Special Legislation: Another Twilight Zone (Part 1)

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SPECIAL LEGISLATION: ANOTHER TWILIGHT ZONE

By FRANK E. HORACK *

"And he finds, with keen, discriminating sight
Black's not so black—nor white so very white" ¹

The Indiana Supreme Court recently held unconstitutional a statute transferring certain duties of city treasurers "in all second and fourth class cities located in a county having a population of not less than 250,000 nor more than 400,000." ² More recently, the same court held constitutional an act fixing the salaries of officials "in counties having a population of not less than 250,000 nor more than 400,000 and having three or more cities, each with a population of 50,000 or more." ³ Both statutes applied to Lake County and only to Lake County. Neither decision is unique, nor without precedent. The conflicting results are only illustrative of the confusion and specious distinction which befogs with judicial wisdom the constitution lore of special legislation.

The constitution prohibits special legislation on seventeen enumerated subjects and in an abundance of caution prohibits any special act "where a general law can be made applicable." ⁴

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¹ George Channing, New Morality.

² 1933 Ind. Acts c. 31.

³ 1931 Ind. Acts c. 47.

⁴ Ind. Const. Art. IV, sec. 22. The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say:

Regulating the jurisdiction of justices of the peace and of constables.

For the punishment of crimes and misdemeanors.

Regulating the practice in courts of justice.

Providing for changing the venue in civil and criminal cases.

Granting divorces.

Changing the names of persons.

For laying out, opening and working on highways, and for the election or appointment of supervisors.
In the judicial application of these provisions, the following questions have been rather consistently raised: (1) When will a statute be subjected to judicial review? (2) When is an act special? (3) When is an act general? and (4) When is a general act inapplicable? Consistency has not blessed the answers to these questions, but it hardly can be supposed that the court is unaware of these inconsistencies nor of the fact that inconsistency is a necessary evil when reaching necessary results.5

I

The court has pursued during different periods in its history, two distinct policies in the review of special legislation. At the present, these two policies vie for supremacy with little indication which, if either, will dominate. In case the legislation appears to the court to be "reasonable" there is a tendency to deny review. Acts which appear to have produced unfair results locally, or to infringe state policy, the court frequently reviews, destructively. Indeed, there seems

5 "A foolish consistency is the hobgoblin of little minds," Emerson, Self-reliance.
to be only slight check upon the judicial ability to choose its own results.⁶

**The Doctrine of Thomas v. Clay County**

In 1854 an act purporting to be general but applying only to Clay County was questioned on the ground that it regulated county business. The counsel for the county resisted on the theory that the legislature had predetermined that a general law was not applicable and that it was therefore not competent for the court to redetermine the issue, but the court unanimously held the act unconstitutional. Referring to argument of counsel, the court said:

“If that position be correct, the 23d section has no vitality; nor is there any reason why it should have a place in the Constitution, it would impose no restriction upon the action of the legislature . . . whether the legislature have in the case at bar acted within the scope of their authority is in our opinion a proper subject for judicial inquiry.”⁷

For fourteen years following this decision, judicial review meant the judicial redetermination of the legislative judgment that in a particular situation a general law was inapplicable. More than this, it was the crystallization of judicial suspicion concerning the legislative sincerity in their constitutional obligation. But in spite of the court’s insistence upon the review of legislative determinations, the court was not over-zealous in its destruction of legislative labors.⁸ Indeed, in most cases

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⁶Judges “must keep within those interstitial limits which precedent and custom and the long and silent and almost indefinable practice of other judges through centuries of the common law have set to judge-made innovations. But within the limits thus set, within the range over which choice moves, the final principle of selection for judges, as for legislators, is one of fitness to an end.” Cardozo, *The Nature of the Judicial Process* (1928), 103.

⁷*Thomas v. Clay County* (1854), 5 Ind. 4.

⁸During the supremacy of the Thomas doctrine, the court held only one statute unconstitutional under the prohibition against special legislation. *Madison, etc. R. Co. v. Whiteneck* (1865), 8 Ind. 217. Four statutes were sustained. *Stocking v. State* (1855), 7 Ind. 326; *Toledo, etc. R. Co. v. Nordyke* (1866), 27 Ind. 95; *Goodrich v. Winchester* (1866), 26 Ind. 119; *Palmer v. Stumpher* (1868), 29 Ind. 329. The case of *Bright v. McCullough* (1866), 27 Ind. 223, although speaking of special treatment, was decided under section 10, article I of the constitution.
the court affirmed the legislative judgment—but there was never a suggestion that the court was precluded from an independent determination.

**The Doctrine of Gentile v. The State**

In 1868 the doctrine of the Thomas case was abandoned. The court announcing the proposition that "Those who make the law are necessarily required in its enactment, to judge and determine, from the nature of the subject and the facts relating to it, whether it could properly be made general, and of uniform operation through the state."9 With caution the court warned that "We are far from claiming that the legislature is omnipotent, but, on the other hand, we are not sure that the superior wisdom of the courts would, in such cases, enable them to judge more accurately than the legislature. * * * The question is one which in its very nature, peculiarly addresses itself to the legislative judgment, and if a local law be enacted, the reasons . . . however satisfactory they may appear to the members of that body, may not appear on the face of the law, and the courts are left in ignorance of them and, if permitted to review the legislative decision, must act upon such reasons and facts as may suggest themselves to the mind; and thus the legislature and the courts would be liable to be brought into frequent conflict to no beneficial purpose."10 Thus, the court concludes that the judicial review of special legislation is unwise.

