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THE WEST VIRGINIA MUNICIPAL HOME RULE PROPOSAL

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In the Autumn of 1936 the voters of West Virginia will be faced with the question, shall the "Municipal Home Rule Amendment" to the Constitution be adopted? The Act initiating the proposed amendment was adopted in March, 1935.[1] Previous efforts to secure passage of such an act had failed.[2] The amendment, upon adoption would constitute section 39 (a) of Article VI of the organic law. Section 39, it may be recalled, forbids special legislation as to eighteen specified subjects, including the incorporation of municipalities with population of less than 2,000 or the amending of their charters. The proposed new section, which follows, would render this restriction applicable to all municipalities:

> "No local or special law shall hereafter be passed incorporating cities, towns or villages, or amending their charters. The legislature shall provide by general laws for the incorporation and government of cities, towns and villages and shall classify such municipal corporations, upon the basis of population, into not less than two nor more than five classes.[3] Such general laws shall restrict the powers of such cities, towns and villages to borrow money and contract debts, and shall limit the rate of taxes for municipal purposes, in accordance with section one, article ten of the constitution of the state of West Virginia.[4] Under such general laws, the electors of each municipal corporation, wherein the population exceeds two thousand,[5] shall have power and authority to frame, adopt and amend the charter of such corporation, or to amend an existing charter thereof, and through its legally constituted authority, may pass all laws and ordinances relating to its municipal affairs: *Provided,* That any such charter or amendment thereto, and any such law or ordinance so adopted, shall be invalid and void if inconsistent or in conflict with this constitution or the general laws of the state then in effect, or thereafter, from time to time enacted."

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1 W. Va. Acts 1935, c. 22.

2 The writer does not now have access to the records but he has personal knowledge of the introduction in the legislature at the last two regular sessions of at least one bill to initiate a municipal home rule amendment to the Constitution and one to effect home rule simply by act of the legislature. The former was lost in the rush at the end of the 1933 session.

3 The Committee proposal required from "three" to five classes.

4 So much of this sentence as follows the last comma is new. The reference, of course, is to the Levy Limitation Amendment.

5 The Committee proposal fixed 5,000 as the minimum population figure.

The model used by the draftsmen was the proposal contained in the report of Governor Conley's Constitutional Committee submitted on December 1, 1930. This was, in turn, modeled on two sections of the Michigan Constitution.[6] The three changes which appear in the new draft will be considered later. In 1932 the writer published in this Quarterly an analysis of the Committee proposal considered in the light of West Virginia's situation.[7] While there has been no radical change in his views on the subject, he is emboldened to take up the issue again, now that the matter is to be put to the voters. It is of the greatest importance that in some manner critical interest in the proposal be stimulated.

The discussion that follows is addressed to the lawyers of West Virginia. It is manifest that the complex legal aspects of the proposed amendment will not be understood by the voters as a whole. That circumstance imposes the peculiar responsibility upon the Bar of the state to give the measure careful study and then to inform the electorate of its merits as a legal instrument. More than that, members of the Bar would be in a position to give intelligent guidance as to the merits of the substance of municipal home rule, once they had given it adequate study.

In the case of the Levy Limitation Amendment, adopted in 1932, we lawyers were sorely delinquent in failing to reveal the flaws in the Amendment in advance. The state awoke after the election on the brink of serious impairment of governmental services, which was entirely needless and inexcusable.[8] The proposal should have been more thoroughly worked out in the first instance, but, in any event, the Bar of the state should have laid bare its defects before it reached the polls. It behooves us, then, to take a look at the municipal home rule proposal while there is yet time.

The prime concern of the amendment is the abolition of special chartering. The merit of that reform is so plain to most people who are familiar with the career of special chartering in West Virginia that one is likely to be predisposed in favor of a proposal which would put an end to the practice.[9] Moreover, the casual reaction one has to the suggestion that municipalities be given

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[6] MICH. CONST. art. 8, §§ 20, 21.

[7] Fordham, *The West Virginia Municipal Home Rule Proposal* (1932) 38 W. VA. L. Q. 235, 329.

