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MUNICIPAL HOME RULE IN INDIANA

HARRY T. ICE*

Any discussion of "Home Rule" should begin with a definition of the phrase. The balance of this Article could be consumed with that subject. In order to limit the scope of the term without entering into the controversial aspects of it, let it be assumed—First, that it is used to refer to local autonomy as distinguished from centralized state control; and, Second, that reference is made only to civil cities and towns, and not to counties, townships, school cities, school towns, school townships, park, utility or sanitary districts, or any other political subdivisions of the State.

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1 "While the rights of local self-government, or rights of home rule are constantly dealt with by the courts, they have never been precisely defined authoritatively. . . . Municipal home rule in its broadest sense means the power of local self-government. . . . It may be said that the idea of home rule in its comprehensive sense includes (1) the choice of the character of the municipal organization, that is, the selection of the charter, (2) the nature and scope of the municipal service, and (3) all local activity, whether in carrying out or enforcing state law or municipal regulations, in the hands of city or town officers, selected by the community." MCQUILLAN, MUNICIPAL CORPORATION (1940) §93. Cf. State ex rel. Clark v. Hawroth, Trustee, 122 Ind. 462, 23 N.E. 946, 947 (1889), where it was said: "The right of local self-government is an inherent and not a derivative one. Individualized, it is the right which a man possesses in virtue of his character as a freeman. It is not bestowed by legislatures, nor derived from statutes."

2 Counties, townships, school cities, school towns and school townships are "corporations" and within the debt limitation provisions of the Constitution, also "municipal corporations." Cf. Follett v. Sheldon, 195 Ind. 610, 144 N.E. 867 (1924); Caldwell v. Bauer, 179 Ind. 146, 99 N.E. 117 (1912). Park, sanitary and utility districts are not, however, "municipal corporations" but are districts existing solely at the will of the legislature. Cf. Board of Commissioners v. Harrell, 147 Ind. 500, 46 N.E. 124 (1897); Johnson v. Board of Park Commissioners, 202 Ind. 282, 174 N.E. 91 (1930).
The subject might be examined historically. It could be explored philosophically, or pursued on the basis of resort to the fundamental law and the judicial precedents.

The historical approach might begin with a study of the Roman City and State—the English borough and the crown, and proceed to the early colonial history of this country. The Ordinance of 1787 of the Congress of the United States providing for the government of the Northwest Territory and the Constitution of Indiana of 1816 studied in the background of the time would throw some light on the subject.

James Bryce in his American Commonwealth deals briefly with the historical aspects of the subject, pointing out that in New England, the town was the first strong unit of local government, while in the southern States, by virtue of the difference in the economic conditions, the county was the important local body politic. In the midwest there was a co-mingling of the concept of town government of New England and county government of the south. The Ordinance of 1787 is silent on the subject of municipal corporations. Such local government as existed was taken for granted. One writer has indicated that self-government was not a real political issue of the time; that the real political issue prior to statehood in Indiana was division of government into counties. Establishment of cities and towns by special charter, a system which existed up until the turn of this century in Indiana, began with laws adopted by the Governor and Judges of the Indiana territory upon the granting of a charter to the “Borough of Vincennes” on August 24, 1805. Prior to statehood, many towns had similar charters.

The Constitution of 1816 (the first document of fundamental law in Indiana), is marked by its silence on the subject of local government. However, there are inferences that may be drawn from certain of its provisions. In Article I, Section 2, it is provided that—

“All power is inherent in the people, and all free government is founded on their authority and instituted for their peace, safety and happiness.”

This later formed the keystone of the arch for the doctrine

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3 Bryce, American Commonwealth (rev. ed. 1914) c. XLVIII, p. 96.
5 Laws of Indiana Territory (1805) c. XVII.
in the Supreme Court of Indiana that the fundamental law of the State recognized the right of local self-government. The balance of the Constitution of 1816 adds little. Article 11, Section 6, provides that all "district, county, or town officers," shall reside within their respective units, and Section 15 of the same Article provides "All town and township officers shall be appointed in such manner as shall be directed by law." At least it may be said that these provisions recognize the existence of local units of government.

Skipping for the moment the intervening period of development of judicial opinion, and turning to the Constitution of 1851, we again find little. Article I, Section 1 contains a provision similar to the one just quoted that "all power is inherent in the people." In the balance of the Constitution, towns are referred to but five times, cities but once, and municipal corporations twice. One of these provisions entered the Constitution in 1881 by amendment which restricted the amount of debt. The references are entirely to incidental matters, such as a prohibition against special laws for vacating streets, alleys and public squares in towns; providing that officers of a town shall reside within the town; that vacancies in offices shall be filled in the manner provided by law; that impeachment of officers shall be in the manner provided by law; and that one of the exemptions from taxation may be one of property held for "municipal purposes." On the other hand, in both the Constitution of 1816 and 1851, there are elaborate provisions with reference to township and county government. Someone may make a real contribution to this subject by the development, step by step, of the early local communities, placing our two Constitutions in that background, and either establishing the proposition that local self-government was assumed as an "inalienable" right, or that the state was the principal unit considered by those responsible for the drafting of our Constitutions. In any such comparison, Schedule 4 of the Constitution of 1851 must be considered, for there it was provided:

"All acts of incorporation for municipal purposes shall continue in force under this Constitution until such time as the General Assembly shall in its discretion, modify or repeal the same."

*Cf. IND. CONST. (1851) ART. IV, §23; ART. VI, §§5, 8 and 9; ART. X, §§1 and 6.*
Under this Section, it has been held by the Supreme Court that the right of the General Assembly to exercise complete authority over the corporate charter was expressly recognized. But such a research would have only an academic value, as we shall shortly see.

