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LOCAL-STATE RELATIONS IN INDIANA: PROPOSED CHARTER MAKING POWERS FOR MUNICIPALITIES

The extent to which cities and towns¹ in Indiana should be permitted to govern themselves has been a subject of constant controversy.² To the many individuals who inhabit these political subdivisions³ the question of home rule⁴ is more than academic. The manner of government under which they live affects materially the amount of taxes they

115. See Dodd, *Statutory Developments in Business Corporation Law, 1886-1936*, 50 HARV. L. REV. 27, 58 (1936).

1. Indiana cities are divided into five population groupings by statute. IND. ANN. STAT. §§ 48-1201, 48-1202 (Burns 1950). Towns are incorporated places of 1500 persons or less. However, some of those having more than 1500 population are still classified as towns since they have not held the necessary elections to become cities.

2. For a while the Indiana Supreme Court followed the inherent right doctrine enunciated by Judge Cooley in Michigan. *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103 (1871). The gist of the doctrine is that, in the absence of any express provision in state constitutions, cities and towns have certain inherent rights of self-government which cannot be interfered with by the legislature. *Evansville v. State, ex rel. Blend*, 118 Ind. 426 (1889); *State ex rel. Holt v. Denny*, 118 Ind. 449 (1889); *State ex rel. Geake v. Fox*, 158 Ind. 126, 63 N.E. 19 (1902). The Indiana cases have never been expressly overruled but have since been interpreted as holding that the inherent powers are identical with those commonly designated as implied or incidental powers essential to enable municipal corporations to accomplish the purposes for which they are created. *Logansport v. Public Service Commission*, 202 Ind. 523, 529, 177 N.E. 249, 251 (1931). The inherent right doctrine has also been regarded as an exception to the general rule that the legislative power of the state is limited only by the express provisions in the constitution. *State ex rel. Schroeder v. Morris*, 199 Ind. 78, 88, 155 N.E. 198, 202 (1927).

For a detailed critical analysis of the inherent right doctrine see McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COL. L. REV. 190-216, 299-322 (1916).

3. According to the 1950 United States Census, 2,217,468 persons, or nearly sixty percent of the total population of Indiana, reside in cities and towns. INDIANA STATE CHAMBER OF COMMERCE, STATISTICAL ABSTRACT OF INDIANA COUNTIES 7 (1954).

4. The term "home rule" has several connotations. In the sense that cities and towns may choose their own officers to administer local government they have always had home rule. However, as referred to here, it involves not only the right of cities and towns to choose their own officers but also the authority to determine for themselves their form of government and to make policy decisions in municipal matters without first securing the assent of the legislature. MOTT, HOME RULE FOR AMERICA'S CITIES 6 (1949).

pay and the quantity and quality of the services provided them to facilitate the functioning of their daily life.⁵

The Optional Charter amendment⁶ recently before the Indiana General Assembly is another in a series of attempts by this state to adjust the extent of the central government's control over its cities and towns.⁷ Like a constitutional grant of home rule, it involves a redistribution of the legislative power of the state.⁸ While there are variations in the application of the theory of home rule from state to state insofar as the degree of powers granted are concerned,⁹ the concept of home rule im-

5. The role of government is especially significant in an urbanized society. The diversity of social and economic interests, the complexity of its network of social relations, the characteristics of its population—all determine and condition the functions of municipal government. The policies to be adopted and the choice of methods of administration bear more directly on the people than at any other level of government. SCHULZ, *AMERICAN CITY GOVERNMENT* 20 (1949).

6. Acts 1953, c. 289. [Senate Joint Res. No. 2].

7. In 1921, the General Assembly enacted a law to provide for alternative forms of government for cities. Acts 1921, c. 218. Michigan City and Evansville adopted charters for the council-manager form of government. In the case of *Sarlls v. State ex rel. Trimble*, 201 Ind. 88, 166 N.E. 270 (1929), the act was challenged as unconstitutional, but the Indiana Supreme Court upheld it in every particular. But when Indianapolis attempted to adopt a charter under the act it was declared unconstitutional by the same court at the following term. *Keane v. Remy*, 201 Ind. 286, 168 N.E. 10 (1929). Section 3 of the act imposing a duty on the city clerk to certify that signatures on a petition were those of qualified voters created, according to the court, a non-delegable judicial duty. As it would be impossible for the clerk to personally certify the signatures within the time allowed the act was unworkable as to Indianapolis. If it was inapplicable to one city, the court reasoned it was not a general law. Therefore, it violated section 23, article 4 of the Indiana Constitution.