The doctrine of the Gentile case was partially relinquished, however, because of legislative indulgence in spurious special legislation. A mistaken interpretation of *Thomas v. Clay County* induced the legislature to enact "acts which were strictly local under titles and enacting clauses purporting to make them general in their operation. * * * This sort of legislation perhaps is the direct fruit of the deep seated error and erroneous impression produced by *Thomas v. Board, etc.* * * And this fruit is evil fruit, because it

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9 Gentile v. State (1868), 29 Ind. 409.
10 Gentile v. State (1868), 29 Ind. 409.
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begets the habit in the legislature of saying what it does not mean and meaning what it does not say. Nay, more, it begets the habit of using every artifice to conceal at least a large part of the legislative intent. That intent is often hard enough to decipher even when the legislature knew what it intended, and tried to express it in plain and intelligible language.

"But when it attempts to conceal its real intent so as to evade a supposed constitutional inhibition out of a laudable desire to pass much needed local laws, it must bring in its train a brood of evils in construing an act so couched in evasive terms and language that are almost interminable in their effect."

Thus, with the legislature doing what it need not have done, the court was irritated at the circumlocution and the doctrine of hands off was abandoned and there was a partial resumption of the doctrine of the Thomas case.

Heckler v. Conter

If Groves v. Lake County had not followed Heckler v. Conter it could have been said that the Gentile case had been abandoned in favor of the earlier Thomas case. As it is, it appears that the court will follow the Gentile case when convenient, and when inconvenient will follow the Thomas case. The Heckler and Groves cases applied to statutes of similar character. Both applied to Lake County. Both were general in form. Both by numerical classification attempted to limit the class in which the statute would operate. The statute under review in the Heckler case sought to transfer duties from municipal treasurers to the county treasurer. In the Groves case the statute regulated the salaries of county officials. Factually this was the only distinction. Procedurally, both cases arose under section 23 of the constitution. Thus the factual significance that the Groves case involved a fee and salary act is somewhat diminished.

11 Italics ours.
13 (1936), — Ind. —, 199 N. E. 137.
The Heckler case appears to be an unequivocal denial of the Gentile doctrine. Indeed, the court said, the appellees "rely upon the case of Gentile v. State and authorities which follow that opinion. But we cannot approve of the reasoning in those cases." The position of the court can best be summarized by three quotations from its opinion:

First. "... if the legislature may arbitrarily decide that a general law cannot be made applicable ... the constitutional provision is, if not a nullity, at least a mere admonition."

Second. "The mistaken judgment or conscientious weakness of the legislature cannot overcome the restraint and limitation upon its power intended by the section." (§ 23.)

Third. "It is inevitable that there should be differences of opinion as to the constitutionality of enacted legislation, but it was intended by the framers of the Constitution that the decisions of this court should determine the laws and the limit of legislative power and not the decisions of the legislature."

Clothed in less polite language, the doctrine of the case seems to be: (1) the court will follow the constitution but the legislature will not; (2) the mental capacities of the court are superior to those of the legislature; (3) the constitutional fathers placed their confidence in the court and not in

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14 (1933), 206 Ind. 376, 187 N. E. 878.

15 Heckler v. Conter (1933), 206 Ind. 376, 187 N. E. 878, at p. 879. "... the dicta of those cases cannot change the rule of law that the power to construe the Constitution is a judicial power. The present legislative tendency toward special and local legislation under the guise and verbiage of general laws should be checked by the legislature itself, or, by the courts, if it fails to do so; otherwise the body of the law will soon revert to the chaotic condition which existed under the old Constitution. ..." Martin, J., in Fountain Park v. Hensler (1926), 199 Ind. 95, 155 N. E. 465. Cf. Terre Haute v. Kolsem (1891), 130 Ind. 434, 29 N. E. 595. "The decisions put at rest the question whether or not the Legislature can determine whether a general law, ... can or cannot be made applicable. ... If the question is legislative, then it is indisputably true that it is excluded absolutely and entirely from the domain of the judiciary." McCabe, J., dissenting in the Kolsem case, suggests that the Gentile case is not authoritative because the act in that case was, in fact, 'general.' Cf.

"The intellectual power, through words and things,
Went sounding on a dim and perilous way."

—Wordsworth, The Excursions.

16 Heckler v. Conter (1933), 206 Ind. 376, 187 N. E. 878.
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the legislature. A partial analysis of these assertions seems desirable in determining the validity of the Heckler doctrine and the alleged abandonment of the Gentile case.

The Legislature Will Not Follow the Constitutional Mandate

The first reason advanced for the necessity of judicial review was that the legislature would not abide by the constitution without some outside compulsion and that "a mere admonition" without judicial benediction would be ineffective. Such assertions are frequently made and too frequently made without inquiry into their accuracy.

In the session of 1849, 91 per cent of the total legislation was special. This, of course, was intolerable. It led Mr. Pettit in the constitutional conventions to declare that the primary purpose of this convention is "to cut down this whole system of local legislation."