The Supreme Court first gave consideration to the extent of the right of local self-government in 1847, and in the period from the first decision to the last important decision rendered in 1935, the Supreme Court has travelled the complete circle of first a declaration of complete central authority to an extensive denial of that authority, and finally a return to the idea of full state authority. Several of the more important cases should be analyzed in order to present this cycle.

In 1847, the Supreme Court had before it an indictment of an individual under a state statute adopted in 1845 controlling the sale of spirituous liquors. In defense, it was contended that the charter of the City of Richmond granted in 1840 (in which the sale took place) gave "exclusive" control over such matters to the city. The Court affirmed the conviction of "guilty," declaring that the State statute had modified the Charter and saying that:

"Public or municipal corporations are established for the local government of towns or particular districts. The special powers conferred upon them are not vested rights as against the State, but being wholly political exist only during the will of the general Legislature, otherwise there would be numberless petty governments existing within the State and forming a part of it, but independent of the control of the sovereign power. Such powers may at any time be repealed or abrogated by the Legislature, either by a general law operating upon the whole State, or by a special act altering the powers of the corporation." Sloan v. State, 8 Blackf. 361, 364 (1847).

For forty-two years, the doctrine of the Sloan case was unquestioned. Three years later, the Court in upholding the right of the State to exempt state bank property from taxation within a City, even though a prior City Charter authorized a tax, said:

"That City, like all other municipal corporations in our State, is entirely under the control of the Legislature. Its charter may be modified or repealed by the Legislature at any time." State Bank of Indiana v. City of Madison, 3 Ind. 43, 46 (1851).

\*Wiley v. City of Bluffton, 111 Ind. 152, 12 N.E. 165 (1887) and cases cited.
The Legislature precipitated a controversy that caused the Supreme Court to modify its earlier declarations as to Home Rule. By Acts passed in 1889 and 1901, the Legislature provided for a Board of Public Works of the City of Indianapolis to have complete jurisdiction of streets, sewers and public buildings, the Board to be elected every two years by the Legislature; the establishment of a metropolitan police and fire board for the City of Evansville, the Board to be elected every two years by the Legislature and to have complete control of the fire and police departments of the City; a like Board for the City of Indianapolis to control police and fire departments, membership of the Board to be elected by the Legislature; the creation of a Board of Public Safety for the City of Fort Wayne vested with the control of the police and fire departments of the City, the members of the Board to be appointed by the Governor of the State. The Mayors in each of these cities refused to recognize the credentials of the newly chosen Board members, and mandate actions were brought by such members to obtain their office. In all four cases, the Supreme Court refused the writ of mandate. Many legal propositions were discussed, but the opinions were grounded upon a denial by the terms of the Acts of the "inherent right of local self-government." The one hundred thirteen pages of discussion in these four opinions is the most extensive judicial consideration of the doctrine of Home Rule by Indiana Courts. The first of the decisions involved the Board of Public Works established for the City of Indianapolis. Judge Coffey wrote the opinion of the Court. A separate concurring opinion was written by Judge Elliott, and a dissenting opinion by Judge Mitchell. Judge Coffey's opinion proceeded, and I quote:

9 Acts of Indiana (1889) c. CXII, p. 222.
10 Ibid.
11 Acts of Indiana (1901) c. XCII, p. 132.
12 State ex rel. Jameson v. Denny, 118 Ind. 352, 21 N.E. 252 (1889); City of Evansville v. State ex rel. Blend, 118 Ind. 426, 21 N.E. 267 (1889); State ex rel. Holt v. Denny, 118 Ind. 449, 21 N.E. 274 (1889); State ex rel. Geake v. Fox, 158 Ind. 126, 63 N.E. 19 (1901).
"It is, perhaps, true that the General Assembly may, at will, pass laws regulating the government of towns and cities, taking from them powers which had previously been granted, or adding to that which had previously been given, but we do not think that it can take away from the people of a town or city rights which they possessed as citizens of the State before their incorporation. The object of granting to the people of a city municipal powers is to give them additional rights and powers to better enable them to govern themselves, and not to take away any rights they possessed before such grant was made. It may be true, that as to such matters as the State has a peculiar interest in, different from that relating to other communities, it may, by proper legislative action, take control of such interests; but as to such matters as are purely local, and concern only the people of that community, they have the right to control them, subject only to the general laws of the State, which affect all the people of the State alike. The construction of sewers in a city, the supply of gas, water, fire protection, and many other matters that might be mentioned, are matters in which the local community alone is concerned, and in which the State has no special interest, more than it has in the health and prosperity of the people generally, and they are matters over which the people affected thereby have the exclusive control, and it can not, in our opinion, be taken away from them by the Legislature. Municipal corporations are to be regarded in a two-fold character; the one public, as regards the State at large, in so far as they are its agents for government; the other private, in so far as they are to provide for the local necessities and conveniences for their own citizens; and as to the acquisitions they make in the latter capacity, as mere corporations, it is neither just nor is it within the power of the Legislature to take them away or to deprive the local community of the benefit of them." (395-396)

Judge Coffey then traced the history of local self-government in England and in America, and concluded:

"It is, therefore, perfectly apparent from the Constitution itself that it was framed with reference to the then existing local governments of counties, towns, townships and cities." (398)

This last statement had reference to Schedule 4 which provided:

"All acts of incorporation for municipal purposes shall continue in force under this Constitution until such time as the General Assembly shall in its discretion modify or repeal the same."

The Judge seems to have overlooked the force of the last clause of the Schedule.

