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THE WEST VIRGINIA MUNICIPAL HOME RULE PROPOSAL

II. *Analysis of the Proposal*

JEFF B. FORDHAM

In the first instalment of this paper, which appeared in the last issue of the *Quarterly*, it was sought to present an outline picture of the legal position of municipalities in West Virginia's governmental system upon a background of appropriate historical materials. The immediate purpose is to consider the home rule proposal which has appeared on the scene so depicted.

On December 1, 1930 the Constitutional Commission appointed by the Governor of West Virginia, in pursuance of a joint resolution of the Legislature, for the purpose of studying the Constitution of the state with a view to suggesting changes required to bring that document up to date, filed its very able report. Among the more interesting recommendations of the Commission was the following municipal home rule amendment,²⁸ a consideration of the merits of which has provoked this discussion :

“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 three nor more than five classes. 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. Under such general laws, the electors of each municipal corporation, wherein the population exceeds five 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 legal 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.”

²⁸ For a general account of the work and recommendations of the Commission see White, *The Amendments Proposed by the West Virginia Constitutional Commission* (1931) 38 W. VA. L. Q. 1.

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Some consideration should be given to the general design of the amendment before attempting to analyze it in detail. Is the scheme directed toward establishing a realm of municipal autonomy independent of legislative control? Is the purpose simply to do away with the special legislative chartering of municipalities? Or is it sought also to give cities a measure of self-government subject to the control of the legislature through laws of general application? The report of the Commission does not render the matter clear. The explanatory statement that "city charters would no longer be amended by the Legislature but would be amended by the local communities in accordance with general law, thus eliminating much special legislation and the evils incident thereto" seems to point to the third suggested purpose.

Looking objectively to the language used it is clear that special legislative chartering of cities is forbidden. It is clear, moreover, that complete freedom from legislative control is not contemplated. The amendment is not self-executing. Charter-making powers are to be exercised under "general laws" classifying municipalities for purposes of incorporation and government. If a city is dependent upon the legislature to render available through general laws both the machinery of home rule and the content of home rule powers then no positive measure of independence from legislative control is given. And that seems to be the effect of the proposal. This view is supported by two considerations. The fact that general laws are to be enacted providing for the "government" as well as the "incorporation" of cities is persuasive since "government" may be taken to include both the framework and powers of a governmental unit. Conceivably it could be urged that this was intended to apply only to cities which did not adopt home rule. But there is no express warrant for the distinction. In fact, it is expressly provided that charter-making powers, at least, be exercised under the general laws as to incorporation and government.

The second consideration is the requirement that the charter and ordinances of a home rule city be consistent with the Constitution and "general laws" of the State, present and future. What is meant by "general laws"? As used in the first part of the proposal the phrase referred to the form and operative effect of statutes rather than the nature of their subject matter since it was used in contradistinction to "local or special laws". As

used in the restriction it does not appear but that the same connotation was employed. True, a city is authorized to "pass all laws and ordinances relating to its municipal affairs", but that authorization is subject to the restriction just stated. At best, ordinances relating to "municipal affairs" would be valid and effective without express statutory extension of power until the field were occupied by an inconsistent statute.

This interpretation is supported by the judicial construction of the Michigan amendment,³⁹ which the West Virginia proposal follows in substance. The Supreme Court of Michigan has gone to the point of deciding that home rule powers must first be made available by statute. Thus it was held that Detroit for want of express legislative delegation of the power could not resort to zoning.⁴⁰ Moreover, the Legislature of Michigan, though acting promptly and liberally in extending home rule powers,⁴¹ has operated from the start on the theory that it had authority to determine what must and might be included in and what must be excluded from a home rule charter.⁴²

If the above interpretation is sound the proposed amendment would effect at best only one object which could not be attained without constitutional changes. No constitutional amendment is required to end special chartering, so far as the power of the legislature is concerned. In the absence of constitutional limitation the power of the legislature with respect to municipal charters is plenary.⁴³ There being no limitation requiring special legislative chartering the legislature could repeal all special charters and set up a system of incorporation under general law.⁴⁴

³⁹ Constitution of Mich., art. 8, §§ 20-25. The West Virginia proposal follows sections 20 and 21 but does not make any reference to specific powers of home rule cities whereas the remaining sections of the Michigan amendment set out many specific powers that home rule cities shall have and impose specific limitations on municipal action. The Michigan amendment and enabling act are discussed in MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* (1916) c. 16, pp. 604-620; Bromage, *What Municipal Home Rule Means Today. III. Michigan* (1932) 21 NAT. MUN. REV. 176; Jacobson, *Charter Amending Powers of Cities Under Michigan Home Rule Legislation* (1916) 14 MICH. L. REV. 281.