[8] The background of the amendment, its slipshod character and the painful process of trying to give it rational and workable application are all described by Sly and Shipman in Public Affairs Bull. No. 8, Tax Limitation in West Virginia (Bureau for Government Research, West Virginia University, 1934).

"Home Rule" is likely to be favorable due, it may be, to the attractive catch-phrase quality of the expression. It is associated with our traditional attachment to local self government. These very circumstances render it the more important that the matter be scrutinized with honest skepticism.

It may be a circumstance of some interest that when the writer first approached the subject in the fall of 1931 he entertained the notion that Municipal Home Rule would be a good thing for West Virginia. A study of the proposal of the Constitutional Committee upon the actual West Virginia background unseated that belief and impelled the conviction that the proposal itself was not satisfactory in any event.

1.

The phrase "municipal home rule" does not have any fixed content. At best, one cannot even approach preciseness of meaning except with reference to the law of a particular state. About the only element that may claim universality is the power of the local electorate, through representatives, to draft, adopt and amend the municipal charter. Even this authority may be little more than a shadow if the grant does not come directly from the constitution but is the fruit of so-called legislative home rule, under which it is left to the legislature to extend charter-making powers to cities. As a matter of description it is true that in most of the eighteen[10] home rule states the municipalities affected are given either complete or extensive law-making power with respect to matters loosely classed under the head of municipal affairs, municipal concerns, local affairs or some similar generality. But too often a confusing want of correlation between the charter-making power and the substance of municipal autonomy is present in the constitutional grant.

What may be termed strictly constitutional home rule makes an allocation of powers as between the legislature and home rule cities which is binding upon both. On the other hand the constitution may require or authorize the legislature to delegate legislative powers to home rule cities. Thus the legislature may be left with just as free a hand as ever it had in determining the

[9] The subject was considered at length in *op. cit. supra* n. 7, at 238 *et seq.*

[10] The seventeen home rule states as of April 1932, are listed *ibid.*, at 236, 237. The only recent convert is Utah, which adopted a constitutional amendment in November 1932, providing for the state's own brand of legislative home rule. UTAH CONST. art. 11, § 5.

measure of legislative power it would confer upon municipal governing bodies.

The constitution may or may not provide the machinery for exercising charter-making powers. It may be entirely general as to the domain of municipal authority or it may proceed to specify certain matters of municipal competence. Nowhere have home rule draftsmen had the hardihood to attempt complete specification in the organic law of the matters covered by such an expression as "municipal affairs". On the other hand, there are several examples of explicit statement of municipal powers with respect to subjects so affected with both general and local interests, that as applied to them the distinction between local and general concerns may be meaningless.[11]

The municipal home rule movement has not been so much a campaign for municipal autonomy as a protest against the evils of legislative abuse with respect to particular cities. Home rule has been sought more as a remedy for an existing ill than as an expression of a philosophy of government inspired by faith in the virtues of local autonomy.[12] It is most significant that the practical objectives of the movement have been largely associated with freeing large cities from the dominance of legislatures controlled by, often hostile, representatives from the less populous and wealthy communities of the state.[13] Metropolitan districts, moreover, are confronted with regional problems, which may demand governmental machinery and authority peculiarly adapted to their situations.

While home rule does not stop with placing a ban upon leg-

[11] California and Colorado have adopted the practice, as it were, of so amending the home rule provisions of their constitutions after unpopular decisions of the courts relating to the content of the general grant as to spell out the matter with respect to the subjects in question. The California provisions have been amended no less than six times. See CALIF. CONST. art. 11, §§ 6, 8 and 11; COLO. CONST. art. 20. The original Michigan and Ohio provisions contained some specification. MICH. CONST. art. 8, § 22 *et seq.*; OHIO CONST. art. 18.

The difficulty of applying the artificial distinction between general and local concerns imposes an almost impossible duty upon the courts. Two recent cases in which the courts were badly divided illustrate the fact. City and County of Denver v. Henry, 38 P. (2d) 895 (Colo. 1934) (traffic control); City of Ardmore v. Excise Board of Carter County, 8 P. (2d) 2 (Okla. 1932) (fiscal control — appropriation for airport lease).