Elliott, J. concurring said that the question was simply one of whether the General Assembly had the power to appoint local county, township, town and city officials. He grounded his argument upon the rights “inherent in the
people,” which he said had its own innate vitality and vigor, and which was older than the Constitution and even the Bill of Rights. He said:

“It needed no constitutional declaration to invest the people with power, but it does require a constitutional provision to take it from them in whole or in part. This inherent power includes the right of the people to choose their rulers. An essential part of this inherent power, as it has been asserted and exercised for many years, is the right of the electors of a locality to choose their own immediate officers. In my judgment our Constitution does not take away this right, but leaves it in the people, undiminished and undisturbed. There it has resided for ages, and there it is to reside until the people shall, in due course, change their organic law.” (401)

Following this statement, he traces development of the right of local self-government in England and in New England, and says:

“By naming cities municipal corporations the right of local self-govern-ment was indicated as existing in their inhabitants. We get our term ‘municipal corporations,’ from the words ‘municeps,’ or ‘municipitis,’ meaning, I may say, without professing to be strictly accurate, ‘the right of a freeman’—the right to vote.
In a recent work the meaning of the word ‘municipal’ is thus illus-
trated: ‘Pertaining to local self-government.’ 5 Encyclopaedic Dict. 131. Our Constitution recognizes and preserves this right, and the thought of destroying it never entered the minds of the men who framed that instrument.” (401-402)

The Judge then traces the philosophical background, and says, concluding on this point:

“The right of local self-government is, indeed, one of the strongest and most efficient checks in our system of checks and balances . . .” (402)

Turning to the development of English law and the rebellion at times against the power of Parliament, he examines the representative character of the General Assembly and says:

“The municipal corporation as a local government is not represented by the General Assembly, and to permit that body to designate the officers who shall govern local affairs would be to tax the citizens of the corporation without representation. This, it is hardly necessary to say, would violate a principle which lies at the foundation of free government. It is no answer to say, as is sometimes said, that the municipal corporation has representatives in the General Assembly, for, as a municipal corporation, it is not, as to its local affairs, represented by that body, for that body represents the State and legislates in State affairs. Incidentally it legislates, in a general way, for localities, but
only because the welfare of the whole State is thereby promoted. As a part of the constituency of the Legislature the citizens of a town or city are represented, but they are represented in the capacity of citizens of the State and not as the inhabitants of a municipal corporation. A town or city has but little power in any General Assembly, and to permit that body to control their local affairs would put them in charge of men from distant parts of the State who could have little, if any, knowledge of local affairs and no direct interest in them, so that the inhabitants of such a town or city would be governed by persons who did not and who could not, in the just sense of the term, represent them, and this result our Constitution will not tolerate.

I do not deny that the Legislature has the power to change the form and mode in which municipal corporations shall be governed; on the contrary, I affirm that without the consent of the inhabitants the form of the corporate government may at any time be altered, but I do deny that the Legislature has the power to deprive the electors of a municipal corporation of the right to choose their own immediate local officers. By immediate local officers, I mean such as are charged with the control of purely local concerns, as the streets, the fire apparatus, and the like matters. In the class of local officers I do not include the peace-keeping officers, or the constabulary, for such officers are, in reality, officers of the State, as it is the duty of the State to provide for the personal safety of its citizens on the thronged streets of a great city as well as on the secluded rural highways. What I affirm, in short, is this: That because an elector lives in a city he can not have the right to vote upon purely local affairs taken from him by any statute.” (409-410)

Mitchell, J., in dissenting opinion said:

“The Constitution has erected no standard by which to determine what constitutes local self-government, or what are natural and inherent rights, as those terms relate to municipal government. These are questions of political, and, therefore, of exclusively legislative concern, with which other departments can not interfere without invading the legislative domain.

Disputes over theories of local self-government began with the organization of civil society, and they will doubtless continue until human government ends. Publicists and doctrinaires, whose writings are appealed to, are not agreed concerning the natural and inherent rights of men, as related to government, nor is it best they should agree. Our State Constitution was adopted by the people, as a well matured scheme of practical, progressive government, and its written limitations may be readily comprehended by intelligent men who are called to engage in framing legislation adapted to the growing needs of every portion of the State. Progress is at an end, however, if legislation must wait until the courts set bounds to the shoreless sea of local self-government, or until the judiciary ascertains and declares what are the 'inseparable incidents' to written Constitutions under our republican system.

The debate on those subjects must be left free, open and unfettered,
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and it must be left, as all the authorities say, exclusively with the people and their chosen representatives.” (412-313)

He also said:

“Municipal corporations are bodies politic and corporate, created by the Legislature as governmental agencies of the State, and they can only exercise such power as they derive from the source of their creation. Such powers as they exercise are at all times subject to legislative control, and in the absence of constitutional prohibition their powers may be enlarged or diminished, or withdrawn altogether, and their property devoted to other uses, as the Legislature may determine.” (416-417)

“The error which lies at the root of the argument by which the unconstitutionality of the acts here in question is attempted to be maintained, springs out of the fallacious assumption that the people of a city or town have any interest or inherent right whatever to municipal government, while every atom and vestige of right in those respects, under our system, are such, and only such, as the Legislature confers. Upon this baseless assumption, which obliterates and confounds all distinctions between municipal regulation, a creature of legislation, and county and township government which existed before Legislatures were, and which is, and always was, common to every community in the State, the whole fabric of argument adverse to the constitutionality of these acts is builded.” (418-419)


The same division of members of the Court was marked in each of the three other cases, but with different Judges writing the majority opinion in each case. The last case involving the Board of Public Safety of the City of Fort Wayne was decided in 1901, and after the decision of that case, the doctrine of local self-government was never again expressed in terms so broad.