⁴⁰ *Clements v. McCabe*, 210 Mich. 207, 177 N. W. 722 (1920). The Enabling Act was so amended the following year as to authorize zoning. See *Damley v. Ingham*, 242 Mich. 247, 218 N. W. 766 (1928).

⁴¹ Pub. Acts of Mich., 1909, No. 279.

⁴² See Jacobson, *op. cit. supra* n. 39.

⁴³ *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985 (1915). See the discussion concerning the asserted inherent right to local self-government in the first instalment of this paper. 38 W. VA. L. Q. 235, 243-245.

⁴⁴ The Constitution of West Virginia, art. 6, § 39, par. 8, simply forbids special chartering of municipalities under 2,000 and has no further effect.

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As a practical matter, of course, no one is naive enough to expect the legislature to take this step and thus the proposed prohibition upon special chartering is necessary to effect the purpose. Likewise the legislature now has power to control the rate of municipal taxes by general law and may regulate municipal indebtedness within the limit now fixed by the Constitution.⁴⁵ Whether the courts would uphold a statute delegating the charter-making power, however, is open to doubt. Such a measure goes a step beyond the well-recognized local option idea⁴⁶ in the degree of power delegated, if not in principle. The idea has been tried in other states. The courts are in discord concerning the validity of the delegation.⁴⁷ On the merits, the constitutional objection seems unsound.⁴⁸ Whatever be the present powers of the legislature it is obvious that the mandate of the proposed amendment would be calculated to impel action that would not otherwise be taken. Thus, as a practical matter, abolition of special chartering and the granting of some measure of home rule require a constitutional amendment. If the notion that the amendment provides for legislative home rule, that is, home rule subject to the control of the legislature, is acceptable, it remains to examine the probable effect of it in detail.

Incorporation of Municipalities by General Law

It was concluded in the first instalment of this paper that special chartering has been a distinct failure and should be abolished. Doubtless that failure was the chief reason for the home rule proposal. In any event the chartering of municipal corporations by special act would be entirely abolished and provision made for the "incorporation and government" of cities, towns and villages by general law, which would divide them for the purpose into from three to five classes based on population. Thus the prohibition against future special chartering is clear enough. Other matters are left more obscure, however.

After the legislature shall have acted in pursuance of the

⁴⁵ The limit is five per cent. of the assessed value of the taxable property within a city. Constitution of West Va., art. 10, § 8.

⁴⁶ With respect to the use of the device in charter-making see generally McQUILLIN, MUNICIPAL CORPORATION (2d ed. 1928) § 149.

⁴⁷ The cases are cited and discussed by McBain, *The Delegation of Legislative Power to Cities* (1917) 32 POL. SC. Q. 276, 391, 405-409.

⁴⁸ There is no express constitutional limitation and actual charter-making is just one step removed from optional charter privileges under general law. This was Professor McBain's conclusion. McBain, *op. cit. supra* n. 47, 410-411.

amendment would existing special charters still stand? It seems that they would continue since the prohibition on special chartering is prospective. Moreover, it is provided that under the general laws extending home rule a city may amend an existing charter. In Michigan the original amendment was held not to permit the amending of existing special charters⁴⁹ but was subsequently changed to authorize such action.⁵⁰ This means that none of the special charter municipalities in West Virginia (which include all with populations exceeding 2,000) would be compelled to organize under the general law unless the legislature expressly repealed all special charters. It is doubtful that the authorization to home rule cities to amend existing charters would be an implied limitation on the legislature's power to repeal by general law since the reference is probably to existence as of the time the amendment is made.⁵¹

Might the legislature make provision by general law for the incorporation of cities previously operating under special charters which did not desire home rule? An affirmative answer as to communities under 5,000, the minimum home rule population, is clearly required since the legislature is expressly commanded to provide for incorporation by general law and municipalities under 5,000 would be ineligible for home rule. It is not likely that cities of over 5,000 would prefer simple incorporation under general law without home rule both to keeping special charters with power to amend and to the home rule power to adopt a new charter. However, the power would probably exist to provide for whatever demand of this sort there might be. If this were not so home rule would be compulsory with respect to changes from or in existing charters and there is nothing in the proposal to suggest compulsion. Thus a city above 5,000 might retain its special charter with power to amend, adopt a home rule charter or shift to incorporation under general law.

The wisdom of permitting a city to amend an existing special charter has been questioned. Professor McBain has expressed the view that the power is undesirable because it merely shifts the

⁴⁹ Attorney-General *ex rel.* Vernor v. Common Council of the City of Detroit, 168 Mich. 249, 133 N. W. 1090 (1912).

⁵⁰ The provision as amended is Constitution of Mich. art. 8, § 21.