An attempted amendatory act extending the time for certifying the signatures, Acts 1929, c. 60, was invalidated by the court as an attempt to amend an unconstitutional statute. In view of the fact that the court's only objection to the act was that not enough time was allowed the clerk to check the signatures, presumably, if the legislature had reenacted the statute extending the time, the entire act would have been valid. It is also open to question whether the duty imposed on the clerk was a non-delegable judicial function. The court merely assumed this point. The fact that so short a period was allowed would seem to indicate that the legislature did not intend the clerk personally to check all the signatures. It would indicate rather that the legislative intent was to confer upon him only ministerial duties.

In 1939, the General Assembly authorized the appointment of a City-Manager Study Commission to study, draft, and submit to the General Assembly such legislation as would be necessary to provide the authority for the adoption of the manager plan of government in cities throughout the state. Acts 1939, c. 176 [House Concurrent Res. No. 2]. This commission submitted a report which proposed the adoption of a constitutional amendment providing for home rule. *REPORT OF THE INDIANA CITY MANAGER STUDY COMM'N* (1940). A revised version of the commission's proposal passed the 1941 session. Acts 1941, c. 243. [House Joint Res. No. 5]. It failed of passage in 1943. The original proposal of the 1939 commission was introduced in 1949 but did not reach the floor of the Assembly.

8. *Withnell v. Ruecking Construction Co.*, 249 U.S. 63, 68 (1919).

9. In Colorado, for example, after an enumeration of eight specific powers that home rule cities may exercise, it is stipulated: "It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of

plies the existence of substantive powers which a municipality may exercise and which cannot be invaded by the legislature.¹⁰ Since an amendment of the type proposed in Indiana grants only charter-making or procedural powers¹¹ it cannot be properly classified as a constitutional home rule grant.¹² Because of this it has been urged that the amendment be rejected.¹³ Nearly eighty years of experience¹⁴ with the application of the home rule theory indicates that home rule is not the solution to the complex problems of state-local relations.¹⁵ This amendment, however,

certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right." COLO. CONST. Art. XX, § 6.

The Minnesota home rule provision, on the other hand, grants no substantive powers which are beyond the control of the state legislature. MINN. CONST. Art. IV, § 36. See MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* 118 (1916).

10. The availability of substantive powers under the classic theory of home rule depends upon the exercise by the city or town of the charter-making power. MCBAIN, *op. cit. supra* note 9, at 112.

11. The 1939 City Manager Study Commission whose recommendations were almost completely embodied in the current amendment stated in its report: "Unlike so-called home rule amendments in a number of states the proposed amendment does not permit a city or town to determine what functions of local self-government it cares to exercise. The determination of functions of local government remains with the General Assembly." REPORT OF THE INDIANA CITY MANAGER STUDY COMM'N 8 (1940).

12. The plenary power of the General Assembly over the functions and duties of municipalities and their officers would be altered by the amendment only to the extent that it could not prescribe the form of charter for city and town governments or their internal structure.

Section 3(1) recognizes that the General Assembly would be able to place duties and responsibilities on charter cities and their officers. All powers of local civil government not mentioned in section 3 would remain subject to general laws of the state by the terms of section 4 of the amendment. Because the General Assembly would retain control and would continue to deal with local problems the charter cities and towns would not have home rule in the technical sense of the term. See MOTT, *op. cit. supra* note 4, at 8-9.

13. Only recently has the Indiana Municipal League voiced its opposition to the proposed amendment. Indianapolis Star, Nov. 14, 1954, p. 1, col. 4.

14. Missouri in 1875 became the first state to provide for municipal home rule by constitutional amendment. Since that time 20 states have adopted constitutional provisions for home rule: ARIZ. CONST. Art. XIII, §§ 2, 3; CALIF. CONST. Art. XI, § 6 *et seq.*; COLO. CONST. Art. XX, §§ 1-6; LA. CONST. Art. XIV, § 40; MD. CONST. Art. XIV § 1 *et seq.*; MICH. CONST. Art. VIII, §§ 20 *et seq.*; MINN. CONST. Art. IV, § 36; MO. CONST. Art. VI, §§ 19, 20; NEB. CONST. Art. XI, § 2-5; NEV. CONST. Art. VIII, § 8; N.Y. CONST. Art. IX, §§ 9, 11-12; OHIO CONST. Art. XVIII, §§ 2, 3; OKLA. CONST. Art. XVIII, §§ 2-5; ORE. CONST. Art. XI, §§ 2, 2a; PA. CONST. Art. XV, § 1; R.I. CONST. AMEND. XXVIII; TEX. CONST. Art. XI, § 5; UTAH CONST. Art. XI, § 5; WASH. CONST. Art. XI, §§ 10, 11; W. VA. CONST. Art. VI, § 39a; WIS. CONST. Art. XI, § 3.