In fact, in 1912, just ten years later, when one member of the Court disqualified himself for interest, the remaining four members equally divided on the application of the doctrine of local self-government in a case in which by state statute a sewer constructed by a contractor at a time when the City was over its two per cent debt limit, was authorized to be transferred to the contractor and leased to the City for a sum sufficient to pay the contract price.14 Two members of the Court felt that the sewer was property of the City upon its construction, and that the Legislature could not take such property from the City by legislative fiat. So they stated, the doctrine of local self-government prohibited such

14 Jordan v. City of Logansport, 178 Ind. 629, 99 N.E. 1060 (1912).
a taking. The two dissenting Judges, however, stated that
the argument that the statute deprived the City of the right
of local self-government was not tenable.

Only a short six years later, and in 1918, the Supreme
Court had before it the question of whether the Shively-
Spencer Act of 1913 vesting the control of utility companies
in the Public Service Commission abrogated certain provi-
sions of a franchise granted to the Logansport Telephone
Company by the City of Logansport. It was argued by the
Telephone Company in support of its position that the mat-
ter of utility service was a local affair, and in the inter-
est of local self-government, the City charter should prevail
over the State regulation.15 Judge Harvey disposed of the
earlier cases in this case of Winfield v. Public Service Com-
mission by saying:

“There are decisions of this court strongly supporting the right of
cities in matters of local self-government. (Citing the cases of 1889
and 1901.) Such decisions do not apply, however, when the interest
of the public generally is involved, as it is in general telephone service.”
187 Ind. 53, 59, 118 N.E. 531, 533 (1918).

Eight short years later, in a case involving the applica-
tion of an Act of the Legislature touching the organization
and hours of operation of the Fire Department of the City
of New Albany, the Court said of the contention that the
Act denied the right of local self-government to the City of
New Albany:

“The question of local self-government, we are advised of excep-
tional cases where legislation has been stricken down upon what is
sometimes called the ‘reserved power of the people.’ Such cases are

15 Authority still resides in the Public Service Commission to grant
indeterminate permits to public utilities. However, local control
has been generally recognized by the Legislature and the Courts
as the rule in the case of municipally owned utilities. The con-
trolling statutes generally vest the authority to purchase, con-
struct, extend and improve utilities in the municipalities free from
the control of the Public Service Commission. See IND. STAT. ANN.
(Burns, 1933) §54-105 et seq. But in certain special cases, the
Commission does have limited jurisdiction to approve the issuance
of bonds for acquisition, extension or improvement of utilities. Id.
at § 48-5345 et seq. (acquisition of waterworks); Id. at § 48-5328,
(improvement of unencumbered waterworks); Id. at §48-5441 (im-
provement of waterworks in cities of fifth class). All utilities
acquired by municipalities under Chapter 190 of the Acts of 1933
are free from control of the Public Service Commission as to rates,
and any other municipally owned utility may be made free
from the control of the Public Service Commission as to rates
on the holding of an election for that purpose. Id. at §54-613.
not made to rest upon any express written prohibition in the Constitution, but upon restraints of legislative power to be drawn from the inhibitory words and the language employed, considered and construed as of the time and under the circumstances surrounding the framers of the organic law. That reasoning was adopted by this court in State ex rel. v. Denny, Mayor, 118 Ind. 382 (1889), and State ex rel. v. Fox, 158 Ind. 126 (1902). We have read the Denny and Fox cases carefully, and under the particular facts then before the court, the reasoning announced seems to be sound, but we are not inclined to extend but to treat the doctrine followed in those cases as an exception to the almost universal rule that legislative power is limited only by the express inhibitions of the Constitution."
(Judge Myers in State ex rel. Schroeder v. Morris, 199 Ind. 78, 88, 155 N.E. 198, 202 (1926).

The complete return to the doctrine of the Sloan case decided in 1847 appears to have been accomplished in the case of Zoercher v. Agler decided in 1930, involving the power of the State Board of Tax Commissioners on petition to review and reduce local tax levies. Judge Martin simply held that it was

"unnecessary . . . to enter upon a discussion of the existence of 'the right of local self-government' in cities, or to determine just what such phrase includes. It can not include the right of taxation . . ."

The significance of this statement was pointed out five years later in a dissenting opinion by Judge Fansler, where there was again involved the same question, namely, the right of the State Board of Tax Commissioners to control municipal expenditures by the reduction of tax levies. The ghost of John Marshall rises in the opening statement of the dissenting Judge:

"The power to control the amount of such expenditures, to limit them, and to deny the city the right to derive such revenue as it may think necessary to preserve its properties, and efficiently provide for the public welfare and safety, is surely the power to destroy the efficiency of city government and to jeopardize the efficiency, if not the existence, of its established institutions. Not one authority is found that sustains the contention that such power may be delegated to a state administrative or ministerial board. The fundamental principles laid down by every writer on the subject appear to be an insuperable argument against it." (653)

However, the majority of the Court made quick disposal of the Home Rule argument:

17 See Dunn v. City of Indianapolis, 208 Ind. 630, 653, 196 N.E. 528 (1935).
“Municipal corporations are creatures of the state. They possess such powers only as are granted by the legislature in express words and those necessarily implied and incidental to those expressly granted, and those indispensable to the declared objects and purposes of the corporation, and to its continued existence.” (640)

“The government of the city of Indianapolis, a creature of the legislature, is part of the taxation machinery, acting in an administrative capacity, . . .” (640-641)

In 1931, the Supreme Court was presented with the argument that the right of local self-government was invaded by a statute giving the Public Service Commission jurisdiction over the rates of a municipally owned electric utility, and the Court devised a new formula to meet the argument. The Court said:

“While the doctrine of the right of local self-government as laid down in the cases above cited (or at least a part of it), has been recognized in later cases (see — citing cases), it would seem that the inherent of common-law powers referred to are identical with those powers which are commonly designated as ‘implied’ or ‘incidental’ powers of a municipal corporation essential to enable it to accomplish the end for which it is created. (Citing cases) This court has declared repeatedly that municipal corporations are subordinate branches of the domestic government of the state and possess only those powers expressly granted to them by the Legislature, those necessarily or fairly implied in or incident to powers expressly granted, and those indispensable to the declared objects and purposes of the corporation. The power of a municipality to own a public utility is generally considered to be neither an inherent nor an indispensable implied power; . . .” (529-531)

This hasty review of the principal decisions indicating that the Court has traveled in a circle and is now back to its opinion of 1847, is perhaps unfair to the Court, for even at full bloom of the doctrine of local self-government, there were certain limitations recognized even by its exponents. It may not be wholly accurate to say that today the doctrine does not prevail to some extent in Indiana. If the Legislature were to again pass laws as bluntly projecting the State into local affairs as in 1889, with no justification to be found either in the necessities of the social or economic conditions, the Court might again, if no other Constitutional thrust would invalidate such acts, resort to the right of “local self-

18 City of Logansport v. Public Service Commission, 202 Ind. 523, 529-530, 177 N.E. 249, 251 (1931); cf. Underwood v. Fairbanks Morse & Co., 205 Ind. 316, 325, 185 N.E. 118, 121 (1933), holding that a city or town has “inherent” authority to provide light and water for “public purposes.”
government" as the lance to administer the coup-de-grace.

It is not an over-statement that the right of Home Rule exists now only by suffrance of the 150 men who meet every other year as the General Assembly of Indiana.\footnote{A difference might be suggested between “constitutional Home Rule” and “statutory Home Rule.” The difference lies only in the source from which the right stems. In the former, it springs from the fundamental law of the Constitution, and in the latter from the acts of the Legislature. Both are within the protection of the Courts, but the latter must of necessity yield to the will of each successive Legislature.} For in the period since 1901, that body by the process of gradual centralization has granted to state administrative agencies or quasi judicial bodies much that was once considered a matter of purely local concern. A foremost example of this encroachment is the State Board of Tax Commissioners with its control over tax levies, budgets and appropriations.\footnote{Cf. Acts of Indiana (1919) c. 59, §§200-201, as amended by Acts of Indiana (1935) c. 150.} Every budget item, from the purchase of meat for the dog pound to the construction of a boulevard in the City passes under its scrutiny, and every additional appropriation not included in the budget must first have its approval. The State Board of Accounts exercises a complete check on expenditure.\footnote{Acts of Indiana (1909) c. 55, as amended.} The Public Service Commission, except in cases where elections are held to remove utilities from their jurisdiction, exercise complete control over the rates, extensions and additions to, and even acquisition of, municipal utilities.\footnote{Control of rates of municipal utilities. Acts of Indiana (1933) c. 190, §19. Approval of bonds for acquisition of or extensions to municipal utilities. Cf. Acts of Indiana (1921) c. 96, as amended; Acts of Indiana (1929) c. 155, as amended; Acts of Indiana (1933) c. 235; Acts of Indiana (1933) c. 259.} The State Board of Health, with its inspections and controls, reduced local Boards to the status of office boys.\footnote{Acts of Indiana (1891) c. 15, as amended.} The State Board of Stream Pollution even has authority to order a municipal corporation to build sewers and disposal works and to issue bonds therefor.\footnote{Acts of Indiana (1935) c. 152, §§6, 8, 9.} Lo, how far we have wandered from Judge Coffey’s opinion in 1889 where he said:

"The construction of sewers in a city . . . is a matter of purely local concern . . . over which the people affected have the exclusive control . . .\"\footnote{State ex rel. Jameson v. Denny, 118 Ind. 382, 395, 21 N.E. 252, 257 (1889).}
All these controls and many more mark the trend towards centralized government. 26

The legislature never prior to 1921 gave cities any choice as to their form of government, although all but three other States permitted a choice of the form of local government. 27

The proponents of the City Manager form of Government in 1921 succeeded in procuring the passage of an Act authorizing the adoption of the City Manager plan. The Act successfully weathered its first attack in the Courts. On every score of constitutionality raised, its validity was upheld. Sarlls v. State ex rel. Trimble, 201 Ind. 88, 166 N.E. 270 (1929). Five months later, and on September 24, 1929, in the

26 The courts have erected no effective barriers. The reason lies in the doctrine that a municipal corporation is the creature of the State. Hence as a corollary, it can not challenge the validity of a state statute. See City of Trenton v. New Jersey, 262 U.S. 182 (1923). In line with this doctrine, legislative control is firmly established over the following features of municipal existence and activity:

(a) Corporate existence—
Sloan v. State, 8 Blackf. 361 (1847).
State Bank of Indiana v. City of Madison, 3 Ind. 43 (1851).
Lucas v. Board of Commissioners of Tippecanoe Co., 44 Ind. 524 (1873).
Eichels v. Evansville Street Railway Co., 78 Ind. 261 (1881).
Warren v. City of Evansville, 106 Ind. 104, 5 N.E. 876 (1885).
Lutz v. City of Crawfordsville, 109 Ind. 466, 10 N.E. 411 (1886).
State ex rel. Schroeder v. Morris, 199 Ind. 78, 155 N.E. 198 (1926).
City of Logansport v. Public Service Commission, 202 Ind. 523, 177 N.E. 249 (1931).

(b) Contracts—
Downey v. Indiana State Board of Agriculture, 129 Ind. 443, 28 N.E. 123 (1891).
Schneck v. City of Jeffersonville, 152 Ind. 204, 52 N.E. 212 (1898).

(c) Municipal Funds—
Indianapolis v. Indianapolis Home for Friendless Women, 50 Ind. 215 (1875).