⁵¹ The point is largely academic, however, since under even a fairly liberal enabling act a city could adopt the substance of an old special charter as a home-rule charter. Certainly it was not intended that the legislature have power to repeal a special charter after it had once been amended by a city. It could, of course, amend the enabling act.

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seat of the "tinkering" which tends to render a charter a disorganized hodge-podge.⁵² This criticism, however, applies to the amendment of home rule charters since, according to his view, piece-meal amendment by any authority may in time put a charter in an imbroglionic state. But to limit amendment to general revision would render amending too difficult. Moreover, it is not perceived that a specific provision requiring periodic revision would be effective because there would be no way to enforce it. The matter is one which with respect to home rule charters, at least, must be left to the good sense of the given community. A prohibition upon amending special charters would be more practicable. Even there, however, a city could go through the form of adopting its old special charter as a home rule product.

The common device of classifying cities according to population is convenient and bears some relation to the factual differences that make for differences in the organization and powers of municipal corporations. There would be no need for extensive classification in West Virginia. Since the proposal makes communities under 5,000 ineligible for home rule, they would probably be put in a separate class and properly so. It is doubtful, however, that the population requirement for home rule should be so low. Twelve of the twenty-two cities in the state of over 5,000 have populations of less than 10,000. It is hardly likely that they will have such peculiar problems of local organization that none of the stock forms of municipal government which might be made available under general law would meet the situation. And, of course, the smaller the city the more unhappy the draftsmanship of home rule charters is likely to be.

It seems that it has always been possible to evade prohibitions against special chartering. The most used device has been that of enacting a law general in form but special and local in application. Thus in classifying municipalities by population a class may be created in which only one city will fall.⁵³ This practice was so overworked in Ohio that the state Supreme Court finally invalidated it.⁵⁴ Under the West Virginia proposal the opportunity for abuse of the legislative power to classify cities is not offset by

⁵² MCBAIN, *op. cit. supra* n. 39, 616-618.

⁵³ Such statutes are usually upheld. See *State ex rel. City of Virginia v. County Board of St. Louis County*, 124 Minn. 126, 144 N. W. 756 (1913); *Eckerson v. Des Moines*, 137 Ia. 542, 115 N. W. 177 (1908).

⁵⁴ *State ex rel. Knisley v. Jones*, 66 Ohio St. 453, 64 N. E. 424 (1902).

the availability of constitutional home rule powers. Experience suggests, however, that the likelihood of abuse is not significant.

The Machinery of Home Rule

As previously intimated the home rule proposal would not be self-executing. In some states the amendment provides the method by which home rule powers are to be exercised⁵⁵ but the West Virginia proposal would leave the matter entirely to the legislature. This involves both the advantage of flexibility and the disadvantage of reliance upon the legislature. The Constitutional Commission seems to have been committed to the theory that a constitution should contain only fundamentals leaving detail to legislative action.⁵⁶ That point of view is sound as a working thesis but is capable of over-emphasis as well as neglect. But it would avail little to imbed the machinery of home rule into the Constitution unless its substantive content was also marked out there.

Although it is clear that a city could not exercise charter-making power until the legislature had provided appropriate machinery could it exercise the law-making powers granted by the amendment without first having adopted a charter? Common sense supports an affirmative answer.⁵⁷ This view, moreover, is sustained by the fact that the charter making power may be exercised simply by amending existing special charters.

The answer to the question whether the grant of law-making power must be rendered available by general law is deeper in the shadow. The writer cannot satisfy himself that the language used is subject to convincing interpretation on the point⁵⁸ and speculation would not be profitable. The difficulty lies in the drafting of the proposal. The reader will have observed that it devotes one long, involved sentence, which constitutes over half its total length, to the granting of home rule powers.

To obviate at least the more general difficulties of interpretation the proposal might be redrafted in sections and stated in full-

⁵⁵ *E. g.*, Constitution of Mo., art. 9, § 16; Constitution of Calif., art. 11, § 8; Constitution of Wash., art. 11, § 10; Constitution of Colo., art. 20, § 4; Constitution of Okla., art. 18, §§ 3, 4.

⁵⁶ See White, *op. cit. supra* n. 38, 2-3.

⁵⁷ The Ohio amendment has been so construed. *Village of Perrysburg v. Ridgway*, 108 Ohio St. 245, 140 N. E. 595 (1923).

⁵⁸ As previously indicated the Michigan amendment is construed to mean that law making powers, at least unusual and far-reaching ones like zoning, must be rendered available by the legislature. *Clements v. McCabe*, *supra* n. 40.