[12] See MCGOLDRICK, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE, 1916-1930 (1933) 302.

[13] Thus, New York, Chicago and Milwaukee have been focal points in the home rule movements in their respective states. Chicago has been unsuccessful. In Maryland home rule is granted to Baltimore alone, the state's one great city. MD. CONST. art. 11A.

islative exploitation and tinkering with urban organization and interests it has not been thought out on the positive side. It takes small account of contemporary developments in public administration. The sum total of our governmental experience does not enable us inductively to formulate a sound, realistic principle of apportionment of governmental powers between such units as the state and its muncipalities. Something consistent with the immediate picture might be roughly approximated, but, like a law book, it would be out of date almost from the moment it was produced.

Federal-state relations are a matter beyond the scope of this paper but is is not amiss to point out that any fixed geographical apportionment of the powers of government is bound to be permeated with artificiality. Thus it is that the constitutional distinction between interstate and intrastate commerce survives today without a counterpart in the economic picture.[14] It is simply to be expected that the necessity of getting things done and done effectively will find a way when artificial legal barriers stand in the path. The irrepressible growth of so-called federal grants-in-aid to the state is no mere anomaly. It has been found to be a way to expand and improve public services in fields that are wont to be described as state matters. To attack the development as an invasion of state's rights is to miss the whole point. There will always be ample room for local or state responsibility in public administration without insisting that a line on a map shall determine the basis upon which we commit ourselves unalterably to conduct our public affairs. Municipal home rule ignores what I make bold to call the fact that effective public administration demands the adaptation of structure and authority to function and not the converse. Home rule, moreover, passes over the general interest in the maintenance of minimum standards of public service in all communities. It is as much a sense of self-interest as altruism that has brought us past the day when we will say of backward communities that we are not our brother's keeper.

2.

In pursuing the consideration of home rule as a potentiality in West Virginia the material will be divided into the following heads: the process of developing a home rule proposal, the demand

[14] This is not to say that the courts ought to ignore the constitutional distinction, althought ony state conception of it is not justifiable and even less desirable.

for the reform, the need for home rule, the substantive objections to the change and the adequacy of the proposal as drawn.

In the study of the subject, the results of which previously appeared in this Quarterly, the material was penetrated, it is believed, to a point justifying the expression of at least tentative views upon the merits. The subsequent career of public affairs in the state has not made the case for home rule any stronger. Nevertheless, the writer's present cause for concern is not so much the belief that the adoption of municipal home rule would be a mistake as the obviously blundering and superficial course which the process of amending the constitution is taking. It did not begin with a factual and legal study of existing municipal government in the state. The legislature assumed no responsibility on that score, neither were the inter-relationships of municipal and state administration re-examined, nor was the experience of the home rule states thoroughly canvassed. The decisions of the courts of other states on home rule questions are particularly significant to the draftsmen because they objectify flaws and twilight-zone difficulties which he can cope with deliberately.

At the very minimum the amendment and the enabling act should have been worked out together. The state's recent experience with the Levy Limitation Amendment should serve as a vivid object lesson as to the evils of putting the matter up to the people and leaving it to a subsequent legislature to try to anchor the amendment to the realities of our governmental structure and administration. It is a simple matter of applying the old adage, "look before you leap." Drafting enabling legislation in advance would be a great aid in exploring the implications of the subject. It is about the closest thing we have to a laboratory in which to put the abstruse generalities of the proposal to the concrete test. It is an especially valuable adjunct to good drafting because it reveals such defects as gaps, conflicts and ambiguities.

It is only fair to say that the Constitutional Committee whose proposal is largely followed in the present measure undoubtedly gave the subject serious study. But the members of that group had the entire constitution to consider. Manifestly they could not conduct a complete investigation of every subject considered. The writer ventures to suggest, moreover, that they were less advocates of home rule than opponents of special chartering. Their work did not relieve the legislature of the responsibility of approaching the subject from the ground up.

