; Baude at 27. And it counterbalanced the expansion of terms of office by limiting the governor to a single term, effectively decreasing the potential time in office from six to four years. And in the wake of interbranch disputes over judicial appointments, as well as a Jacksonian emphasis on populism, the 1851 constitution removed the power to select judicial officers from both the legislative and executive branches and entrusted the voters with this task. *Compare* 1816 Const. art. V, §§ 7, 8, 10 to 1851 Const. art. 7, §§ 3, 7, 11, 14.

On the first Monday of August 1851, the usual election time, Indiana voters ratified the constitution. *See* Woodburn at 247.

IV. Progressives attempt to update the 1851 Constitution.

The 1851 Constitution, with its more liberal amendment process, had hardly taken effect before the first proposals to change it arose. Leaders sought to restore annual sessions, remove the sixty-day session limit, and to allow certain special and local laws. *Id.* at 248. Between 1853 and 1857, these proposals frequently made their way to the General Assembly. *Id.* As early as 1859, some even proposed a new convention. *Id.* That effort fell only one step short of success, with the governor signing a bill to put the convention vote to the people on March 5, 1859. *Id.* at 249–50. The reasons included that the 1851 Constitution made it "difficult, tedious, and in some respects impossible, or at least inadequate to the emergencies of the ease or to the wants of the citizens of the State, restricting remedies that would tend to the public good." *Id.* at 248.

Advocates of further change ran into an obstacle in this Court's interpretation of Article 16, section 1, which required a majority of those casting any ballot in the election, not of those voting in the constitutional referendum. *See In re Denny*, 59 N.E. 359 (1901). And Article 16, section 2 prevented any amendment from proceeding whenever another remained pending before the voters, causing a stoppage in the amendment pipeline.

The cumbersome amendment process led the progressive 1911 General Assembly to attempt to place an entirely new constitution for consideration by the people without following Article 16's procedures or holding a proper constitutional convention. *See* Charles Kettleborough, *Constitution Making in Indiana: A Source Book of Constitutional Documents with Historical Introduction and Critical Notes*,

Vol. II 1851–1916 384–537 (1916) (available at https://indianamemory.contentdm.oclc.org/digital/collection/ISC/id/3380/rec/1). This episode propelled then-governor Thomas Riley Marshall into the national discourse and onto the national ticket, ultimately becoming Vice President of the United States during Woodrow Wilson's tenure. His nomination came just months after this Court held the purported constitution invalid in *Ellingham v. Dye*, 178 Ind. 336, 99 N.E. 1 (1912). *See* Ryan T. Schwier, *The "Marshall Constitution" and the Jurisprudence of Article 16*, 52 Ind. L. Rev. 79 (2019), (previously published in the Indiana Legal Archive (Nov. 23, 2014) (available at http://www.indianalegalarchive.com/journal/2014/11/23/the-marshall-constitution-2)).

Although the Marshall Constitution,[6] as it came to be called, contained many Progressive-era reforms, it contained little adjustment to the balance between legislative and executive relating to special sessions, as the following comparison shows:

[6] The entire text of the Marshall Constitution can be found on pages 388–424 of Kettleborough's volume II.

> The sessions of the ~~G~~**g**eneral ~~A~~**a**ssembly shall be held biennially at the capital of the ~~S~~**s**tate ~~**commencing**~~**beginning** on the **first** Thursday ~~**next**~~after the first Monday ~~**of**~~**in** January, ~~**in the year one thousand eight hundred and fifty-three**~~**1913**, and on the same day every second year thereafter~~,~~ unless a different day or place shall have been appointed by law. **The general assembly shall remain in session for not exceeding one hundred days.** ~~**But i**~~**I**f, in the opinion of the ~~G~~**g**overnor, the public welfare shall require it, he may, at any time**,** by proclamation, call a special session **for a specific purpose or purposes, but for a limited time, not to exceed thirty days, at which special session, only such specific purpose or purposes shall be taken up and acted upon**.