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er, more specific language. It is no answer to say that generality is a desirable quality in a constitutional provision because it leaves details to that more plastic authority, statutes. Home rule provisions are inclined to be so general that the making of constitutional law is left, to an abnormal extent, to the courts. Generality, moreover, does not necessarily mean flexibility; it may well simply mean uncertainty till a court has spoken and inflexibility thereafter.

Limitation by General Law Upon Municipal Indebtedness and
Taxation

West Virginia now had a constitutional provision limiting municipal indebtedness to five per cent. of the assessed value of the taxable property within a city.⁵⁹ The legislature has regulated the subject within the range of the maximum limit.⁶⁰ Under the proposed amendment the legislature would be required "to 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" by general laws. No reference is made to existing restrictions. It may be possible to reconcile the proposal with the existing constitutional provision⁶¹ but careful drafting requires that they be expressly harmonized. If it be desirable to render the maximum debt limit more flexible by placing the matter in the hands of the legislature there is all the more reason for redrafting this part of the proposal.

It is rather generally considered salutary to provide some measure of supervision of local fiscal matters by state authorities. The idea is, infact, already being exploited in West Virginia. Municipal accounts are audited under the direction of the State Tax Commissioner.⁶² There is no reason why the practise should not be continued under a home rule system.⁶³

The power to tax is conceived to be a legislative power with which the legislature may endow municipal corporations. In West Virginia the Constitution expressly authorizes the legislature to empower municipal corporations to assess and collect taxes

⁵⁹ Art. 10, § 8.

⁶⁰ W. VA. REV. CODE (1931) c. 13, art. 1, § 3.

⁶¹ Thus, conceivably, by construing the two provisions together, the proposal might be said to be a mandate to the legislature to regulate the subject within the present maximum limit.

⁶² W. VA. REV. CODE (1931) c. 6, art. 9, § 5.

⁶³ The Ohio amendment specifically authorizes statutory provision for the practise. Constitution of Ohio, art. 18, § 13.

for "corporate purposes",⁶⁴ but is silent with respect to the tax rate. The legislature, however, has acted upon the subject by limiting the rates of taxes of local governmental units generally.⁶⁵ The reference in the proposal and in the statute is, of course, to the general property tax which is the chief source of revenue for municipalities as well as counties and school districts. So long as the general property tax remains an important source of revenue for local units of government which may overlap, it is obvious that the legislature should continue to have power to coordinate and control their several tax rates. It is believed that investigation will reveal an unnecessary duplication in local governmental machinery the correcting of which would bring about a revision in the general property tax.

If the legislature proved liberal in extending home rule powers cities might resort to other forms of taxes not expressly denied them by statute or otherwise inconsistent therewith.⁶⁶ The necessity, however, for ultimate legislative control over tax matters to effect an equitable distribution of the tax burden on the one hand and of the benefit on the other is manifest.

The Grant of Home Rule

The central problem of home rule from the standpoints both of draftsmanship and of the practical functioning of local administration has been the distribution of powers between local and state agencies. The reader will recall the suggestion that the West Virginia proposal would not set up constitutional home rule. It would simply shift the problem of distribution of powers to the legislature. Thus it would be for the legislature to indicate what might, must and must not be included in a home rule charter. Doubtless that body would in good faith leave free rein as to the form of municipal government but be more specific as to the powers thereof.⁶⁷ But there is nothing in the proposal to preclude the enactment of an enabling act regulating in detail the very form of government available to home rule cities.

Even though it were decided that the law-making power was

⁶⁴ Art. 10, § 9.

⁶⁵ W. VA. REV. CODE (1931) c. 11, art. 8.

⁶⁶ Thus in Minnesota a charter provision for a wheelage tax not authorized by statute was upheld. *Park v. City of Duluth*, 134 Minn. 296, 159 N. W. 627 (1916).

⁶⁷ The Michigan Enabling Act, however, went so far as to prescribe certain officers which every home rule city must have. Pub. Acts of Mich., 1909, No. 279.

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available without the aid of an enabling act a city could exercise the power freely only where the field was not already occupied by statute. Insofar as an applicable statute existed ordinances would have to conform thereto no matter how local the subject matter. That appears to be the effect of the proviso of the proposal voiding charter provisions and ordinances in conflict with "the general laws of the State". The legislature could dispose of this limitation when desired by expressly providing in a statute that it should be inapplicable to home rule cities. This could be done, of course, only with respect to matters appropriate for municipal action.

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The discussion thus far involves an attempt to interpret the proposal along broad lines in order to indicate its general effect. The writer is not satisfied that the views expressed are watertight. The language of the proposal is too obscure for a commentator to be sure of his ground. That is one justification for considering another line of interpretation. It will afford a basis, moreover, for appraising in part the home rule experience of other states.