15. The decided tendency of courts to construe strictly constitutional grants of home rule powers, the frequent failure of legislatures to clearly define the scope of local autonomy in home rule grants and the imposition of limitations on the exercise of granted powers are the principal defects in the application of the home rule theory. For analysis of these points see: Brachtenbach, *Home Rule in Washington—At the Whim of the Legislature*, 29 WASH. L. REV. 295 (1954); Greenwood, *Powers of Municipal Corporations—Including Home Rule*, 22 TENN. L. REV. 480 (1952); Richland, *Constitutional City Home Rule in New York*, 54 COL. L. REV. 311 (1954); Schmandt, *Municipal Home Rule in Missouri*, 1953 WASH. U.L.Q. 385; White, *Constitutional Changes in Matters*

limited as it is to a grant of procedural powers should be adopted for it embodies a fresh attack upon the at once difficult and fundamental problems of the overall state-local governmental arrangement.

Changes in the socio-economic structure of urban communities¹⁶ have caused problems to arise that transcend artificial corporate boundaries. A larger community has developed, the interests of which cannot adequately be protected by the classical "city" or "town" governments.¹⁷ The manner of law enforcement within an urban community affects materially the rate of crime and law violations throughout the whole metropolitan area.¹⁸ Regulations governing fire, safety, and public health as well as the maintenance of streets and highways to be effective throughout a populated area must be coordinated.¹⁹ As the corporate boundaries of a city define the legal limits of its authority,²⁰ and, since home rule operates only within such limits, even a grant of broad substantive powers would not be a satisfactory solution.²¹ A city remains powerless, both legally and economically,²² to tackle the many problems that affect the interests of the whole socio-economic unit.²³ Any policy which seeks to entrust the responsibility for performing the necessary services to a unit of government that simply is unable to reach all those affected by the problems is obviously unsound.

Moreover, the extra-territorial implications of "local" problems and functions indicate that these problems and functions are no longer "local"

of *Home Rule and Municipal Government*, 25 TEMP. L.Q. 428 (1952).

16. See ANDERSON AND WEIDNER, *STATE AND LOCAL GOVERNMENT IN THE UNITED STATES* 172-174 (1951).

According to the definition adopted for use in the 1950 census, the urban population comprises all persons living in (a) places of 2,500 inhabitants or more incorporated as cities, boroughs and villages, (b) incorporated towns of 2,500 inhabitants or more, (c) the densely settled urban fringe, including both incorporated and unincorporated areas, around cities of 50,000 or more and (d) unincorporated places of 2,500 inhabitants or more outside any urban fringe. UNITED STATES CENSUS OF POPULATION: 1950 Vol. I, XV (U.S. Bureau of Census 1952).

17. For a critique of the current trend in urbanization and the concomitant community-wide problems see WOODBURY, *THE FUTURE OF CITIES AND URBAN REDEVELOPMENT* 485-507 (1953).

18. ANDERSON AND WEIDNER, *op. cit. supra* note 16, at 173.

19. *Ibid.*

20. See REP. N. Y. STATE CONST. CONVENTION COMM., *PROBLEMS RELATING TO HOME RULE AND LOCAL GOVERNMENT* 63 (1938).

21. See for a discussion of this point GOODNOW AND BATES, *MUNICIPAL GOVERNMENT* 108 (1919).

22. The borrowing power of municipal corporations in Indiana is limited to two percent of the assessed valuation of property within such municipal corporation. IND. CONST. Art XIII, § 1. For discussion of municipal taxation and its limitations see note 30 *infra*.

23. For an elaboration see Fordham and Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18 (1948).

at all.²⁴ There is a unity of interests between all levels of government in matters that affect the health, safety, morals, and general welfare of the people.²⁵ Attempts to define the extent of autonomy to be accorded cities and towns in such tenuous terms as "local" or "municipal" affairs²⁶ are based upon misconceptions of the true nature of government.²⁷

A practical consideration which is often overlooked by home rule enthusiasts in their demands for exclusive authority over local functions is the adequacy of the power to finance these functions. Whatever may be the theoretical authority of governments in cities and towns, it cannot be exercised without the requisite funds.²⁸ Traditionally, the principal tax base of Indiana local governments has been real and personal property taxes.²⁹ In recent years this source has proved to be insufficient to finance the operations of local governments because of its inelasticity³⁰ and because of the ever increasing exemptions.³¹ In practice the granting

24. See TOOKE AND MCINTIRE, *CASES AND MATERIALS ON MUNICIPAL CORPORATIONS* 305 (3d ed., 1942) for a consideration of the increasing impact of local affairs on state matters.