With the possible exception of the capital city, Charleston,[15] the demand for home rule has not been grounded upon legislative abuse, but is an indictment of the special charter system. So far as the writer is aware instances of failure to obtain adequate grants of power for municipal needs have been rare. It is true that in some communities in the state there is a definite sentiment for home rule, the strength of which I have no desire to discount. But, if it be true that this feeling is less a matter of espousing home rule than of waging war on special chartering the real objective could be obtained more simply. It is high time West Virginia was discarding the special charter system but it is plainly not desirable to proceed beyond satisfactory measures to that end without weighing what we are about in terms of different objectives.

3.

The proposed amendment requires whatever measure of home rule municipalities of over 2,000 inhabitants are to receive to be handed on to them through "general laws" by the legislature. It is not likely that this mandate would be disobeyed because the abolition of special chartering removes the temptation to legislative truancy. It may be, however, that some West Virginians will find the amendment to conceal what will be for them,[16] a joker. The proviso which follows the language of the amendment relative to home rule powers would render invalid any home rule charter provision or legislative act which was "inconsistent or in conflict with . . . . the general laws of the state." Now, "general laws" may connote either the form and operative effect of statutes, the nature of the subject matter to which they relate, or both. It is plain that the use of the expression in that part of the amendment which precedes the proviso employs the first connotation since it appears in contradiction to "local or special law." The subject matter of these "general laws", the incorporation and government of municipalities, combines elements of both local and general interest. In short, the legislature could confine home rule powers as narrowly as it pleased so long as it did so by statutes of general

[15] The very fact that Charleston is the capital city has made its charter an attractive item for legislative tinkering. Ripper legislation relating to the City of Williamson was attacked without success in Booten v. Pinson, 77 W. Va. 412, 89 S. E. 985 (1915).

[16] It seems hardly unfair to say that the voters are not to be expected to dig out for themselves the legal implications of the proposal. More than that, few of those with the requisite specialized knowledge are likely to do so in fact.

operation — by the home rule enabling act itself if no other. Whether the state Supreme Court of Appeals would apply the rule that the judicial interpretation of so much of the Michigan constitution as was borrowed by the amendment would be adopted, in effect, along with the amendment itself in West Virginia remains to be seen,[17] but it is worth observing that the Michigan cases support the present interpretation of "general laws".[18]

Does West Virginia need legislative home rule? The whole matter turns upon whether the cities of the state require charter-making powers to assure themselves adequate governmental machinery and authority. Now, a set of reasonably comprehensive general laws on the subject might be expected to suffice for any municipality not confronted with peculiar regional or metropolitan problems. Wheeling is the only community which may even be nominated for the exceptional class. The heart of legislative home rule would be the enabling act. Conceivably it might be so specific as to both the form and powers of municipal government that it would leave the municipal charter-making province a mere shell. Were the legislature to go to the other extreme by adopting the general language of the amendment the cities would have, at legislative sufferance, maximum competence within the constitution to supply possible gaps in structure and authority but such enabling legislation would introduce one of the worst feature of constitutional home rule. It would pass on to the courts substantially the whole responsibility for marking out the content of home rule powers because the amendment does not purport to delimit the charter-making authority further than to require that the product consist with general laws and the only additional specification as to municipal legislative powers is to confine them to the unsurveyable realm of "municipal affairs." A middle course, expressed in an enabling act which detailed as far as practicable the legislative notion of the content of "municipal affairs", but which left large leeway for local determination of matters of structure, would probably be the best alternative.

This preferred type of enabling act is least objectionable but that does not help to establish an affirmative need for legislative

[17] While the rule is more commonly applied in statutory construction it is applicable to the copying of a constitutional provision of another state. See 2 LEWIS' SUTHERLAND, STATUTORY CONSTRUCTION (2d ed. 1904) § 404, citing cases. It is open to doubt that the Supreme Court of Appeals would, in the present instance, consider the Michigan cases authoritative since several changes in verbiage have been made.