The first legislature under the new constitution sharply reduced the bulk of local acts. Special legislation had been cut from 91 to 44 per cent. Thereafter, the percentage remained about the same until 1900. In 1925 it had fallen to 22% and by 1935 it was but 12%. A table showing the distribution by years and subject-matter follows:

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18 Quoted in Newton County v. State ex Bringham (1903), 161 Ind. 616, 69 N. E. 442.
PERCENTAGE OF SPECIAL LEGISLATION TO TOTAL ENACTMENTS IN CERTAIN SESSIONS OF THE INDIANA LEGISLATURE

<table>
<thead>
<tr>
<th>Year</th>
<th>1849</th>
<th>1850</th>
<th>1851</th>
<th>1850</th>
<th>1851</th>
<th>1852</th>
<th>1865</th>
<th>1885</th>
<th>1901</th>
<th>1925</th>
<th>1935</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Number All Acts</td>
<td>616</td>
<td>496</td>
<td>75</td>
<td>157</td>
<td>159</td>
<td>266</td>
<td>219</td>
<td>326</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Per Cent Special Acts</td>
<td>91%</td>
<td>90%</td>
<td>44%</td>
<td>34%</td>
<td>42%</td>
<td>44%</td>
<td>22%</td>
<td>12%</td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

To avoid misunderstanding and prevent unnecessary argument concerning the significance of the above figures, certain possible interpretations should be set forth. The decline in special legislation may be explained thus. (1) The legislature obeys the constitutional mandate—not quite perfectly, but with a constantly improving record. (2) The legislature obeys the court—not quite perfectly, but increasingly so as the courts return to a more rigid application of the doctrine of judicial review. (3) The legislature obeys neither the court nor the constitution, but enacts such laws as the demands of the time and place make legislatively expedient—and as the physical improvement of the state (particularly, roads and highways) and the mechanization of transportation have changed the majority of our problems to state problems, the demand for special local legislation is declining. Any one of the explanations is at once adequate and inadequate. A more thorough analysis of the subject-matter of the special legislation is essential.

REDUCTION IN AMOUNT OF SPECIAL LEGISLATION EXPRESSED IN TERMS OF ITS ORIGINAL BULK

<table>
<thead>
<tr>
<th>Subject Matter of</th>
<th>1849</th>
<th>1851</th>
<th>1865</th>
<th>1885</th>
<th>1901</th>
<th>1925</th>
<th>1935</th>
</tr>
</thead>
<tbody>
<tr>
<td>TOTAL SPECIAL LEGISLATION</td>
<td>1850</td>
<td>1852</td>
<td>100%</td>
<td>6%</td>
<td>9%</td>
<td>11%</td>
<td>20%</td>
</tr>
<tr>
<td>A. Relating to Gov't</td>
<td>100%</td>
<td>6%</td>
<td>14%</td>
<td>14%</td>
<td>28%</td>
<td>8%</td>
<td>9%</td>
</tr>
<tr>
<td>B. Gov't and Individual</td>
<td>100%</td>
<td>2%</td>
<td>......</td>
<td>......</td>
<td>22%</td>
<td>8%</td>
<td>12%</td>
</tr>
<tr>
<td>C. Special Privilege</td>
<td>100%</td>
<td>5%</td>
<td>4%</td>
<td>6%</td>
<td>5%</td>
<td>7%</td>
<td>2%</td>
</tr>
</tbody>
</table>

The three groups mentioned above are of necessity arbitrarily created. Group A concerns the structure of local government, the powers and duties of its officers, the general problems of management and supervision. Group B involves governmental relations of more popular interest to the people,
but still primarily governmental in nature—taxes, school, roads, and liquor control. Group C involves the grant of special privileges—special acts of incorporation, legislative divorce, changing names, and validating acts and awards and compensation. A comparison of the above table will indicate that regardless of cause, the grant of special privilege has been practically discontinued by the legislature. The narrowness of the distinction which exists between Group A and B suggests that if they are treated together the picture is clarified.

The really difficult problem is to determine whether the constitutional amendment is really responsible for the reduction in amount and character of special legislation or whether it is more readily explainable upon some other basis. Special legislation concerning elections and voting, roads, street and highways, and liquor regulation at one time constituted 60 per cent of all special legislation in Indiana. In 1935, they amounted to but 7 per cent of the bulk of special legislation that was only 7 per cent of its original. In terms of 1849, special legislation on these subjects has declined 99.5 per cent. Is this not compliance with the constitution? Its cause is perhaps more tenuous. For example, the era of prohibition might explain the absence of special legislation on liquor regulation. The constant centralization of authority over roads and highways tends to make adjustment of local problems in highway administration a problem for administrative rule and standard rather than legislative adjustment.

Special legislation concerning county, township, and municipal government has always accounted for the largest percentage of prohibited legislation. Although measured by its own bulk in 1849 it has decreased 91 per cent; still special local legislation is the largest single problem in the field of special legislation.

During the past eighty-five years the constitutional prohibition seems to have had adequate legislative respect. If there has been any variation in compliance it has favored those prohibitions which are clear and exact in their demands. Thus, while there has been nearly perfect compliance with the pro-
hibition against special privilege legislation, in the realm of "county business" the record is as uncertain as the standard. But judged by gross figures and not by the pyrotechnics of particular pathological cases, the constitution has received legislative respect and compliance.