Conceivably the proposal may be taken to apportion governmental powers between the central government of the state and its municipalities according to whether a given matter is a local or general concern. Under this view the legislature would have the function of providing the machinery but not the content of home rule by general law. Insofar as a city in charter-making or legislating remained within the limits of "municipal affairs" its actions would be paramount and would prevail over conflicting statutes.⁶³

The most significant difference between the amendment as so conceived and the first suggested interpretation is that as a practical matter under the former the problem of gradually marking out the content of home rule would devolve directly upon the courts whereas under the latter the determination would be primarily, at least, for the legislature.⁶⁴ One does not require an account of the judicial experience with the former view to appreciate difficulties it presents. Apportionment of governmental powers on the basis of a distinction between general and local concerns sets up a standard at once so vague and artificial that its

⁶³ This is the situation in California, Oklahoma and Texas, for example.

⁶⁴ The legislature, of course, could by a very general and liberal enabling act shift the problem at once to the courts.

application involves an abnormally large area of doubt. Little wonder Judge McFarland of the California Supreme Court was moved to say concerning the California amendment: "The section of the constitution in question uses the loose, indefinable, wild words municipal affairs, and imposes upon the court the almost impossible duty of saying what they mean."⁷⁰

An examination of the cases will indicate the force of Judge McFarland's observation. That exercise, moreover, has relevancy to the West Virginia proposal for, though it be construed to render home rule entirely a matter of legislative delegation, the legislature might make a full unqualified extension of home rule powers the exercise of which would present many judicial problems as to their "localness". Thus under the Minnesota amendment, the state legislature gave home rule cities an extensive power over their frames of government and "municipal functions" as the legislature could have exercised before the adoption of the amendment.⁷¹ And the requirement of consistency with state law has been so construed that home rule charters prevail over statutes on the same subject "except in those cases where the charter contravenes the public policy of the state as declared by general laws, and in those instances where the legislature expressly declares that a general law shall prevail" or the purpose appear by implication.⁷² This interpretation gives home rule cities full sway as to "municipal concerns" so far as the field is not occupied by the legislature in the manner indicated.⁷³

It being impossible to present in a brief way the judicial material on the application of the home rule concept to all func-

⁷⁰ *Ex parte Braun*, 141 Cal. 204, 213, 214, 74 Pac. 780, 784 (1903), quoted in *McBain, op. cit. supra* n. 39, at 279. And Jones, J., in *State ex rel. Toledo v. Cooper*, 97 Ohio St. 86, 91, 119 N. E. 253, 254 (1917) had this to say about the Ohio amendment:

"Indisputably these provisions are hazy and ambiguous, and it is unfortunate that the members of the constitutional convention did not more fully define the powers of local self-government committed to chartered cities, and thus relieve the courts from exercise of wide discretion and from never ending appeals for construction of this constitutional clause, and likewise relieve the judicial department of the government from the criticism too often made that it has exercised the power of framing a Constitution—a power that has been lodged solely in the people."

⁷¹ *Minn. Laws*, 1899, c. 35. See Anderson, *Municipal Home Rule in Minnesota* (1923) 7 *MINN. L. REV.* 306, 308-313.

⁷² See *American Electric Co. v. City of Waseca*, 102 *Minn.* 329, 113 *N. W.* 899 (1907); Anderson, *op. cit. supra* n. 71, 322-326.

⁷³ What constitutes a declaration of the public policy of the state is extremely hazy and, thus, the limitation is largely judicial.

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tions in which cities participate only a few important functions will be considered here. The inquiry will be limited to utilities, protection, education, health and sanitation, street control and local improvements.

Utilities

In several states home rule provisions expressly empower cities to own and operate utilities.⁷⁴ In New York where there is no express grant of the power it has been held that a city may not engage in the business of common carrier by bus.⁷⁵ That is, doubtless, a too narrow view of the matter. Certainly with respect to the bare determination of whether to engage in the business the matter is for the city. The basic power to act might as readily be left to it. (Legislative power to limit municipal indebtedness could be used to devitalize the power, however, were its existence conceded).⁷⁶ It has been decided that home rule cities have power to engage in the businesses of supplying their citizens with wood and coal,⁷⁷ gasoline⁷⁸ and ice,⁷⁹ — services which the courts are yet unwilling to classify as utilities for purposes of regulating privately owned and operated enterprises. The regulation of rates, however, is usually considered a general concern.⁸⁰ This means that a home rule city could protect its citizens directly only by operating utilities itself.⁸¹ Even then the rates could be

⁷⁴ Constitution of Mich., art. 8, § 23; Constitution of Ohio, art. 18, § 4. In Oklahoma the Constitution, art. 10, § 27, extends the power to cities generally apart from home rule.

⁷⁵ *Browne v. City of New York*, 241 N. Y. 96, 149 N. E. 211 (1925).