25. In upholding a statute providing for a metropolitan police force for certain cities which the appellants contended was an invasion of the cities' right of local self-government the Indiana Supreme Court said: "The maintenance of peace and quiet and the suppression of crime and immorality are matters of general interest, and to the attainment of these ends the cities and towns are largely subject to legislative control. As the commonwealth is a unit in respect to its interests in such matters, the regulation thereof is a proper subject of legislation. . . ." *Arnett v. State ex rel. Donohue*, 168 Ind. 180, 182 (1907). The court distinguished a similar statute which had been declared unconstitutional in *Evansville v. State ex rel. Blend*, 118 Ind. 426 (1889) on the ground that that act applied to both municipal fire and police departments. *Ibid.*

26. I McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* 272 (2d ed., Smith, 1940).

27. "The inherent weakness of the home rule charter system lies in the fact that no clear separation can be made between matters which are of strictly local importance and those which directly or indirectly affect interests outside the municipality. Governmental authority is not a thing that can be mapped off in blocks and lots like a tract of land; it is a field that is always expanding or contracting, besides being constantly changed in the urgency of its exercise. . . . [T]he line of demarcation between matters of local and general interest is becoming increasingly difficult to draw." MUNRO, 7 *ENCYC. Soc. Sci.* 434, 435 (1932).

28. See GOODNOW, *MUNICIPAL HOME RULE* 49, 50 (1895).

29. IND. COMM'N ON STATE TAX AND FINANCING POLICY, *PRELIMINARY REP.* 70 (1954); see Fordham and Mallison, *Local Income Taxation*, 11 *OHIO ST. L.J.* 217 (1950).

30. The chief limitation of the property tax is that it is politically impossible to expand and contract it to keep pace with increased revenue requirements. Economists believe also that it would be unsound to continually increase the burden of property taxes for it does not necessarily relate to the ability-to-pay. A further limitation is the fact that it only applies to property within cities' geographical boundaries while the benefits it provides are enjoyed by the commuting suburbanite who does not share its burden. *Id.* at 71; WOODBURY, *op. cit. supra* note 17, at 665.

31. The Indiana Commission on State Tax and Financing Policy in its preliminary report, April, 1954, expressed the opinion that it would be desirable to exempt household goods from property taxation. It was questionable whether such could be done in view of Article 10, Section 1 of the Indiana Constitution. An opinion was requested and received from the Att'y General on this question to the effect that it would not be possible to exempt household furnishings and equipment from personal property tax rolls spe-

of home rule taxing powers³² has proved to be far less than a complete answer to this problem. In Ohio, the pre-emption doctrine has been used to prevent home rule cities from exploiting other sources of revenue.³³ In Missouri, the power of home rule cities to tax has been construed to be little more than a matter of legislative grace.³⁴ In view of the enlarged governmental services and the consequent increase in costs of financing schools,³⁵ streets, public welfare, health and other functions,³⁶ the broadest home rule authority to undertake such projects without the necessary power to raise sufficient funds is of little value.

For some communities home rule coupled with full responsibility for the costs of the necessary governmental services would result either in

cifically by statute, without constitutional amendment. IND. COMM'N ON STATE TAX AND FINANCING POLICY, PRELIMINARY REP. 49 (1954).

See the list of present exemptions in IND. ANN. STAT. § 64-201 (Burns 1951).

32. In some states the constitutional provision for home rule expressly confers taxing powers on municipalities. COLO. CONST. Art. XX, § 6 (g). In others the legislature is required to grant the power by general law and is thereafter forbidden to impose taxes upon municipalities or their inhabitants for municipal purposes. See CALIF. CONST. Art. XI, § 12. In Ohio the power of home rule cities to levy taxes is given in a negative way. It is provided that the legislature may pass laws to limit the power of municipalities to levy taxes. OHIO CONST. Art. XVIII, § 13.

33. Where the state has imposed a tax upon a particular subject cities and towns are precluded from imposing a tax on the same subject. The application of the pre-emption doctrine may be either express or it may be implied from a tax of a character similar to the one the local body seeks to impose. *Haefner v. Youngstown*, 147 Ohio St. 58, 68 N.E.2d 64 (1946); *Cincinnati v. American Telephone & Telegraph Co.*, 112 Ohio St. 493, 147 N.E. 806 (1925); *State ex rel. Zielonka v. Carrel*, 99 Ohio St. 220, 229, 124 N.E. 134, 136 (1919).

See generally Glander and Dewey, *Municipal Taxation: A Study of the Pre-Emption Doctrine*, 9 OHIO ST. L.J. 72 (1948).