[18] They are collected in MCGOLDRICK, *op. cit. supra* n. 12, at 191, 192.

home rule. It would allow greater latitude and, in fact, room for experimentation, as to the structure of municipal government but there is little, if anything, to show that this circumstance has been a stimulus to creative action in states already on the home rule roster. A system of general laws outlining all the common forms of municipal government and giving municipalities their choice by local option, that is, the so-called optional charter system, would meet existing structural requirements.[19] True enough, that system means standardization but it remains to be shown that it would smother whatever local creative impulse there may be. Structural developments could find expression by changes in the general statute.

It has been urged in behalf of home rule generally that it operates to stimulate interest in public administration. If it really quickened the sense of civic responsibility of the voters that would be a brilliant star in its crown. Doubtless, citizens who actually participate in drafting charters would be so affected, and that is something, but it is a bit too much to expect home rule to arouse, on a sustained level, a zeal for good government in a public which to date has, with a few notable exceptions, displayed such spirit only once or twice in a generation.

4.

If there be no positive need for legislative home rule in West Virginia, what, if any, are the objections to it? Some of the counts against constitutional home rule lie here also, but with less gravity. In the first place, anything which would tend to revive the unfortunate sectionalism of West Virginia's past would be a blow to the state. A liberal grant of home rule powers by the legislature might well be expected to accentuate localism. That is not the path of progress. Independence of spirit is admirable; local self-sufficiency, on the other hand, is laden with the seed of stultification. The observation thins out as applied to the larger cities and might be substantially disposed of by limiting home rule to a few large centers.

To repose charter-making powers in local hands in communities large and small is to establish a breeding ground for legal complications and litigation. The courts might develop a definite pattern of interpretation of a statute which set up an optional

[19] Examples of this type of system are to be found in Iowa and Kentucky. IOWA CODE (1931) cc. 326-329; KY. STAT. (Carroll, 1930) cc. 116, 118.

charter system but they would be faced with a great diversity of charter materials under a home rule regime,[20] where problems of interpretation might often be well-nigh hopeless. True, uniformity of interpretation is not an ultimate but we have told only a part of the tale. It goes without saying that our small communities have their able people but it takes more than that to produce a good municipal charter. It is too much to hope that the requisite understanding of municipal government and public administration and grasp of drafting technique exists in such municipalities. Poor drafting may be the assassin of substance. The fact that there has not been a conspicuously large amount of litigation involving locally drafted special charters is not very comforting. Potentially, trouble is there although the inertia of the public may let almost anything get by. Home rule charters, moreover, could not be expected to facilitate administration in the growing list of services demanding state and local co-operation.

5.

One who is persuaded that municipal home rule would not be good for West Virginia can stand by in Hyperborean aloofness and scrutinize the immediate proposal as searchingly as he likes without feeling any responsibility for so-called constructive criticism. Skeptical analysis is entirely appropriate here, however, because the proposed amendment will go to the voters in its present form, barring a special session of the legislature the call for which covered the matter of repealing the initiatory act. If it is not so drawn as to give effective constitutional expression to its purpose it should not be adopted.

As an ultimate matter the desirability of legislative home rule is left to the decision of the voters. Unfortunately, most of them will not vote upon the specific proposal. Instead, each will, at best, vote upon the question, "shall West Virginia adopt municipal home rule as I conceive it?" This makes it the more important that the projected amendment be in finished shape, a well-designed legal tool, before it reaches the polls.

The amendment begins auspiciously with an explicit ban upon special chartering. It could have stopped right there and left no serious gap since the legislature would not require express author-

[20] The argument that few of the smaller municipalities would avail themselves of home rule powers is not compelling, even if true. At best it means that the evil would be quantitatively less and it is not to be overlooked that the potentiality of its expansion would always be present.

ity to enact general laws dealing with the incorporation of municipalities. It could even classify them for the purpose.[21] There is no objection, however, to including a mandate requiring general laws on the subject. While the prohibition upon local or special laws relates to "incorporating" cities, towns or villages or amending their charters the next sentence commands the enactment of general laws for the "incorporation and government" of cities, towns and villages. This creates a minor ambiguity because local or special laws providing for the "government" of municipalities is not forbidden. It is fairly safe to assume, however, that local or special laws concerning the "government" of municipalities would not have happy careers in the courts because obedience to the constitutional mandate would produce general laws covering the subject of municipal government and any inconsistent local or special act could not be permitted to stand without making the requirement meaningless. But the use of similar language in describing both the subject matter excluded from the range of local or special legislation and that required to be dealt with by general laws is desirable.