"Mistaken Judgment and Conscientious Weakness"

These are hard words. But assume that they are true. Is this not a new ground for judicial intervention? Has it not been long the judicial theory that only the completed instrument was for the judicial eye and that the influences which induced its enactment were beyond judicial scrutiny? Thus

20 It may possibly be true, as counsel assert, that the motives of the legislature were not commendable; but granting all this, yet no reason is supplied...
where a statute was enacted through fraud it was still enforced by the courts. If relief cannot be given for fraud, surely not for "mistaken judgment and conscientious weakness."

And who is to determine what is "mistaken judgment?" Surely the court is not infallible—or is that the theory? Something is wrong with such a proposition. It assumes that if a mistake has been made, the only means of remedy is the court. The English have relied on correcting their mistakes where they have been made and seem not altogether disappointed in the result. There are no constitutional obstacles, so far as we know, which would prevent a legislature from repealing an act mistakenly adopted!

Finally, the argument of the court would have had greater weight had it announced this doctrine of judicial review in a case where the constitutionality involved a question of law. The question—whether a particular community and only that community needs special legislative attention—requires only a policy judgment; and when a court endeavors to review such a judgment they enter into the field of legislation. This, of course, is not necessarily bad, although it may lead to "mistaken judgment and conscientious weakness."

"Constitutional Mandate for Judicial Review"

This argument, if supportable, would, of course, resolve the entire question and all the others advanced might with propriety be stricken as surplusage. The court in this case unfortunately fails to cite constitutional provisions or extracts from the debates in support of this contention. The writers have searched with some diligence for the expression of these sentiments. They seem to be lacking not only on the general proposition of constitutionality but also on the particular question of whether the court will review the factual background and the motives behind the enactment of legislation. If even the first were true (and the writers are willing to accept that

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for condemning the law, for the courts cannot inquire into the motives of the legislature." Terre Haute v. Kolsem (1891), 130 Ind. 434, 29 N. E. 595.

authority without specific constitutional grant) they feel that the next step—that the court is directed to review motive—is an unwarranted extension of the doctrine of judicial review and should not be done without express constitutional authority.

Thus, it would appear that the fears of the court in the Heckler case that the constitution would be a nullity without judicial review, the accusation of the court that the legislature was motivated by "mistaken judgment and conscientious weakness," and the assertion of the court that the power was constitution-given are all unsupportable.

The Doctrine of Groves v. Lake County

Perhaps the most important part of the Groves decision is its failure to mention the Heckler case. Certainly it is that its doctrine does not accord with its predecessor, but springs beyond it to the Gentile case. The theory of judicial review here expounded is:

First. "If the act in question is condemned . . . the court would be holding that the classification made by the legislature is unnatural, artificial, and arbitrary or, in other words, this court would be required to substitute its own judgment in place of the judgment of the legislature."

Second. "To analyze the elements entering into the services required by county officials in populous counties is the work of legislature."

Third. "It is the application of the law which concerns the court."22

The most direct conflict which results between the Groves case and the Heckler case is in the theory of the legislative-judicial relationship. The Heckler case is a bold announcement of judicial supremacy and in a sense the inviolability of judicial wisdom. The Groves case professes judicial humility. The court said that its constitutional duty was to apply the law, and that only incidentally in applying the law did it pass upon the constitutionality of legislative power. Neither doctrine adequately explains judicial action or what courts do in fact. Judicial supremacy is effective only so long as opponents

22 Groves v. Lake County (1936), — Ind. —, 199 N. E. 137.
bring their cases before the courts, and there are times when even the bitterest litigants settle rather than have their differences settled by judicial determination. And, so far as equality of authority is concerned, this, too, is a myth in practice; for regardless of what the court may say, it frequently is in fact the last tribunal and thus regardless of its hypothetical equality, its decisions because they are the last become the most significant.

Thus, in a degree, the importance of these theories of judicial review lies primarily in their effect upon the court. When the court has the attitude that the legislative action, if not "arbitrary," is the result of "mistaken judgment or conscientious weakness," judicial review in fact means judicial autocracy; when the court believes that it should not "substitute its own judgment in place of the judgment of the legislature," judicial and legislative co-operation is the paramount value.

At present the condition of judicial review in Indiana is uncertain. The most recent decision seems in accord with the more acceptable doctrine of judicial review. The uncertainty of the cause of decisions, however, makes advisable the consideration of those further questions which the court has considered when it has taken jurisdiction for review.

II

When Is An Act Special?

"When is a hen not a hen? When it's a rooster," was the answer to our childhood jingles. In a like manner the answer to when is a statute special has been, "When it's not general." The generality or speciality of a statute may be determined, according to the courts, either from its form, its substance, or from the method of its proof.

At common law, courts could take judicial notice of general or public statutes, but private or local acts required proof. This distinction was based upon the unique character of special or private act, which was in the nature of a contract between the Crown and the beneficiaries of the statute and thus
was not binding upon strangers. In *Hingle v. State,* an attempt was made to apply this rule to Indiana legislation. Fortunately, the dictum was not followed, for the difference between English and Indiana legislative procedure is so great that any attempt to apply the English rule would have led to ridiculous results.