Compare Ind. Const. art. 3 *with* 1911 Ind. SB 407, art. IV, § 9 (the "Marshall Constitution") (Kettleborough vol. II at 398). Even though the Marshall Constitution aimed to preserve the established balance of power related to special sessions, it serves as yet another instance of constitutional framers' understanding that the proper method for doing so requires drafting or amending a constitutional provision.

V. Amendments of 1970 begin a period of modernization and reform.

The Court eventually would reverse its interpretation of Article 16, allowing a smoother path to amendment that required a majority of votes cast in the election for the amendment itself. *See In re Todd*, 208 Ind. 168, 193 N.E. 856 (Ind.1935). And in 1966 the voters ratified an amendment to Article 16, section 2 eliminating the hurdle posed by previously pending amendments not yet cleared through the process. These changes and the many developments in society, politics, and government since 1851 provided momentum for serious study of reforms in the middle twentieth century.

The General Assembly appointed a Study Committee on Legislative Operations, which issued a report in 1967. The report recommended returning to annual sessions. *See* Ind. Legislative Advisory Comm.,[7] *Biennial Report to the Indiana General Assembly* 14–15 (1967) (the "1967 Biennial Report") (App. VII:186,[8] 192–93). It also recommended that the "Speaker of the House and President Pro Tempore of the Senate, after consultation with the Governor, be permitted to call a special session. The governor's power to call special sessions would remain unchanged." *Id*.; *see* Ind. Legislative Council, *Report to the Indiana General Assembly*, at 6 (1972) (the "1972 Report") (summarizing amendment process) (available at Ind. State. Library). Once again leaders aiming to alter the mechanism by which to begin a special session looked to constitutional amendment to accomplish that goal.

Two years later the Constitutional Revision Commission echoed the call for annual sessions. *See* Ind. Constitutional Revision Comm., *Biennial Report to the Indiana General Assembly*, at 72–73 (1969) (the "1969 Biennial Report") (available at Ind. State. Library); *see* 1972 Report at 6. It also proposed additional language to the language on sessions that would allow for the length and frequency to be "fixed by law." *Id*. It did not propose altering the mechanism for calling special sessions.

Just before Hoosiers considered these changes, the Legislative Process Committee made clear that the special session provisions would be unchanged. Ind. Legislative Process Comm., *Report of Legislative Process Comm.* (the "1970 Report")

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[7] The "Legislative Advisory Committee" became known as the "Legislative Council" by June 1967. Ind. Legislative Council, *The Legislative Ledger*, Vol. 2, No. 1 (June 1967).

[8] "App. VII:186" refers to the Appellant's Appendix, volume VII, page 188. "Addend. 25" refers to the Appellant's Addendum, page 25.

3 (1970) (Addend. 16). That committee's report also mentions that a proposed bill that would add a short session to override vetoes "would remedy" the legislature's inability to do so after the regular session and would restore "to the General Assembly an important part of its constitutional authority." *See* 1970 Report at 9 (Addend. 22). Finally, the report recommended the voters approve the amendments for an annual session as proposed and approved by the 1967 and 1969 legislative sessions. *Id.* at iii, 7; *see* 1972 Report at 6.

The changes to Article 4 ultimately comprised only a small part of the package of reforms presented to the voters in 1970. The most important and substantial change occurred within the judicial branch. Article 7 saw entire sections replaced. Judicial independence took precedence over direct democracy, and elections gave way to merit selection. But other changes were coupled with the judicial reforms. Relevant today are changes to Article 4, section 9. The changes related to the frequency and start date of regular legislative sessions resulted in the following language governing legislative sessions:

> The sessions of the General Assembly shall be held ~~**biennially**~~ at the capit~~**a**~~**o**l of the State, commencing on the ~~**Thursday**~~ **Tuesday** next after the ~~**first**~~ **second** Monday ~~**of**~~**in** January~~**, in the of each** year ~~**one thousand eight hundred and fifty-three, and on the same day of every second year thereafter,**~~ **in which the General Assembly meets** unless a different day or place shall have been appointed by law. But if, in the opinion of the Governor, the public welfare shall require it, he may**,** at any time by proclamation, call a special session. **The length and frequency of the sessions of the General Assembly shall be fixed by law.**

Compare 1851 Const. art. 4, § 9, *with* Ind. Const. art. 4, § 9.