34. The legislature in Missouri is prohibited from imposing taxes on cities for municipal purposes but may vest in the cities the power to assess and collect taxes for such purposes. The legislature, however, does possess the power to determine the kind of taxes the city may impose. *Kansas City v. J. I. Case Threshing Machine Co.*, 337 Mo. 913, 87 S.W.2d 195 (1935).

In answer to a home rule city's contention that the tax the legislature sought to impose upon it was for a purely local purpose and therefore violative of the constitutional prohibition, the Missouri Court said, "The distinction is not between local and general concern, but between corporate and governmental functions. The power of taxation is a governmental function which the constitution authorizes the general assembly to delegate to the city as to municipal taxes, but only in a manner 'consistent with and subject to the constitution and laws of the state.'" *Coleman v. Kansas City*, 353 Mo. 150, 161, 182 S.W.2d 74, 77 (1944). The court further said that it was within the power of the legislature to determine not only the kind of taxes a municipality may impose but also the manner in which taxes may be levied and collected by the city. *Ibid.*

35. While all functions of local government reflected a substantial increase in costs, expenditures for education in local communities represented the major item in dollar volume of the record-breaking 1949-1950 fiscal year. Expenditures for education in the 1949-1950 fiscal year were 15.5 percent over 1948-1949 and 161.6 percent over the fiscal year 1940-1941. IND. STATE CHAMBER OF COMMERCE, IND. TAX AND SOCIAL SECURITY MANUAL § IV, p. 1 (1951 ed.).

36. See for a description of these functions IND. STATE CHAMBER OF COMMERCE, HERE IS YOUR INDIANA GOVERNMENT 75-80 (6th ed. 1953).

highly inadequate services or a complete lack of them.³⁷ A primary reason for the Indiana system of tax collection and fiscal administration is to apply the ability-to-pay theory of taxation to the state as a whole instead of allowing each city or town to support its own activities at whatever level its own economic base will allow.³⁸ Recently the Indiana Municipal League in objecting to the attitude of the state towards its municipalities in matters of finance emphasized the fact that certain cities receive back in the form of state-aid only a small portion of the taxes collected at the local level.³⁹ While the larger cities and towns are able, with ample revenues derived from low tax rates levied on high assessed valuations, to furnish the services demanded of them by their citizens, the smaller communities can only manage to provide a semblance of desirable or necessary services.⁴⁰ State assistance⁴¹ in paying the costs of these services illustrates the pervading state interest both in seeing that the services are furnished and that they are maintained at a reasonably high level throughout the state. It further shows that complete independence cannot exist when problems are common to all levels of government.⁴² The major functions of government involve an emphasis on cooperation not independence.

An amendment granting only procedural powers would tend to eliminate some of the major problems of achieving a satisfactory relationship between municipalities and the state. It would permit cities and towns to determine their form of government and organizational structure, to make rules relative to selection, term, compensation, hours of work and dismissal of personnel, and to provide for recall of elective

37. See WOODBURY, *op. cit. supra* note 17, at 521.

38. This is evidenced by the disparity in the amount of state-aid given to the various units of local governments. *E.g.*, in 1950, the percentage of state-aid given civil cities in Indiana was only 6.7 of their total receipts whereas state-aid represented 12.8 percent of the total receipts of civil towns. IND. COMM'N ON STATE TAX AND FINANCING POLICY, PRELIMINARY REP. 64 (1954). "The general over-all premise for a system of state aid to local units is that it broadens the tax base and thus does not burden unduly the taxpayer of any particular area." IND. STATE CHAMBER OF COMMERCE, IND. TAX AND SOCIAL SECURITY MANUAL § V, p. 2 (1951 ed.).

39. It was declared: "The people of New Albany paid to the State in the fiscal year 1953-1954 approximately \$3,490,119. The State returned to the civil City of New Albany only \$159,690.38." Louisville Courier-Journal, Oct. 7, 1954, § 2, p. 1, col. 7.

40. WOODBURY, *op. cit. supra* note 17, at 521.

41. State-aid shifts the burden of financing local governmental functions from property to non-property tax sources. In Indiana this shift has been largely to the gross income tax and taxes on motor vehicles and their use. Since 1933, the state government has depended primarily on non-property taxes for revenues. In 1950-1951, 69.3 percent of the state's revenues were from the gross income tax. The percentage rose to 72.31 in the fiscal period 1952-1953. IND. COMM'N ON STATE TAX AND FINANCING POLICY, PRELIMINARY REP. 4 (1954).