When an act is special in form, that is, applies to a particular community or individual or class by direct reference, the courts generally have held that the act is special. This may not mean necessarily that the act is unconstitutional, for unless the act involves one of the seventeen prohibited subjects the court may still determine that a "general act is not applicable." The speciality of the act is not questioned. In one case, however, the court went out of its way to say that an act which referred specifically to the office of judge in each judicial district was general. This case, however, seems to be the only one in Indiana where the court has said that an act special in form was general in character and that it would be governed by character rather than form. More frequently, the courts have evaded the question of definition by "presum-

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24 (1865), 24 Ind. 28, "What is a special act? It is such as at common law the courts would not notice, unless it were pleaded and proved, like any other fact."

25 Or more frequently, "If a local law be enacted on a subject not enumerated in section 22, we must presume that, in the opinion and judgment of the legislative department, a general law on the given subject could not be made applicable." Gentile v. State (1868), 29 Ind. 409; Mode v Beasley (1895), 143 Ind. 306, 42 N. E. 727, Wiley v. Bluffton (1893), 111 Ind. 152, 12 N. E. 165. Cf. "We do not decide that this law is not 'general, and of uniform operation throughout the State,' but it has been held that laws, operating alike in all parts of the state, under the same circumstances and conditions, comply with the requirements of section 23."

26 "This court has judicial knowledge that the act names all of the judges of all the courts of the classes affected existent in the state at the time of its passage; and therefore, naming all of them, it is of as general application as if it had provided generally that it should apply to all." Spencer v Knight (1911), 177 Ind. 564, 98 N. E. 324.
ing" that the case arises under section 23 of the constitution, rather than under section 22. Then the problem of "speciality" is avoided for the more tenuous question, "would a general law be applicable?" In short, special legislation is that legislation which the court calls Special. The presumption is that an act special in form is special in fact—but if there is doubt, the presumption is that it does not concern one of the seventeen prohibited subjects.

**When Is An Act General?**

Although the converse of the question, "When is an act special?" this question raises many more perplexing questions. In the first place, there is no presumption that an act general in form is also general in operation. It might even be said

27 The cases reflect a neat interplay between sections 22 and 23. If there is no judicial doubt and the act is to be set down, there is a tendency to place it with the specific prohibitions of section 22. If there is doubt concerning the factual coincidence between the contested statute and section 22, there is a tendency to find that in case of ambiguity the act should be tried under section 23. Once under that section the court, of course, can find either that it is a legislative question whether a general law is applicable, or, if review is granted, may find the classification unreasonable and the act special, or find the classification and the act general, or that a general law would have been inapplicable.

28 "The law is general in form, but whether a law general in form is, in fact, general or special depends on its subject-matter, and not on the form it is made to take; and even though it is general in form if, upon judicial investigation of its subject-matter, it is found to be local, the court will not hesitate to so declare it; . . ." Rosecranz v. Evansville (1923), 194 Ind. 499, 143 N. E. 593. And the operation of the act must likewise be general or uniform; but "a law which applies generally to a particular class of cases is not local or special. The constitution does not require that the operation of a law shall be uniform, other than that its operation shall be the same in all parts of the State under the same circumstances."

Sarlls v. State (1923), 201 Ind. 88, 166 N. E. 270; Smith v. Board (1909), 173 Ind. 364, 90 N. E. 881, Keane v. Reamy (1929), 201 Ind. 286, 168 N. E. 10. "But no mere form of words will prevent this court from looking to the application of an act." Bumb v. Evansville (1906), 168 Ind. 272, 80 N. E. 625. "The questions themselves have found their origin in the fact that it seems to have been thought that local legislation could be best accomplished by enactments general in terms and form, though necessarily local in substance and application. It may have been apprehended that there was some constitutional restriction which would be fatal to acts which were in terms local, but which could be evaded by giving them a general form and yet a local application." Eithel v. State (1870), 33 Ind. 201.
that there is a "suspicion" that a questioned act is probably special in operation.\footnote{For example, at one session of the legislature the following classification for school purposes was made (see, Rushville v. Hayes (1904), 162 Ind. 193, 70 N. E. 134) (1) cities over 100,000; (2) cities between 2,820 and 2,830; (3) cities between 7,800 and 7,820; (4) cities between 7,095 and 7,105; (5) cities between 6,100 and 6,130; (6) cities between 7,200 and 7,700; (7) cities between 3,410 and 3,420; (8) cities between 4,025 and 4,050. "the bill for the act was introduced by the representative from the county in which the appellant company is located, this action was begun within a few months after the law was enacted, and it is quite apparent that the act was intended by its author and by the general assembly which enacted it to apply to this one corporation alone. This would invalidate the act." Fountain Park Company v. Hensler (1926), 199 Ind. 95, 155 N. E. 465, citing Rosencranz v. Evansville (1923), 194 Ind. 499, 143 N. E. 593. But see, "Hence the legislative intent is made clear and undoubted, that the act was designed never to have any effect or operation anywhere in the state outside of the city of Indianapolis, while it purports to be a general act. And yet no one can entertain a reasonable doubt of the constitutionality of the act, not because it purports to be general but because it is on a subject on which the applicability of a general law has been left by the constitution to the exclusive judgment of the legislature on inquiry into the facts." Mode v. Beasley (1895), 143 Ind. 306, 42 N. E. 727. See also, notes 20 and 21, supra.} At least a portion of our legislative history justifies that suspicion.