The legislature would be under orders, so to speak, to classify municipal corporations upon the basis of population into from two to five classes. For what purpose the classification is to be made is not stated. One might suppose that the purposes are incorporation and government but the conjunction "and" appears between the mandate as to incorporation and government and that relating to classification. So, taken literally, classification is required aimlessly. It would be easy to dispose of this point in a redraft by specifically relating the second clause of the compound sentence to the first one.

The limitation upon the number of classes of municipalities is wholesome but, as drawn, it does not eliminate the possibility of legislative subterfuge by way of a law general in form but applicable in fact to a single city. Thus, Huntington might be placed in a class by itself under a law creating a class of cities of over seventy-five thousand people. In order to cover the situation it would be necessary to specify laws which were general in actual application as well as form, somewhat after the manner of the New

[21] The doctrine of complete legislative supremacy over the being and powers of municipal corporations obtains in West Virginia. Booten v. Pinson, *supra* n. 15. Thus, the legislature could exercise its plenary power to supplant all special charters with incorporation on a classified basis under general law.

York and Wisconsin Amendments.[22] If experience of other states is relevant this precaution would not be amiss.[23]. The first clause in the next sentence of the amendment would require the legislature to embody in the same general laws, that provided for the incorporation and government of municipalities, restrictions on their "powers to borrow money and contract debts." The language used was copied uncritically from the Michigan Constitution. It originated, be it observed, in the Michigan Constitution of 1850, while the home rule provisions of that state were added in 1908 and 1912.[24] It so happens that the Constitution of West Virginia already contains a section which limits municipal indebtedness to five per cent of the assessed value of the taxable property within the territory of the corporation.[25] This section also requires that at the time of incurring indebtedness provision be made "for the collection of a direct annual tax, sufficient to pay, annually, the interest on such debt, and the principal thereof, within and not exceeding thirty-four years."[26] Judicial reconciliation of the proposal with this section of the constitution is quite possible but that does not excuse needless ambiguity.[27] It seems fair to say that the Michigan Constitution has been followed without awareness of the existing section on the subject. If this be a mistaken assumption it is none the less important that the ambiguity be dis-

[22] N. Y. CONST. art. 12, § 2 (forbids legislation which shall "be special or local either in its terms or in its effects"); WIS. CONST. art. 11, § 3 (home rule powers are subject "only to this constitution and to such enactments of the legislature of state-wide concern as shall uniformly affect every city or every village").

[23] The practice was carried so far in Ohio that draftsmen became careless about maintaining even the semblance of general law. The state supreme court in 1902 finally put the quietus on this practice by holding that any legislative classification of municipalities was unconstitutional and thereby overruling what had been thought to be a well-entrenched line of cases. State *ex rel.* Knisely v. Jones, 66 Ohio St. 453, 64 N. E. 424 (1902). This so undermined the jungle of charter material on the statute books that it was necessary to call a special session of the legislature to provide a way to tide the municipalities over until a new system could be established. See MCBAIN, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE (1916) 73-74.

[24] The requirement was, in 1908, carried over into art. 8, § 20 of the Constitution of 1908. The home rule grant appears in the following section.

[25] WEST VA. CONST. art. 10, § 8.

[26] See the recent case, Warden v. City of Grafton, 176 S. E. 706 (W. Va. 1934).