(d) Municipal property—
Lucas v. Board of Commissioners of Tippecanoe Co., 44 Ind. 524 (1873).
Jordan v. City of Logansport, 178 Ind. 629, 99 N.E. 1060 (1912).

(e) Municipal Tax Levies—
City of Logansport v. Public Service Commission, 202 Ind. 523, 177 N.E. 249 (1931).

27 See Report, Indiana City Manager Commission, October 1, 1940, p. 5.
case of Keane v. Remy, 201 Ind. 286, the same Court destroyed the hopes of the friends of the plan for ultimate success through the legislative process. In the Keane case on a very technical construction, the Court held the same Act, which it had declared to be constitutional in the first instance, to be invalid.

Since that time, the agitation for the right of cities to adopt their own form of government has continued. In 1939 a concurrent resolution was adopted by the General Assembly authorizing the appointment of a Commission to "study, draft and submit" to the legislature "such legislation as is necessary to provide the authority for the adoption of the Manager plan of Government in Cities throughout the State."

In the preamble of the resolution, it was declared:

"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 to select for themselves the form of the government of such City." Act of Indiana (1939) c. 176.

An able Commission was appointed under the Act with seven members, two named by the President of Purdue University, two named by the President of Indiana University, and one each by the Governor, the Lieutenant Governor and the Speaker of the House. The Commission consisted of Clarence W. Efroymson, Indianapolis, Chairman, Pressley S. Sikes, Bloomington, Secretary, John W. Esterline, Eli Lilly and Virgil K. Shepherd, of Indianapolis, Roy J. Harrison of Attica, Alfred H. Randall of Fort Wayne, members.

On October 1, 1940, this Commission reported for adoption an amendment to the Constitution of the State, which

28 Cf., "There are impressive indications that American Cities are moving into a fifth period of legal development, a period in which the emphasis is upon function and administration rather than geographical areas and the legal distribution of governmental powers." Fordham, The West Virginia Municipal Home Rule Proposal (1932) 38 W. VA. L Q. 235, 238. See also Reinhart, Municipal Home Rule in Colorado (1930) 28 MICH. L REV. 352, 403, and Weiner, Municipal Home Rule in New York (1937) 37 COL. L REV. 567, 561 (asserting that the demand for home rule is waning in certain states).

29 Seventeen states have Home Rule provisions in their Constitutions. In the following ten of the seventeen, any form of charter may be adopted by the voters without any further action by the Legislature:

ARIZ. CONST. (1910) ART. XIII; COLO. CONST. ART. XX; MD. CONST. ART. XI-A; MICH. CONST. ART. VIII; MO. CONST. ART. IX; NEB. CONST. ART.
without further legislation would permit cities and towns to establish Charters fixing (1) their form of government; (2) the method of election of their officials; (3) the distribution of functions; (4) conditions of employment for employees; (5) administration of special districts created. The amendment as written was introduced in the General Assembly of 1941, and after a process of amendment, a much shorter form was passed. The principal difference between the draft submitted by the Commission and the one adopted by the Legislature is that in the legislative draft the self-executing provisions were eliminated. Under this last draft, it will be necessary for the Legislature to pass an enabling act

XI; N.Y. CONST. ART. X; OHIO CONST. ART. XVIII; ORE. CONST. ART. XI; UTAH CONST. ART. XI.

In the following states, further legislative action must be taken or approval granted by the Governor before a charter may be adopted: CALIF. CONST. ART. XI; MINN. CONST. ART. IV; OKLA. CONST. ART. LVIII; TEX. CONST. ART. XI; WASH. CONST. ART. XI; W. VA. CONST. ART. VI; WIS. CONST. ART. XI. For a discussion of home rule history, amendments, and decisions in various states, see Anderson, Municipal Home Rule in Minnesota (1923) 7 MINN. L. REV. 306; David, Home Rule in California (1940) 5 LEGAL NOTES ON LOCAL GOVT. 125; Dawley, Special Legislation and Municipal Home Rule in Minnesota: Recent Developments (1932) 16 MINN. L. REV. 659, 672; Fordham, The West Virginia Municipal Home Rule Proposal (1932) 38 W. VA. L. Q. 235, 329; Jacobson, Charter Amending Powers of Cities Under Michigan Home-Rule Legislation (1916) 14 MICH. L. REV. 281; Montague, Law of Municipal Home Rule in Oregon (1920) 8 CALIF. L. REV. 181; Peppin, Municipal Home Rule in California: I (1941-2) 30 CALIF. L. REV. 1, 272; Reinhart, Municipal Home Rule in Colorado (1930) 28 MICH. L. REV. 382; Weiner, Municipal Home Rule in New York (1937) 37 COLUM. L. REV. 587; Note (1929) 39 YALE L. J. 92.

The provision is broad enough to end any constitutional doubt as to proportional representation as a method for selection of city officials. The system was held valid in Reutner v. Cleveland, 107 Ohio St. 117, 141 N.E. 27 (1923); Hile v. Cleveland, 107 Ohio St. 144, 141 N.E. 35 (1923); and Johnson v. New York, 274 N.Y. 411, 9 N.E. (2d) 30 (1937). It was held invalid in Wattle v. Upjohn, 211 Mich. 514, 179 N.W. 335 (1920); and People v. Elkus, 59 Cal. App. 396, 211 Pac. 34 (1922). It is also broad enough to authorize preferential voting which has been held valid in Orpen v. Watson, 86 N. J. L. 69, 93 Atl. 853, 96 Atl. 43 (1915); Zent v. Nichols, 50 Wash. 508, 97 Pac. 728 (1908); Adams v. Lansdon, 18 Idaho 483, 110 Pac. 280 (1910); Fitzgerald v. Cleveland, 88 Ohio St. 338, 103 N.E. 512 (1913). The system has been held invalid in Brown v. Smallwood, 130 Minn. 492, 153 N.W. 935 (1915). No comment is made on the wisdom of the system of proportional representation or preferential voting. Indiana has no decision upon the subject, but Kelso v. Cock, 184 Ind. 173, 110 N.E. 937 (1916) indicates the Court might follow Michigan, California and Minnesota. For a thorough analysis and condition of the systems, see HERMANS, DEMOCRACY OR ANARCHY (1941).