The form of enactment is not conclusive, thus an act general in form but special in fact will be treated, judicially, as a special act. Again, it should be warned that this does not mean that the act is unconstitutional. If not relating to one of the seventeen prohibited subjects, its validity cannot be questioned unless a general law would have been inapplicable.

The substance of the act will frequently determine its generality; but this only in conjunction with the reasonableness of the regulation or the classification of the subject-matter.

For the most part, the generality or speciality of an act is an issue subordinate to the inquiry: when is a general law applicable?

**When Is a General Law Applicable?**

In order to avoid nice distinctions between special and general acts, the court has frequently said that a general law would be inapplicable, thus escaping the necessity of determining the generality or speciality of the particular act con-
tested. Or, the court, upon the review of the contested act, may determine that the act is general within the limits of its subject-matter. Either procedure reaches a constitutional result.

Most of the litigation concerns the reasonableness of the limits imposed upon the operation of the contested statute. So far, the standards of reasonableness have been tenuous—the classification of subject-matter must be "natural and not artificial," founded on "reason and necessity," or based on "health, morals, and welfare."

Natural and not artificial. There has been a general hue and cry for classifications of this character. But, in a sense, to say that a class is "natural" is, of itself, a non sequitur. Every classification is artificial. There are degrees of artificiality, but nothing more. Every classification selects from the totality of objects those which have significance for the particular judgment the classifier has in mind. Thus, a declaration that "the legislature has merely recognized, not made, the classification," is as misleading as is the suggestion that "there can be no real difference between a county having a population of 24,000 and one having 26,000."

The first

30 Supra, n. 27.
31 "The legislature must classify in nearly every act which it passes. . .
State v. Wiggam (1917), 187 Ind. 159, 118 N. E. 694; and, "Under the Constitution of this State, cities and towns may be classified upon the basis of differences in population, and laws applicable to a single class may be regarded as general in character, and not local or special." Rushville v. Hayes (1903), 162 Ind. 193, 200, 70 N. E. 134.
32 "Science seldom makes a grand attack on a whole army of difficulties; it divides and conquers. . . After experiment comes the typing up of the results of innumerable experiments in the same field into bundles having one or more characteristics in common; classification. . .
From classification some of those who go on ascend to ghostly things called classes, which seem to be disembodied Platonic ideas of the properties of all the things in the parcels. . .
The real trouble begins when some mathematicians and others who verbalize about the symbols they use to 'denote' classes gradually become so familiar with the verbal patterns of their mystic incantations that they believe in the 'existence' of the classes." Bell, The Search for Truth (Reynal & Hitchcock, 1934), p. 78.
33 Supra, n. 78.
34 Kraus v. Lehman (1907), 170 Ind. 408, 418, 83 N. E. 714. At best the rules of classification are only useful guides for reaching a justifiable result
statement only affirms the court's agreement with the legislative classification. The second suggests that for the court a two thousand population difference was not significant. Naturalness and artificiality are only relative terms.

Reason and necessity. The big question here, of course, is, who is going to decide what is reason and what is necessity? As used by the court, reason appears to mean "prudence" rather than "reason," and necessity apparently means "usefulness" rather than "necessity." The rule as applied by the court in *Fountain Park Co. v. Hensler*, save for the abiguous use of "natural," seems satisfactory:

"A representative classification must embrace all who naturally belong to the class, all who possess a common disability, attribute or classification, and there must be some natural and substantial difference, in the main as to the subject and purposes of the legislation between those within the class included and those whom it leaves untouched. The legislature cannot take what might be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered factions of the original unit as two classes and thereupon enact different rules for the government of each."

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Health, Morals, or Welfare. This judicial personification of thunder, lightning, and rain provides the hurly-burly for battles lost and won. But a standard built on so uncertain guides is of little use to legislators. Even judicially it affords unexpected results. Often used as a generalization of the

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with the least amount of effort. The standards set forth in *Bullock v. Robison* (1911), 176 Ind. 198, 93 N. E. 998, are perhaps the most useful of those which the court has advanced: "A valid classification must not conflict with well-recognized rules, some of which are as follows: (1) The classification must embrace a class of subjects or places, and not omit any one naturally belonging to the class. (2) It must be based on some reasonable ground, that bears a just and proper relation to it, and not be a mere arbitrary selection. (3) More is required than a mere designation by such characteristics as will serve to classify; the characteristics serving as a basis must be of such substantial nature as to mark the objects so designated as particularly requiring exclusive legislation. (4) There must be a substantial distinction, having reference to the subject-matter of the proposed legislation, between the objects or places embraced in the enactment, and the objects or places excluded."

85 (1926), 199 Ind. 95, 155 N. E. 465.
“privileges and immunities” concept, the “class legislation” provision, and the “general incorporation” clause, health, morals, and welfare has at times had an extensive use.

**Classification vs. Identification**

Although the general applicability of a law may be doubtful in many cases, it is seldom that any doubt exists concerning the speciality of the interests which seek and gain special privilege. The most frequent special act seeks to give special benefit or concession to individual counties or municipalities. Where the request is meritorious the generality of description is an unnecessary sham. The courts, however, have encouraged the system and have gravely analyzed numerical identifications with a profundity which must have surprised, though pleased, the original draftsmen of the legislation.

**Classification by Exclusion.** Classification by exclusion can be either (1) territorial, or (2) numerical. Territorial exclusion has been infrequent; indeed, it appears to be more accidental than intentional.