42. See ANDERSON AND WEIDNER, *op. cit. supra* note 16, at 136.

officials.⁴³ Presently, the General Assembly regulates these functions through legislation⁴⁴ which is notable for its overlapping provisions and general confusion.⁴⁵ This is a natural result of the rule that cities and towns can exercise only such powers as are expressly granted by the legislature or necessarily implied from an express grant.⁴⁶ Permitting a city or town to formulate a charter under an amendment of the kind proposed would relieve the General Assembly of the details of local government⁴⁷ and avoid uncertain and conflicting legislation.⁴⁸ Further, it would remove from the General Assembly the temptation to interfere with the internal operation of municipal governments for reasons of partisan politics.⁴⁹

The desirability of permitting cities and towns to choose their own form of government is not questioned. It cannot be overemphasized, however, that a mere change in the form of government is not a guarantee of good government. Civic obligations can be as persistently evaded by citizens under the commission form as under the mayor-council or council-manager form of government. The success of any municipal administration depends not upon the form but upon the character and ability of the personnel who administer it.⁵⁰ Governmental organization is a factor, however, that may impede or facilitate successful municipal administration.⁵¹ In view of this, cities and towns should be allowed to work out for themselves a system of governmental organization conforming to their own peculiar needs and desires and should not be compelled to operate under a system rigidly prescribed for them by the General Assembly.⁵²

43. The proposed amendment is explicit as to these points. Acts 1953, c. 289. [Senate Joint Res. No. 2].

44. IND. ANN. STAT. §§ 48-1202, 48-1806 (Burns 1950).

45. Although Indiana cities are divided into five general classes with varying organizational structures, there are statutes creating special classes within and among one or more of the five general classes. *E.g.*, IND. ANN. STAT. §§ 48-2501; 48-2513; 48-2531 (Burns 1950).

46. Southern Ry. Co. v. Harpe, 223 Ind. 124, 58 N.E.2d 346 (1944).

47. See, *e.g.*, IND. ANN. STAT. § 48-1407 (Burns 1950) where there are listed 51 separate powers that common councils of cities may exercise.

48. See Heyerdahl, *Indiana Still Seeks Home Rule*, 43 NATIONAL MUNICIPAL REV. 182 (1954).

49. See KNEIER, CITY GOVERNMENT IN THE UNITED STATES 63-68 (1947).

50. A self-evident but often forgotten truism; see 1 McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS 961 (2d ed., Smith, 1940).

51. See WOODBURY, *op. cit. supra* note 17, at 524.

52. The House concurrent resolution authorizing the appointment of a commission to prepare and recommend legislation to enable cities to adopt the city-manager plan of government recited: "Whereas, In the interest of local self-government and home rule it should lie within the province of the majority of the citizens of each city of this state to select for themselves the form of the government of such city; and Whereas, Under the present law of the state there is now no opportunity for the people residing in mu-

It has been contended by those who have opposed the Optional Charter amendment that, as it is drawn, the proponents of a particular form of city government will have an advantage in any local election for the adoption of a charter.⁵³ The possibility that any type of government will be foisted upon an unsuspecting populace is more apparent than real. The terms of the proposed amendment are permissive; no city or town is required to make any change in its organizational structure of government.⁵⁴ This argument by opponents of the amendment clearly indicates a mistrust in the competency of citizens to exercise sound judgment at the polls.

Critics further say that the section prescribing the procedure for charter adoption is made to order for machine politics in that not enough time is allowed for deliberate consideration of the merits of a proposal.⁵⁵ At three stages in the course prescribed for charter making, however, the electorate may voice their opinion. They must vote on the question of whether a commission shall be chosen to frame a charter; if a majority votes affirmatively on this question, the electorate must choose a commission; and the electorate must then decide whether to accept or reject

municipalities to select the form of government of their choice; and Whereas, There are many who believe that the Manager Plan of government has proved to be a form of government making for efficiency and economy. . . ." Acts 1939, c. 176. [House Concurrent Res. No. 2]. The resolution continued with the proposal of the appointment of the commission.

While only the manager plan was mentioned, it is evident that the General Assembly anticipated that other forms of government would be desired by some cities. REPORT OF THE INDIANA CITY MANAGER STUDY COMM'N 7 (1940).

53. The Indiana Municipal League has objected that the amendment actually seeks to promote the city manager form of government. The fact that only this form of government was adopted under the 1921 optional charter statute and the additional fact that the resolution authorizing the appointment of the 1939 study commission, whose recommendations are embodied in the present proposal, specifically mentioned only the manager plan have contributed to this suspicion. However, this objection cannot be substantiated by the terms of the amendment.