⁷⁶ It is significant, moreover, that aside from the rate-making power the legislature may contral the reaping of a profit from municipal utility operations. Thus it has been held that net income from a city water system was taxation, in effect, and since taxation was legislative in nature a statute construed to forbid the transfer of any surplus from water departments to general city accounts was valid and binding. *Cincinnati v. Roettinger*, 105 Ohio St. 145, 137 N. E. 6 (1922).

⁷⁷ *Central Lumber Co. v. City of Waseca*, 152 Minn. 201, 188 N. W. 275 (1922).

⁷⁸ *Standard Oil Co. v. City of Lincoln*, 114 Neb. 243, 207 N. W. 172 (1926), aff'd. 275 U. S. 504, 48 S. Ct. 155 (1927).

⁷⁹ *City of Denton v. Denton Home Ice Co.*, 27 S. W. (2d) 119 (Tex. Comm. App. 1930).

⁸⁰ *State ex rel. Kansas City Pub. Serv. Co. v. Latshaw*, 30 S. W. (2d) 105 (Mo. 1930). (Holding that rate regulation is a police power of the state that could not be abridged by a statute authorizing cities to contract as to rates!) *Traverse City v. Railroad Commission*, 202 Mich. 575, 168 N. W. 481 (1918). (Franchise stipulations as to rates were deemed subject to change by the Railroad Commission under its general power over rates notwithstanding home rule since rate regulation was a general concern).

⁸¹ By general law in West Virginia, W. VA. REV. CODE (1931) c. 8, art. 4, § 10, cities are empowered to prohibit the erection of utility plants. This

subjected to regulation by the appropriate general state authority.

The West Virginia proposal is silent upon the subject of utilities as well as upon all other specific forms of municipal activity. At present a West Virginia city may own and operate utilities either under special charter or general law.⁶² It may by contract stipulate rates in granting utility franchises⁶³ but a rate so set is none the less subject to revision by the Public Service Commission.⁶⁴ This system might be continued under the proposed amendment. The possible superiority from the local standpoint of a system of decentralized control, involving municipal regulation of rates would hardly be conceded by the utility interests. The choice, of course, would lie in the lap of the legislature.

Protection

While judicial departure from the proposition that control of a fire department is a local concern⁶⁵ is unlikely, the decisions are in discord with respect to the "localness" of police administration.⁶⁶ By reason of their position as law enforcement officers engaged in enforcing state as well as local law municipal police officers have long been considered agents of the state.⁶⁷ They are employed and paid by the city. The actual conduct of police administration is just as appropriately reposed in local hands as any other branch of municipal activity. There may be sound reasons for setting up general statutory standards in police service but the only reasons the writer can discover in support of direct state

power would not extend to the impairment of any existing franchise but could be used in aid of municipal ownership and operation where no problem of interfering with a franchise existed.

⁶² The special charter provisions vary, of course, with the given city. The City of Morgantown, for example, has charter authority "to erect, own, control and maintain, or authorize or prohibit the erection of any waterworks in the said city or any gas plant, or electric light plant, for light, heat, and power, or for either of said purposes." Acts of W. Va., 1921, Municipal Charters, c. 15, § 18 (a). For the general statute see W. VA. REV. CODE (1931) c. 8, art. 4, § 10.

⁶³ *Improvement Co. v. City of Bluefield*, 69 W. Va. 1, 70 S. E. 772 (1911). See also *City of St. Mary's v. Hope Gas Co.*, 71 W. Va. 76, 76 S. E. 841 (1912).

⁶⁴ *City of Benwood v. Public Service Commission*, 75 W. Va. 127, 83 S. E. 295 (1914).

⁶⁵ See *Simpson v. Gage*, 195 Mich. 581, 161 N. W. 898 (1917).

⁶⁶ Cases are collected by McBain, *The New York Proposal for Municipal Home Rule* (1922) 37 POL. SC. Q. 655, 677.

⁶⁷ By statute in West Virginia the mayor and public officers of municipalities are required to assist in enforcing the criminal law of the state. W. VA. REV. CODE (1931) c. 8, art. 4, § 25.

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control of police administration in a city are the patronage requirements of partizan politics.⁸⁸

Education

Nothing has been more definitely conceded to be a general concern than education. This position was taken in a recent Nebraska decision with respect to the establishment of a municipal university.⁸⁹ The same conclusion led to a decision in Ohio against the applicability of municipal building regulations to school buildings to be erected within the limits of the city.⁹⁰ It seems fairly evident that the test of local or general concern is entirely irrelevant to the problems of public education. But if the matter is otherwise left open the courts can exploit the general concern notion to advantage in aid of a unified and flexible educational policy.