See Appendix B.

See Acts of Indiana (1941) c. 243, set forth in full in Appendix A.
before Charters may be adopted, whereas such legislative action was not necessary under the Commission's original draft. The amendment must be concurred in by the next session of the Legislature and approved at an election by the people before it can become a part of the Constitution. The amendment provides for the adoption of a law by the General Assembly for the choice of form of government by cities and towns through adoption of Charters which may provide for the selection of officials, and prohibits the Legislature from passing local or special laws affecting the powers of Charter cities or towns, and providing also that the Legislature shall not enact any law which will "restrict, reduce, suspend or repeal" the provisions of any Charter theretofore adopted, so far as the same relate to (a) the form of government; (b) the selection of officials; (c) the compensation of officers or employees; or (d) the distribution of functions to Boards, Bureaus and Commissions. Under this Section, if it becomes a part of the Constitution, before City Charters may be adopted, the Legislature must first pass an enabling act.

The Commission in its deliberations was obviously moved by two impelling influences—(First) in the recommendation of an amendment to the Constitution rather than a statute, the Commission acknowledged the doubtful status under judicial decisions of the right to local self-government and also the need for permanency of a City Charter. Without some provision in the fundamental law, any charter City would hold its form of government by sufferance of each successive General Assembly. Apparently the Commission felt that a Charter City should not be burdened every two years with the threat of a political challenge of repeal of its charter in the Legislature every two years. And, secondly, the Commission must have recognized that under present day conditions, complete local autonomy could not be safely granted to Cities and Towns. Undoubtedly these men must have shared the fear expressed in 1847 by the Supreme Court in the Sloan case, of the establishment of "numberless petty governments within the state . . . independent of the control of the sovereign power." So the Commission wisely recommended local self-government in only the five enumerated

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respects just mentioned, and provided that in all other instances, the general laws applicable to municipal bodies should apply to charter cities and towns.

The present proposed amendment, if adopted and approved by the electors, will usher in, in Indiana, a new era in the government of cities and towns. The amendment is broadly written so that any form of government, whether it be City-Manager, Mayor-Council or Commission, or even some new form not yet devised, may be adopted by the Charter and given a permanency revocable only by the will of the electors within the city or town.

The adoption of the amendment and an enabling act under it will also present many new problems. Problems of construction will, undoubtedly, reach the Supreme Court, and whether that body construes the amendment liberally or strictly will have much to do with the ultimate successful operation under the amendment and enabling act. It is submitted that when the amendment becomes law, it is tantamount to a declaration by the people that there are certain fundamental concerns of government that are local in character, and the Court should have regard for this declaration. It should, within the limits of the amendment, accord it a liberal construction.

Perhaps the amendment marks an end to the long judicial controversy over local self-government, establishing for a time at least a compromise between centralization and Home Rule, setting off as local the right to choice of form of government, selection of officials, distribution of functions, and provision for compensation of officials, but leaving to the State as matters of general concern all legislation relating to the public health, safety and morals, and leaving also to the State those controls now exercised in all fields over taxation and other functions too numerous to narrate. Broadly the dividing line seems to be that as to form of government and all that it includes, the problem is local; but as to function and all that it includes, the problem is state-wide and should be dealt with by state authority.
A JOINT RESOLUTION PROPOSING AN AMENDMENT
TO THE Constitution of the State of Indiana by creating
and adding a new article to be numbered Article 17 pro-
viding for city and town charters.
(H. J. R. 5.)

PROPOSED CONSTITUTIONAL AMENDMENT — RE-
FERRED TO NEXT GENERAL ASSEMBLY.

Sec. 1. BE IT RESOLVED BY THE GENERAL
ASSEMBLY OF THE STATE OF INDIANA, That the fol-
lowing proposed amendment to the Constitution of the State
of Indiana is hereby proposed and agreed to by this, the
82d General Assembly of the State of Indiana, and is hereby
referred to the next General Assembly for reconsideration
and agreement.

PROPOSED AMENDMENT—ARTICLE 17.

Sec. 2. That the Constitution of the State of Indiana
be amended by adding thereto an Article 17, Section 1, to
read as follows:

Article 17. Sec. 1. The General Assembly shall pro-
vide by law for the adoption of alternative forms of civil
government by the voters of cities and towns through local
adoptions of charters, and for the amendment or repeal by
the voters of cities or towns from time to time of charters
so adopted. Any such charter may provide for any method
of nomination, election, or recall or elective officers, provided
the secrecy of the ballot and rights of suffrage are main-
tained. No local or special law shall be enacted which has
the effect of withholding powers from, or restricting the
powers of, any charter city or town. No amendment, revis-
on or repeal of any law providing for the adoption, amend-
ment or repeal of charters of cities and towns shall restrict,
reduce, suspend or repeal the provisions of any charter there-
tofore adopted by the voters of any city or town insofar as
such provisions relate to its form of government, the nomi-
nation, election, term or recall of its officers, or compensation
of officers or employees, or distribution of functions or
duties to officers, employees, departments, boards, bureaus,
or commissions.

APPENDIX B

A Joint Resolution proposing an amendment to the Constitu-
tion of the State of Indiana by creating and adding a
new Article to be numbered Article 17 providing for
City and Town Charters.
Sec. 1. Be it resolved by the General Assembly of the State of Indiana, That the following proposed amendment to the Constitution of the State of Indiana is hereby proposed and agreed to by this, the Eighty-Second General Assembly of the State of Indiana, and is hereby referred to the next General Assembly for reconsideration and agreement.