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36 Ind. Const., Art. I, sec. 23. “The general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.”

37 Ind. Const., Art. IV, sec. 22.

38 Ind. Const., Art. XI, sec. 13. “Corporations, other than banking, shall not be created by special Act, but may be formed under general laws.”

39 For example, in State v. Wiggam (1917), 187 Ind. 159, 118 N. E. 684, the court in a most indefensible decision held an act special after first applying the much abused *eiusdem generis* rule so as to hold that the act which applied to “bottles, siphons, cans, kegs, barrels, hogsheads, or other enclosures made of glass, metal or wood” did not apply to “boxes, jugs, jars, pails,” etc., and therefore did not embrace all subjects of a similar character. This, the court said, violated the prohibition against special legislation because the classification was “arbitrary and violates every provision of our Constitution above set out,” and that with such limited operation (note the court is limiting the operation, not the legislature) there was “no reason in health, morals, or welfare of the public in this act and, therefore, it is unconstitutional.” Fortunately, such judicial chicanery is isolated in but a few, unrepresentative opinions.

40 See, supra, notes 23 and 29.

41 “Ninety-one of the counties were included in the salary provisions by the act while one county was wholly omitted. It would appear, therefore, that the act is local in the sense that it applies to less than the whole state, and that it has failed in its apparent purpose as a general law. . . . It is no less objec-
The more arbitrary cases involve the classification of cities and counties numerically, excluding from the operation of the law all cities or counties below a particular population. Acts of this character have been supported on the theory that differences in the number of persons in cities and counties determine the need for different local services, for different tax systems, for different governmental organization and, thus, for special legislation. And so long as one line is drawn the court has said, "The line must be drawn somewhere (and) such a line must of necessity be more or less arbitrary".* * * "If there is reason for the classification, then, in the very nature of the case, the very existence of the power implies the right to fix it at some place, or at some number, or at some population, and, as applied to cities, for certain purposes, the right is admittedly given to fix it at a definite population."42 But a distinction has been attempted between cases arising under section 22 and section 23. In *Kraus v. Lehman,*43 the court said:

"As shown by the census of 1910, Henry County had a population of 25,088, while the population of Bartholomew County was 24,594, a difference of only 494. . . . Certainly, in the need for a court-house, there can be no real difference between a county having a population of 24,000 and one having 26,000. Of course, if the legislature were dealing with a classification under section 23, *supra,* then it might be said that the line must be drawn somewhere, and that the question of where it should be drawn was one for the legislature. Conceding for the sake of argument that in enacting a law upon any subject enumerated in Section 22, *supra,* the legislature may resort to a classification . . . there must be a real reason or necessity for the classification, and the necessity or reason must adhere in the subject-matter and must be natural and not artificial and the question as to whether the classification comes within the rule herein asserted would be one reviewable by the courts."

This distinction is without merit. Judicial review is either justified in both cases or not at all. The line between things

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*Strange v. Grant County (1909), 173 Ind. 640, 91 N. E. 242.*

*State ex rel. v. Bouse (1894), 140 Ind. 506, 39 N. E. 64.*

*Strange v. Grant County (1907), 170 Ind. 408, 83 N. E. 714.*
within and without regulation should, if review is to be taken, depend upon real distinctions in every case.\textsuperscript{44} The reality of the distinction depends not upon the population, but upon the differing needs of communities included and communities excluded.

\textit{Classification by Inclusion. Within wide limits.} So long as the numerical limits of the class are large, the court will sustain the classification.\textsuperscript{46} Thus statutes applying to all cities having a population of not more than 30,000 and not less than 15,000 would generally be supported. And this even though the number of cities within this limit might not exceed one. Possibilities in this direction are numerous.\textsuperscript{46} The only limit upon this type of classification is that the act be not limited in operation as to time.\textsuperscript{47} And this although it is the general legislative practice to amend the law so as to exclude those cities whose population-increase brings them within the terms of the special act. The history of special legislation for Indianapolis, for example, indicates a constant increase in the population requirements so that the legislation at all times

\textsuperscript{44}"Where, then, shall we draw the line? It would be very simple to draw it at those purposes for which precedent in the past can be found, and to exclude all others. This test should be easy in application, but would be essentially vicious and erroneous. Growth and extension are as necessary in the domain of municipal action as in the domain of law." Sun Printing and Publishing Co. v. New York (1896), 8 App. Div. 230, 40 N. Y. S. 607.

\textsuperscript{45}"The act in question related to cities having a population of more than 50,000 and less than 100,000. . . * * * but it should be regarded as settled that provisions which are strictly germane to the government of cities are not to be regarded as local or special because the act may, at a particular time, apply to but one city, where it is framed on lines as broad as the statute in question." Bumb v. Evansville (1906), 168 Ind. 272, 80 N. E. 625. Cf. Rosen-cranz v. Evansville (1923), 194 Ind. 499, 143 N. E. 593; Fountain Park v. Hensler (1926), 199 Ind. 95, 155 N. E. 465.

\textsuperscript{46}Selected at the "right" point a wide population spread can include but few individuals, and a narrow classification can include many. In Indiana counties, for example, a population spread of from 275,000 to 400,000 would include no counties at all, from 40,000 to 45,000 would include only Knox, and 75,000 to 100,000 would include only Madison and Vigo. On the other hand a spread of only 775 would include the counties of Jefferson, Fayette, Rush, Morgan, Hendricks and Adams. The tendency is, of course, even more pronounced in cities.