[27] The ambiguity was noticed in (1932) 38 W. VA. L. Q. 329, 336. It may be that the effect of the new provision would be deemed by the courts simply to require the legislature to regulate within the existing debt limit. The tax requirement would also survive under this interpretation. The command to the legislature would be superfluous, however, because that body has already regulated the subject within the bounds of the present constitutional provisions. W. VA. REV. CODE (1931) c. 13, art. 1.

pelled by redrafting the proposal. Were it the design of the proposal to supplant the existing debt limit section with a provision leaving the matter entirely with the legislature there should be some independent study of the desirability of the change before undertaking to redraft the proposal.

The proposal of the Constitutional Committee, like the Michigan Constitution, contained a requirement that the set of general laws contemplated by the amendment "limit the rate of taxes for municipal purposes." The present legislative proposal adds the words, "in accordance with section one, article ten of the constitution of the state of West Virginia."[28] The reference is to the Levy Limitation Amendment. The effect of the revised provision is to require legislative action pursuant to an existing constitutional provision which is not self-executing. (It would not do that accurately, however, since the Levy Limitation Amendment classifies property for tax purposes, specifying a different maximum levy for each class and thus contemplating different rates, while the home rule proposal refers to the "*rate* of taxes".) Such a mandate is superfluous. It would be better to leave the subject untouched.

Under the self-same general laws "the electors of each municipal corporation, wherein the population exceeds two thousand, shall have power and authority to frame, adopt and amend the charter of such corporation, or to amend an existing charter thereof, and through its legally constituted authority, may pass all laws and ordinances relating to its municipal affairs: *Provided,* That any such charter or amendment thereto, and any such law or ordinance so adopted, shall be invalid and void if inconsistent or in conflict with this constitution or the general laws of the state then in effect, or thereafter, from time to time enacted." This language and the rest of the long, involved sentence of which it is a part contains the home rule grant. While the quoted words do not directly command enabling legislation the intention to require the legislature to delegate the charter-making power is clear. The absence of any attempt to mark out the substantive range of the power to be delegated, further than to require consistency with the constitution and general laws of the state, is rendered conspicuous by the subsequent language providing that the legislative body of a home rule municipality "may pass all laws and

[28] This reference to the constitution is awkward and wordy. A correct reference appears in the last sentence of the proposal.

ordinances relating to its municipal affairs".[29] The range of subjects which might be included in a municipal charter might be quite different from the nebulous realm of "municipal affairs" but the requirement of consistency with general laws immediately makes the difference potentially immaterial. It means that the legislature by enacting laws of general application may confine both municipal charter-making and legislative powers as narrowly as it pleases.[30] This is a desirable feature, in net effect, since it would leave the state with legislative home rule and not imbed the system deeply in the constitution. But despite the effect of the proviso requiring consistency with general laws the affirmative grant of charter-making and law-making powers should be clearly correlated. It is not helpful to make simply what Professor McBain calls the adjective grant of power to frame a charter, and then make a separate grant of municipal law-making power in substantive terms without relating the latter to the charter authority.[31] The charter is the organic law of the municipality and logically, if we adhere to the notion that municipal legislative powers are not plenary but only such as are delegated by constitution or statute, law-making powers would flow from it. The sentence which makes the home rule grant leaves us in perplexing doubt as to whether the law-making power is conferred upon the electors or the corporation. (It is clear that it would be exercised directly by the corporate governing body in either case.) The matter is not unimportant. If the power were given the corporation it would exist apart from the exercise of the charter authority and thus would not be properly correlated with the power to make a charter. On the other hand, if the legislative power be deemed to depend upon the exercise of the charter authority, municipalities which continued under special charters would be without the law-making power contemplated in the proposal until they make it available by a charter amendment. Assuredly, these matters could be dealt with more intelligibly in a redraft of the proposal.

The amendment would confer the charter-making power upon the "electors" of a municipality. Must they act directly or might the legislature provide a method of representative action? The

[29] This law-making power, it appears, must be rendered available by enabling legislation. *Infra* p. 48.
[30] See above n. 18, *supra*.
[31] *Op. cit. supra* n. 23, at 668-669.

latter view has been taken by the Supreme Court of Michigan.[32] This undoubtedly conformed to the intention of the draftsmen but it would have cost very few words to have explicitly authorized representative action.