54. The 1939 study commission pointed out in its report that it would be desirable to allow a wide range of choice among the several forms of city government. Because a particular form of city government has the organized support of certain civic organizations by no means indicates that the terms of the amendment favor that type. The League's real objections are to be found outside the terms of the proposal itself. It is interesting to note that the National Municipal League of which the Indiana organization is a member has long supported the very type of amendment that is now pending in this state. Acts 1953, c. 289. [Senate Joint Res. No. 2] see also REPORT OF THE INDIANA CITY MANAGER STUDY COMM'N 6 (1940).

55. "The time elements in the amendment as it now stands would enable a small, organized group interested in obtaining a certain form of charter to whisk an election through so hurriedly that dissenters would not have a chance to raise an articulate voice or to assemble candidates for the charter commission. The conditions are made to order for the election of a machine-picked commission which would hustle through a machine-dictated job of charter making and schedule an election so swiftly that a citizen away on an ordinary vacation when the charter was submitted might return to find that it had already been voted on." Indianapolis Star, Nov. 27, 1954, p. 12, col. 1.

any proposed charter.⁵⁶ Further, a city or town may alter its form of government only by resort to the process of charter making as set forth in the amendment. It would seem, therefore, that the contention that not enough opportunity is allowed for expression of the popular will is unwarranted.

The Optional Charter amendment would allow municipalities to coordinate the activities and services performed by special districts within the framework of municipal government.⁵⁷ The placing of functions in special districts applies the metropolitan region concept and attacks problems as an integrated whole.⁵⁸ The current practice is to create a separate district for each function thus dispersing the powers to a series of disconnected agencies.⁵⁹ This tends to contract the power of the central city government. Section 3 of the Indiana proposal not only would considerably broaden municipal powers by extending them to more areas; but, by permitting cities and towns to eliminate duplication of efforts and excessive personnel, the proposal increases the possibilities of reducing the costs of administration. In this respect the Indiana proposal is most forward-looking and would contribute greatly to the adjustment of the complex problems of state-local relations.

While the amendment would promise to alleviate some of the many

56. The procedure for charter adoption is set forth in section 1 of the proposed amendment. Acts 1953, c. 289. [Senate Joint Res. No. 2].

57. Section 3, Subsection 5 of the amendment provides that any city adopting a charter under the amendment shall have the authority ". . . To administer any special district already created or hereafter created if more than half the area of such districts lie within such city or town, except that this clause shall not apply to districts heretofore created for the purpose of operating public utilities unless the General Assembly directs otherwise by law." *Ibid.*

58. In New York "public authorities," as special districts are called in that state, which were created by the legislature and vested with powers to affect the "property, affairs or government" of cities were attacked on the ground that they invaded home rule powers. *Gaynor v. Marohn*, 268 N.Y. 417, 198 N.E. 13 (1935); *Robertson v. Zimmermann*, 268 N.Y. 52, 196 N.E. 740 (1935). The court in both cases upheld the constitutionality of the acts creating the public authorities on the ground that the functions they were to perform were matters of state concern requiring the exercise of the state's police power.

There are examples in other areas of the wide effect of city functions. The Sanitary District of Chicago is responsible for sewage disposal over an area of 442 square miles embracing 61 municipalities within its boundaries. In other metropolitan areas such as Los Angeles, Boston and Seattle special districts have been created to maintain parks, conduct slum clearance and low-cost housing projects and other public works. *KNEIER, CITY GOVERNMENT IN THE UNITED STATES* 361, 362 (1947). In Indiana, the Board of Sanitary Commissioners in first class cities is given jurisdiction to act outside the cities corporate boundaries. *IND. ANN. STAT. § 48-4203* (Burns 1950).

59. Usually special districts are created to furnish particular municipal services in order to meet emergencies that may arise. There has been little tendency to give additional functions to such authorities once they have been created. Obviously there is need for integrating the functions performed by these districts in instances where the state has extensively made use of this device for alleviating metropolitan problems.

problems it would be no panacea. The difficulties involved in determining what functions are appropriate for cities and towns remain. The General Assembly is compelled to act as a super-city insofar as it determines the duties and functions of cities and towns and their officials.⁶⁰ It is not the best forum in which to make these decisions.⁶¹ Novelty, growth, and complexity are characteristic of urban life. This creates continuing problems which take varying forms in different areas of the state. The governmental body charged with responsibility for dealing with them must be able to act with dispatch. Flexibility of control is essential. Efforts to achieve flexibility of legislative control have taken several forms, the most notable being special legislation⁶² and classification.⁶³ None has proved to be entirely satisfactory. A review of the events prior to and after the adoption of constitutional restraints on special legislation well illustrates the difficulties encountered in legislative control of municipalities.⁶⁴ Whether or not a city or town is granted the power to perform a given function should depend not upon the whims of factions in the law making body but upon a thorough investigation of the necessity and propriety of the power.