Sec. 2. That a new and additional Article be added to the Constitution of the State of Indiana to read as follows:

"Article 17—City and Town Charters.

Sec. 1. Any incorporated city or town may frame and adopt a charter for its own civil government, or reframe an existing charter adopted pursuant to this Article, in the following manner: The common council or other legislative authority of the city or town, by a two-thirds vote of its members, may and, upon written petition of qualified electors within such city or town equal in number to at least ten percent of the total votes cast therein at the last preceding general election for secretary of state in cities and for clerk-treasurer in towns, shall provide by ordinance for the submission to the qualified electors of such city or town of the question "Shall a commission be chosen to frame a charter for the City (or Town) of .................?" Such ordinance shall require the submission at the next general election, if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise at a special election to be called and held within the time aforesaid and on a day named in such ordinance. The proposed charter commission shall consist of eleven members, each of whom shall be a qualified elector of such city or town, and they shall be chosen by the qualified electors within such city or town at the same time as the submission of the question. Candidates therefor shall be nominated by written petition signed by qualified electors within such city or town equal in number to at least one-half of one percent of the total votes cast therein at the last preceding general election for secretary of state in cities and for clerk-treasurer in towns, but the signatures of more than one thousand qualified electors shall not be required for the nomination of any candidate. Such nominating petition or petitions shall be filed with the clerk of the city or town at least thirty days prior to the date set for the submission of the question. Candidates for
the proposed charter commission may also be nominated in the original petition for submission of the question.

The ballot shall contain the question and the names of the candidates for members of the proposed charter commission, but without party designation. Each elector shall have the privilege of voting for eleven candidates. If a majority of the qualified electors voting on the question of choosing a commission shall vote in the affirmative, then the eleven candidates receiving the highest number of votes cast at such election shall constitute the charter commission, and shall proceed to frame a charter. If a charter has not been framed within one year from the date of the election, the commission shall be automatically discharged and a new commission may be chosen in the manner hereinabove prescribed. The commission shall act at all times by majority vote of its members.

The charter so framed shall be submitted to the qualified electors of the city or town at an election to be held at a time determined by the charter commission. Alternative charter provisions may also be framed by the commission and submitted to be voted on separately, but at the same election. The proposed charter and alternative charter provisions, bearing the written approval of a majority of the members of the commission, shall be deposited with the clerk of the city or town, who shall cause such charter and notice of such election to be published once a week for four weeks in one or more newspapers of general circulation in such city or town. Such proposed charter and such alternative charter provisions as are approved by a majority of the electors voting thereon, shall become the charter of such city or town at such time as may be fixed therein, and shall supersede all laws affecting the organization and civil government of such city or town which may be in conflict therewith. Within ten days after such approval a copy of such charter as adopted, certified by the presiding officer of the common council or other legislative authority and authenticated by the seal of such city or town, shall be made in triplicate and deposited, one in the office of the secretary of state, one in the office of the recorder of the county in which the city or town is located, and one in the official records of the city or town. Amendments to any charter so adopted may be proposed by the common council or other legislative authority of the
city or town upon a two-thirds vote thereof, or by written petition of qualified electors of the city or town equal in number to ten per cent of the total votes cast within the city or town at the last preceding general election for secretary of state in cities and for clerk treasurer in towns. Any such amendment shall be submitted at the next general election, if one shall occur not less than sixty nor more than one hundred and twenty days after its proposal in either of the two methods herein prescribed; otherwise, at a special election to be called and held within the time aforesaid. Prior to such election the clerk of such city or town shall cause the proposed amendment or amendments to be published as in the case of original charters. If any such amendments be approved by a majority of the electors voting thereon, the same shall become part of the charter at the time fixed in such amendment, and the clerk of the city or town shall cause the same to be certified and filed as in the case of original charters.

The general election laws of the state then in force shall govern the elections herein provided for to the extent such laws are applicable. If conflicting charter provisions are approved by a majority of the electors at the same election the provisions receiving the largest affirmative vote shall prevail to the extent of the conflict.

Sec. 2. The common council or other legislative authority of such city or town shall provide and appropriate an amount necessary for the reasonable expenses of the commission and for holding elections as provided in this article; and may borrow funds for such purposes.

Sec. 3. Any city or town forming its charter under this constitution shall have and is hereby granted the authority to exercise the following powers relative to its local affairs:

1. To prescribe its own form of civil government. Where a state law places a duty or responsibility upon cities or towns, a charter city or town shall either by the terms of its charter or in a manner prescribed by the charter determine which city or town official shall exercise that duty or responsibility.

2. To adopt by terms of its charter methods for the nomination and election and recall of its elective officers, provided the secrecy of the ballot is maintained.
3. To create, abolish or combine departments, divisions, bureaus, sections, commissions, boards, or agencies to carry out the functions of local civil government.

4. To provide for the election, compensation, hours of work and dismissal of all its officers and employees, and terms of office of elected officials.

5. To administer any special districts already created or hereafter created if more than half the area of such districts lies 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.

Sec. 4. All powers of local civil government except those specified as numbers 1, 2, 3, 4, and 5 of section 3 shall be subject to general laws. But no law shall be enacted which has the effect of withholding powers from, or restricting the powers of, a charter city or town unless all cities or towns of the state are likewise limited or restricted.

Sec. 5. All laws relating to cities and towns not inconsistent with this constitution shall remain in force until they shall expire or until they shall be repealed or until they are superseded, in so far as they are within the specified powers granted to chartered cities or towns, by provisions of the charter or by legislative action of such cities or towns.