The General Assembly's brief consideration and rejection of a change to the provision on special sessions and fixation instead on the length and frequency of its

routine legislative sessions is evident in the 1967 to 1970 editions of the bimonthly newsletter published by the Indiana Legislative Advisory Commission (later known as the Indiana Legislative Council) for consumption by "all legislators and the various news media in Indiana." Ind. Legislative Council, *The Legislative Ledger*, Vol. 1, No. 1 (July 1966) (available at Ind. State. Library). A comprehensive summary of the amendment process before the fall referendum was published in the July 1970 edition. Ind. Legislative Council, *The Legislative Ledger*, Vol. 4, No. 3 (July 1970) ("The amendment proposes to delete from the Constitution the restrictions on the length **(61 calendar days)** and frequency **(biennial)** of legislative sessions and substitute limitations fixed by law.") (emphasis added). The summary also noted the schedule attached to the amendment "applie[d] only until a law [was] passed setting the length and frequency of sessions." *Id.* It also noted opponents of the amendment argued in part "Real crises can be dealt with in special sessions and do not require annual sessions." *Id.*

In 1971 the General Assembly enacted a statute specifying the length and frequency of legislative sessions: Ind. Code § 2-2.1-1-1 (added 1971). This law struck a compromise between annual and biennial sessions, allowing for a "long session" of sixty-one days and a "short session" the next year limited to thirty session days. I.C. §§ 2-2.1-1-2, -3; *see* McLauchlan at 779–80. A later committee focused on length and frequency, reviewing whether the first four "annual" and "even year" sessions under the 1970 amendment were working in "the way that had been anticipated." Ind. Legislative Council, *Report of the Committee on the Length and Frequency of Sessions*, 1 (1974) (Addend. 37).

VI. Related shifts in interbranch relations.

The same momentum that led to the reforms of annual sessions and clarifying the legislative authority to set its own regular sessions led to changes in how the legislature, especially the Indiana Senate, related to the executive branch. Since the state's founding, the lieutenant governor had been elected directly and independent from the governor. The lieutenant governor had also presided over the Senate.

Unlike the vice president's role in the U.S. Senate, Indiana's lieutenant governor played an active role as a legislative leader. Committees and their chairs were appointed and bills assigned by that office. But slowly, and especially in years in which different political parties won the lieutenant governor and Senate majorities, tensions began to rise. Although customarily the lieutenant governor would follow the input of the Senate President Pro Tempore.

But in the same session that voted in 1969 to send the modernization amendments to the voters the next year, the Lieutenant Governor and President of the Senate was Dick Folz, an elected official in his first year in that position who had never served in the legislature. Folz ignored President Pro Tempore Allan Bloom's input on conferees for that session's budget bill, appointing his own choices.

One senator, Phil Gutman, found particular offense at this maneuver, prompting him to explore whether he could catapult himself to replace Folz as Senate leader on a "let the Senate run the Senate" campaign. Two weeks after the voters approved the amendments of 1970, Gutman's campaign succeeded, and he became President Pro Tempore. As promised, he implemented rule changes to "Take Back the Senate." The Lieutenant Governor's powers quickly became limited to those required by the Constitution: presiding and breaking ties. Lawrence Borst, *Gentlemen, It's Been My Pleasure: Four Decades in the Indiana Legislature* 104–07

(2003). The pro tem would assume all substantive authority. Trevor Foughty, *The Making of the Modern State Senate Pro Tem: Part 3, Taking Back the Senate,* Capitol & Washington (Mar. 15, 2018), https://www.capitolandwashington.com/blog/2018/03/15/the-making-of-the-modern-state-senate-pro-tem-3/.