Only municipalities eligible for home rule, that is, those with populations exceeding two thousand, would enjoy the grant of law-making power. Some difficulty attends the question whether the availability of the power would have to await the enactment of enabling legislation. The answer is probably "yes" because the sentence which grants both the law-making and charter-making authority begins with the words "Under such general laws", which doubtless modify all that follows.

Eligibility for home rule was limited by the Constitutional Committee proposal to municipalities "wherein the population exceeds five thousand." The present proposal cuts the minimum population figure to two thousand. This, as a matter of policy, is a case of going from bad to worse. It simply has not been made to appear that the smaller municipalities of the state have the slightest need of charter-making powers or could exercise them competently, were they granted. If the matter were vital to local responsibility for good local government the situation would be different but that is not the case. The heart of local autonomy is local control of and responsibility for local administration, not local charter-making. The Constitutional ban upon special chartering is the only substantial limitation in the proposal upon legislative dominion over municipalities. The measure of home rule that would be extended to West Virginia municipalities under it would simply be a new and less objectionable form of special chartering. But it would still be a system of numerous independent special laws, which would inevitably be freighted with a large portion of error, ambiguity and conflict. The writer has not had extensive practical experience with special legislation but if the measures within the range of that experience have been fairly representative the quality of that body of our public law, especially in matters of draftsmanship, is distinctly inferior.

The essential kinship of legislative home rule and special chartering becomes more evident when one examines the perfunctory legislative process in special charter matters. The draftsmanship as well as the impulse for charter changes is almost uni-

[32] Attorney General *ex rel.* Hudson v. Common Council of Detroit, 164 Mich. 369, 129 N. W. 879 (1911). See McBAIN, *op. cit. supra* n. 23, at 613-614.

versally local. Frequently referendum classes are attached as a means of resting ultimate responsibility upon the municipal electorate. The legislature performs the desultory function of rubberstamping the local measure. From the standpoint of the legislature home rule would end the special charter evil and thus lift a needless burden but, regarded in the large, much of the substance of that system would remain to clutter the jurisprudence of the state.

The amendment would permit home rule cities to amend existing special charters, thus taking up where the legislature is required to leave off in the special chartering process. Whether this should be permitted is, of course, a matter of policy. It would not be so objectionable as applied to special charters which are compact workable instruments.

In addition to the second alternative of starting afresh with a new home rule charter, might the legislature offer still another choice in the form of simple incorporation under general law? The point is very much in doubt. With reference to the Michigan Constitution Professor McBain has said that the power is probably denied by implication.[33] It is believed that the point is debatable but it is enough to say here that good drafting would have left no room for serious question. An additional alternative would increase the diversity of municipal organization and to that extent would be open to objection. The superiority of the system of simple incorporation under general law seems great enough to overbalance that consequence, however.

Summary

1. The question of policy.

While opinion on the merits will differ widely the view recorded in the foregoing pages is that municipal home rule is not desirable in West Virginia. A self-executing constitutional grant of home rule would be seriously objectionable. Legislative home rule would be less vulnerable and much would depend upon the nature and quality of enabling legislation, At best, however, it does not appear that West Virginia needs such a system even were the objections to local charter-making minimized.

Incorporation under general laws which would set up the optional charter system would be preferable as a successor to

[33] *Op. cit. supra* n. 23, at 607.

special chartering. Limited classification under laws that would be actually general in application is also desirable.

2. The adequacy of the immediate proposal.

Quite apart from considerations of the substance the present draft of a constitutional amendment is not acceptable. It is so unsatisfactory in form and detail that it should be rejected at the polls. There is no reason why proponents of municipal home rule in West Virginia should not have the verdict of the electorate upon the subject once it has been properly developed to that point. It is too plain for argument, however, that the matter is not now ripe for a referendum. The present proposal is the superficial product of inadequate study. The real question at the election will relate to the specific proposal and not municipal home rule *in vacuo*. It is, then, of the utmost importance that the electorate be not imposed upon.