West Virginia is definitely committed to a system of state control of education. A class of independent school districts, set up under special acts of the legislature in many of the urban communities, has considerable autonomy in administration as distinguished from standards of service but even there the ultimate control of the legislature is clear. Municipal corporations as such do not participate in public education. Though a school district and a municipality exactly coincide territorially they constitute two distinct corporations.⁹¹

Special legislation relating to schools and school districts might well receive the same fate to which the proposed amendment would consign special chartering of cities and for similar reasons. In other respects, however, the desirability of changes in the present system should rest in the hands which are continuously shaping educational policy.

Health and Sanitation

Inquiry into the competency of a city to establish health and sanitary regulations is usually formulated in terms of the police

⁸⁸ The experience of St. Louis strongly supports this conclusion. See Barclay, *What Municipal Home Rule Means Today*. *V. Missouri* (1932) 21 NAT. MUN. REV. 312, 316, 317.

⁸⁹ *Carlberg v. Metcalfe*, 120 Neb. 481, 234 N. W. 87 (1930).

⁹⁰ *Niehaus v. State ex rel. Board of Education*, 111 Ohio St. 47, 144 N. E. 433 (1924).

⁹¹ District boards of education are constituted corporations by statute. W. VA. REV. CODE (1931) c. 18, art. 5, § 5. Likewise special acts creating independent school districts give corporate charter to the boards of education. *E. g.*, Acts of W. Va., 1925, c. 102, § 10.

power. The extent of the police power of home rule cities is decidedly uncertain; the cases lean toward classifying health and sanitary measures as general concerns. Thus the reenactment by New York City of the state multiple-housing law was declared void because the subject-matter, housing conditions, was not a local affair.⁵² An Ohio statute divided the state into sanitary districts, constituted each municipality such a district and required each city to contribute directly to the expenses called for by the measure. The Ohio home rule amendment expressly authorizes municipal sanitary measures "not in conflict with general laws".⁵³ Thus the statute would have been valid in any event but the court proceeded to declare that it related to matters of general concern.⁵⁴ In Ohio the regulation of hours of work on city public work has been declared a fit subject for municipal action⁵⁵ but a Michigan decision invalidated charter and ordinance provisions prescribing maximum hours and minimum wages for all city employes.⁵⁶ The Michigan court proceeded on the notion that some city employes were engaged in functions of general concern to arrive at the conclusion that the regulation of their working conditions was a general affair. The decision is a fair indication of the artificiality of the distinction upon which it was based.

Here again we have a public function as to which the "local *versus* general" distinction spells little. Of course, both local and state authorities are interested in the subject. The problem, however, relates to the selection of the most appropriate means to advance the purpose. Experience in the field suggests that these functions be performed in large part under the control of the local authorities. The legislature remains the agency through which to coördinate local administration with state policy and standards.

Street Control

This branch of municipal activity affords an interesting example of changing conditions forcing a change in the judicial outlook upon the application of the "local *versus* general" notion

⁵² *Adler v. Deegan*, 251 N. Y. 467, 167 N. E. 705 (1929).

⁵³ Constitution of Ohio, art. 18, § 3.

⁵⁴ *State ex rel. Village of Cuyahoga Heights v. Zangerle*, 103 Ohio St. 566, 134 N. E. 686 (1921). See also *Board of Health of City of Canton v. State ex rel. O' Wesney*, 40 Ohio App. 77, 178 N. E. 215 (1931).

⁵⁵ *Stange v. City of Cleveland*, 94 Ohio St. 377, 114 N. E. 261 (1916).

⁵⁶ *Attorney General ex rel. Lennone v. City of Detroit*, 225 Mich. 631, 196 N. W. 391 (1923).

to public functions. In the youth of automobile traffic the use of automobiles was definitely localized. Inter-city and interstate traffic cut a very modest figure. It was easy then for a court to declare traffic control a local affair.⁹⁷ It is not so today. The development by Ford and others of cars within the range of modest buying power made their ownership a commonplace, which, in turn, has led to the present splendid system of paved highways and streets. The effect on traffic is too apparent to require description. It is enough to say that traffic is no longer local and the courts know it. The recent decisions point definitely to the view that traffic regulation is to be classed as a general concern.⁹⁸

This does not mean that home rule cities have no power to regulate traffic; it means that municipal regulation must be consistent with the state law. It does not apply, moreover, to other street uses. For the most part that they were "local concerns" would not be contested.⁹⁹ It has been declared in California, however, that a municipality operating an electric light service was subject to a regulation of the State Railroad Commission forbidding the placing of light poles nearer than eight feet to the center line of a railway since the regulation of utilities was a matter of general interest.¹⁰⁰

Local Improvements

The Supreme Court of Colorado has declared that an ordinance providing for the levy and collection of special assessments in aid of street improvements related to a subject "typical-

⁹⁷ *Kalich v. Knapp*, 72 Ore. 588, 142 Pac. 594 (1914).