One last adjustment to this aspect of executive–legislative relations would occur before the dust settled. The ninety-seventh and ninety-eighth sessions of the General Assembly voted to put before the voters yet another adjustment to state government's structure in the constitution. This change would rob the lieutenant governor of its own slot on the ballot, instead slotting the candidate as a running-mate of the governor. *Id.*

The shift, at first gradual and then relatively sudden, in the lieutenant governor's role in the legislature serves as yet another example of the ongoing Hoosier dialogue about the proper role of each branch. Although most of the battlegrounds in this development did not require constitutional amendment, the voters did ultimately have to consider whether to adjust the mode of selection of the office.

VII. Amendments in 1984 clarify, clean up, and further modernize the Constitution.

The flurry of activity in the late 1960s that led to the 1970 amendments didn't just stop once ratified. The spirit of reform persisted, and this generation had concretely grasped the state constitution as a work in progress. This attitude led to revisiting the text on a regular basis a part of their legislative responsibilities.

In 1981 the Committee to Review Obsolete Provisions Contained in the Indiana Constitution presented a report to the legislature. It described its task as follows: "to complete the work begun by the Indiana Constitutional Revision

Commission in 1967." *Report of the Comm. to Review Obsolete Provisions Contained in the Indiana Constitution* 1–2 (Oct. 1981) (Addend. 44–45). It praised the incremental approach of revision over calling a convention, concluding that "hundreds of thousands of dollars were saved" as a result of that decision. *Id.* It also noted that even since 1972, twenty-six sections were struck, twenty-four added, and twelve changed. *Id.* This was the same constitution as that adopted in 1851, but it had received a tremendous upgrade. Naturally, these changes would require additional amendments to ensure other provisions had consistent language and even consistent style. The reforms had left "obsolete provisions and antiquated language." *Id.*

The committee proposed amending thirty-two sections of the Constitution. It also recommended striking all schedules. *Id.* "Ten of the sections related to gender, four to rephrasing or relocating words or provisions, eight to conform to today's practice, or conditions, and eleven to other obsolete, antiquated, or offensive language (one section involves two different types of amendments)." *Id.* It struck the schedules "because their purpose was to implement amendments, not become a part of the Constitution." *Id.*; Section 33, Public Law No. 231 (1982 Ind. Acts 1664) (striking out the schedule adopted with the 1970 amendments to Sections 9 and 29 of Article 4).

The committee's work ultimately led to the constitutional amendments ratified by the voters in 1984. *See* Inter-univ. Consortium for Political and Social Research, *Referenda and Primary ElectionMaterials Part 12: Referenda Elections for Indiana* 11 (June 2002) (available at https://cdn.ballotpedia.org/images/7/7e/Referenda_Elections_for_Indiana_1968-1990.pdf); 1982 Ind. Acts 1664–65; 1988 Ind. Acts 2212–18.

VIII. Not until 2021 did anyone question that only the governor could call a special session short of a constitutional amendment.

Governors have at times had regular occasion to call special sessions. They often consult with legislative leaders in doing so, though more often the need from a special session arises from a disagreement between the governor and at least one legislative house during the regular session. Legislators who take it upon themselves to determine where the text of the Constitution confers authority to call a special session have apparently always concluded that the General Assembly had no power to do so. In the debate surrounding the present legislation, though, legislators seem to have deflected responsibility of constitutional interpretation to "the courts." This reflects a very different attitude from the 1960s, '70s, and '80s, and even as late as the 2018 when voters ratified a more specific requirement to avoid debt and balance state budgets. *See* Ind. Const. art. 10, § 5.