\textsuperscript{47}To be discussed a little later in this article.
applies only to Indianapolis. Classification even within wide population limits is only an evasion of the identification rule.

Classification by Inclusion. Within narrow limits. Where the operation of the act is limited to communities with populations of small variation the court has in most instances refused to sustain the legislation. Thus, an act applying to counties with populations between 15,000 and 15,050 was held unconstitutional, for "the possibility that other cities and towns may hereafter meet the narrow conditions of the statute is not sufficient to take it out of the prohibition of the constitution." But if the populating limits had been "wide" this possibility would have been sufficient. Numerical breadth or narrowness, however, seems to be delusive. For example, a population-difference of only 1,000 can include an extremely large and harmonious class of cities if the difference is selected at the "proper" point in the concentration of population, while much greater "spreads" of population may, in fact, include no cities at all, or only very few. The whole question here is whether the court should look to the numerical differences or to the effect of the numerical differences. In as much as there is no validity in the differences themselves,

48 To cite only some of the more recent acts, see: 1895 Ind. Act, c. 13 (cities of over 100,000), 1915 Ind. Acts, c. 23 (cities over 100,000), 1921 Ind. Acts, c. 33 (cities over 200,000), 1931 Ind. Acts, c. 94 (cities over 300,000). It is significant to note that in the index to the Acts, these statutes are always under the heading "Indianapolis."


60 "The spread in population in this act is much smaller in per cent. than the spread of population covered by the act providing for the extension of the corporation boundaries of cities which was declared unconstitutional. The limited spread in population in the act before the court is one element, graphically expressed, which tends to and does limit the application of the act solely to the city of Evansville. * * * The result of such legislation is identification, not classification." Rosencrantz v. Evansville (1923), 194 Ind. 499, 143 N. E. 593.

61 See, supra, n. 46.

62 A similar problem exists in the law of wills. The question is, will you look to the words or the effect of the words? See, the conflict between Gray and Warren. Gray, Striking Out Words of a Will (1913), 26 Harv. L. Rev. 212; Warren, Fraud, Undue Influence, and Mistake in Wills (1928), 41 Harv. L. Rev. 509.

53 See, supra, n. 32.
it appears much more accurate to look to the effect of the differences. Indeed, there is, at best, but little reality to population classification. The validity of classification must depend upon the character of the particular community.

Population and the Time Factor. If the population class is limited by a particular census, the court has held the act unconstitutional on the ground that other cities cannot qualify under the act. This is, they say, identification, not classification.64 If, however, the population is fixed "according to the last preceding census" the act is valid, because other cities by an increase or decrease in population may acquire the benefits of the legislation.65 The distinction is, of course, specious, for the population requirement is usually changed by the time other cities are qualified. Further, as the validity of the act is dependent upon the relation of the special procedure to the conditions of the cities then within the purview of the legislation—an act unreasonable in itself should not be sustained on the theory that cities not within its terms might eventually be included.

Population and Geographic Factors. When population and some physiographic factor are combined, then the legislative purpose seems to be identification. Courts, however, have not always said that such acts were bad. Theoretically, populations of other communities might change so that if communities had the proper physical characteristics they might come within the terms of the act. This was the theory of Groves v.

64 "Were it not for the express declaration in section one, which absolutely fixes the census of 1870, and confines it to that alone, as the one by which population is to be determined, it might be viewed as general . . . (but) under such circumstances, a law of this character must be regarded as special . . ." Campbell v. Indianapolis (1900), 155 Ind. 186, 57 N. E. 920. "The result of such legislation is identification, not classification." Rosencranz v. Evansville (1923), 194 Ind. 499, 143 N. E. 593. But see, State ex rel. v. Kolsem (1891), 130 Ind. 434, 29 N. E. 595.

65 Likewise, the validity of the act seems to depend upon the condition of its operation at the time of attack and not upon its ability to become reasonable at some future time. The converse has already been asserted in Spencer v. Knight (1911), 177 Ind. 564, 98 N. E. 324. "And we can see no warrant for declaring it to be now a local and special law and unconstitutional, on the bare possibility that the legislature might add others to the class by a later enactment . . ."
The argument, though logical, is metaphysical. How soon can it be anticipated that another county in Indiana will contain three cities of 50,000 each? The unlikelihood of such growth need not destroy the validity of the act, however. It is possible that the act questioned in the Grove case, could have referred *eo nomine* to Lake County and still have been supported on the theory (if judicial review *must* be taken) that a general law was not applicable.

56 (1936), — Ind. —, 199 N. E. 137. "Plainly a law may be general in its provisions, and may apply to the whole of a group of objects having characteristics sufficiently marked and important to make them a class by themselves, and yet such law may be in contravention of this constitutional provision. Thus, a law enacting that in every city in the state in which there are ten churches, there should be three commissioners of the water department, would be a specimen of such a law," cited in Jordan v. Logansport (1912), 178 Ind. 629, 99 N. E. 1060. Cf. 1923 Ind. Acts, c. 26. "An Act authorizing the creation of port districts in cities of the second class having a population of more than eighty-five thousand and less than eighty-six thousand according to the last preceding United States census, which border upon navigable streams"