A method of control of the functions of city government that is gaining more and more acceptance is that of administrative regulation.⁶⁵ In the field of taxation and finance Indiana has adopted one of the most advanced plans of administrative control in the United States.⁶⁶ Recent years have been marked by a growing appreciation of the advantages of

60. See Heyerdahl, *op. cit. supra* note 48, at 183.

61. Representation of urban areas in Indiana's General Assembly, as in other states, is not directly proportionate to its percentage of the total population. Consequently, legislation affecting the peculiar interests of urban areas is at the mercy of rural representatives who cannot fully appreciate the needs of urban areas. Moreover, the limited biennial sessions of the General Assembly allow insufficient time for a scientific determination of the immediate needs of cities and towns to say nothing of providing for emergencies that may arise in the interim.

62. The first Indiana General Assembly (1816) enacted a general law for the incorporation of towns. Acts 1817, c. 17. It became the practice however, for the General Assembly to grant each city or town its charter by special act. Abuse of the privilege to enact special laws relating to cities and towns, largely at the solicitation of municipalities themselves, led to the constitutional prohibition of special legislation in 1851. IND. CONST. ART. IV, §§ 22, 23.

63. Prior to 1905, there were but two general classes of municipal corporations in Indiana—cities and towns. When it was desired to make particular laws applicable only to certain cities or towns special classes were created. Thus, there were many classes of cities and towns before the general law of 1905 classifying cities under the 1851 constitution. IND. ANN. STAT. § 48-1201 (Burns 1950).

64. See II ESAREY, HISTORY OF INDIANA 974-979 (1935) for a consideration of this problem.

65. This plan is based upon the English system of control. See GOODNOW, MUNICIPAL GOVERNMENT 136-138 (1919).

66. For an analysis of the Indiana plan see Dortch, *The "Indiana Plan" in Action*, 27 NATIONAL MUNICIPAL REV. 525 (1938).

administrative supervision over local governmental functions in other areas.⁶⁷ A system of state administrative supervision and control⁶⁸ would avoid many of the inadequacies of the present system of control, providing the desirable element of flexibility and at the same time protecting the higher interest of the state in seeing that local governments conform to the highest possible standards of efficiency.

The identity of local governments with the people must be preserved. The growing interdependence of communities economically and the costliness of services and functions demanded by citizens of local governments serve to illustrate also the broader responsibility of the state in protecting the welfare of its citizens. It is submitted that an amendment granting procedural powers will do much to relieve many of the problems arising as a result of the present system of control over the form and internal organization of cities and towns. The problems of state-local relations can best be solved, however, by creating an administrative board invested with the authority for a continuous determination of the proper functions of local governments. The ultimate solution depends, in a large measure, on an enlightened, voluntary cooperation between local authorities and state administrative agencies.

A CONSIDERATION OF THE PROBLEMS IN CONSORTIUM RECOVERY

From judicial decisions, scholarly texts, and journal writings a pressure is being generated leaving the law of consortium in unrest.¹ The impetus for this pressure is easily discernable in a typical situation in-

67. Administrative control is most pronounced in the areas of finance, education, highways, public health and social welfare. But no state has developed a systematic basis for administrative controls, encompassing all the major functions of government. See SCHULZ, *AMERICAN CITY GOVERNMENT* 148 (1949).

68. Two principal plans of administrative control have been used. One involves concentrating within a single state agency control over the various municipal functions. The plan followed in the United States is characterized by the distribution of control among existing administrative agencies. *Id.* at 149.

1. A recent leading case allowing a wife to recover for negligent invasion of consortium rights is *Hitaffer v. Argonne Co.*, 183 F.2d 811 (D.C. Cir. 1950). Two jurisdictions have followed this judicial innovation. *Brown v. Georgia Tennessee Coaches Inc.*, 88 Ga. App. 519, 77 S.E.2d 24 (1953); *Cooney v. Moomaw*, 109 F. Supp. 448 (D. Neb. 1953). For a discussion of the various aspects of consortium favoring the view of granting recovery to the wife see, HARPER, *TORTS* 566 (1933); PROSSER, *TORTS* 948 (1941); Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); Lippman, *The Breakdown of Consortium*, 30 COL. L. REV. 651 (1930); Notes, 9 IND. L.J. 182 (1933), 5 CORNELL L.Q. 171 (1920), 39 CORNELL L.Q. 761 (1954), 35 KY. L.J. 220 (1947); 39 MICH. L. REV. 820 (1940), 23 U. OF CIN. L. REV. 108 (1954).