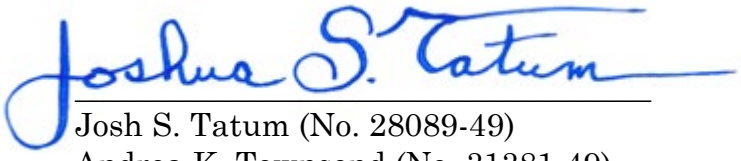
As professional scholars of Indiana governmental history, amici share a concern about the lack of historical perspective in the General Assembly's arguments in this litigation. The meaning of the 1851 Constitution has changed substantially over the past 170 years. Some of those changes have been interpretive, as seen in this Court's developing treatment of Article 16. But otherwise these changes have come from amendment, a process that remains appropriately cumbersome but straightforward. Importantly, the balance of power between the executive and legislative branches originally outlined in the 1851 Constitution relating to special sessions—those sessions not beginning on a "day … appointed by law"—survives today. The 1970 amendment did not alter that balance. Under that long-lasting arrangement, entrusting the governor with the power to call a special session makes sense. The executive plays a central role in the legislative process and in the structural operation of the policy-making body.

A shift in authority along the lines contemplated by H.E.A. 1123 constitutes precisely the kind of determination the framers of the 1851 Constitution and the 1970 amendments would expect to be accomplished by constitutional amendment, not legislative act.

CONCLUSION

Hoosiers have kept at the "work in progress" of constitution making, practicing the "art of adjustment" when needed. Since nearly 200 years ago, that important work included a debate about the appropriate authority and circumstances to call a special legislative session. Until 2021, the debate assumed that question to require constitutional amendment. This Court should not allow the General Assembly to short circuit the well-established process to shift the balance the 1851 Constitution's framers carefully settled on and the 1970 amendment's framers left in place.

Respectfully submitted,

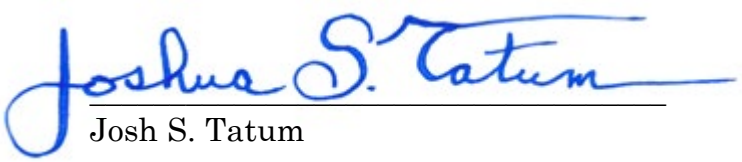


Josh S. Tatum (No. 28089-49)
Andrea K. Townsend (No. 31381-49)
Yuning Tian (No. 36984-53)
PLEWS SHADLEY RACHER & BRAUN LLP
1346 North Delaware Street
Indianapolis, Indiana 46202-2415
Phone (317) 637-0700
Fax (317) 637-0710

Attorneys for James H. Madison, William McLauchlan, and Elizabeth R. Osborn

WORD-COUNT CERTIFICATE

In compliance with App. R. 44(E) & (F), I verify that this Amicus Brief, including footnotes and excluding the items set forth in App. R. 44(C), contains no more than 7,000 words.



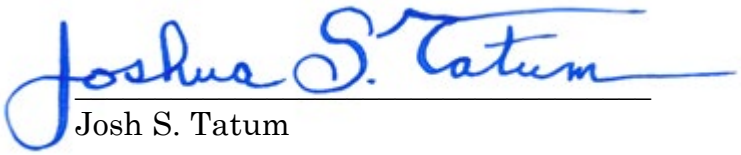
Josh S. Tatum

CERTIFICATE OF SERVICE

I certify that this Amicus Brief was filed and served on the following using the Indiana E-Filing System on January 5, 2022:

A. Richard Blaiklock
rblaiklock@lewiswagner.com
John C. Trimble
jtrimble@lewiswagner.com
Aaron D. Grant
agrant@lewiswagner.com
Michael D. Heavilon
mheavilon@lewiswagner.com
Lewis Wagner, LLP
1411 Roosevelt Avenue, Suite 102
Indianapolis, Indiana 46201

Thomas M. Fisher
Solicitor General
Tom.Fisher@atg.in.gov
Julia C. Payne
Julia.Payne@atg.in.gov
Melinda R. Holmes
Melinda.Holmes@atg.gov
Office of the Indiana Attorney General
Indiana Government Center South, Fifth Floor
302 West Washington Street
Indianapolis, Indiana 46204



Josh S. Tatum