⁹⁸ *Schneiderman v. Sesanstein*, 121 Ohio St. 80, 167 N. E. 158, 64 A. L. R. 981 (1929); *Ex parte Daniels*, 183 Cal. 636, 192 Pac. 422 (1920). Both of these cases involved speed regulation. In Ohio regulation of weight of loads to be hauled over streets had previously been treated as a local matter in *Froelich v. City of Cleveland*, 99 Ohio St. 376, 124 N. E. 212 (1919), and expressly distinguished from speed regulation as a matter of business management and not a safety measure under the police power. The distinction is nebulous, at best. A much more obviously bad distinction, however, has been made in holding statutes, constituting driving an automobile while intoxicated an offense, superior to conflicting local regulations—a sound enough result. It is the specious notion that such a statute is not a traffic regulation but simply a regulation of personal conduct. See *Helmer v. Superior Court*, 48 Cal. App. 140, 191 Pac. 1001 (1920); *Clayton v. State*, 297 Pac. 1037 (Ariz. 1931). The opinion in the former case is significant, however, in its recognition of the idea that change in traffic conditions may convert into a general what was once a "municipal affair".

⁹⁹ *Sunset Telephone and Telegraph Co. v. Pasadena*, 161 Cal. 265, 188 Pac. 796 (1911) (Control of streets for purpose of granting or denying franchises to telephone companies was deemed a "municipal affair").

¹⁰⁰ *Sincerney v. Los Angeles*, 53 Cal. App. 440, 200 Pac. 380 (1921).

ly and pre-eminently of 'local concern' ''¹⁰¹ This view is shared by the courts of Oklahoma¹⁰² and Minnesota,¹⁰³ but was rejected in Ohio.¹⁰⁴

What are the merits of the problem with respect to street construction and maintenance, for example? The service is one customarily subsidized in part by general taxation and in part by special assessment. The people most benefitted pay the largest share; the citizens, who come next in benefit, contribute the balance. The general public of the state receive a more remote benefit and pay nothing. Experience in the field points to no better way to pay for the service. Yet the function cannot accurately be classified as essentially local. There is a general interest in having a safe and adequate system of streets and highways throughout the state. This interest may find expression in efforts to pull backward communities up to the higher level. And thus there would be some warrant for statutes setting up standards without interfering with local freedom in administration. Congress had made strides in improving highways in states backward in road building through the indirect device of "federal aid".¹⁰⁵ The legislature, unless precluded by the "local concern" notion, could impose standards as to streets directly.

The dissatisfaction with "localness" as a measure of home rule powers, which the writer has expressed,¹⁰⁶ is nothing more or less than an objection to the stock home rule concept. It relates primarily to constitutional home rule, which sets up a realm of complete freedom from legislative control in "municipal affairs". But it has some application to the West Virginia proposal even when viewed as a provision for legislative home rule since the maximum range of the law-making power of a city acting under it would be the outer boundary of "municipal affairs". The notion is not, of course, essential to a grant of substantial municipal autonomy. The constitutional provision might be framed to specify rather fully the powers and functions of municipalities. That device, however, would be open to the objection of inflexibility,

¹⁰¹ Board of Com'rs. of El Paso County v. City of Colorado Springs, 66 Colo. 111, 180 Pac. 301 (1919).

¹⁰² Berry v. McCormick, 91 Okla. 211, 217 Pac. 392 (1923).

¹⁰³ The Minnesota cases are collected in Anderson, *op. cit. supra* n. 71, at 312.

¹⁰⁴ Berry v. City of Columbus, 104 Ohio St. 607, 136 N. E. 824 (1922).

¹⁰⁵ McDONALD, FEDERAL AID (1930). See c. 5. esp.

¹⁰⁶ For further material upon the unhappy judicial experience with the "localness" notion see Professor McBain's discussion of the California cases. McBAIN, *op. cit. supra* n. 39, chaps. 8-10.

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which lies against constitutional home rule generally. What is conceived to be a more desirable solution is legislative home rule under a constitutional amendment directing the legislature to extend the charter-making power to cities and leaving it entirely to the legislature to mark out the substantive content of home rule. The minimum response by the legislature would involve something about equal to ordinary incorporation under general law. But there is little likelihood that it would act in bad faith.

The West Virginia proposal, we have concluded, would probably provide for legislative home rule. So it is not open to the objection that it would saddle upon the state a vague constitutional division of governmental powers between the state government and municipalities. Insofar as it applies the "localness" concept of home rule to the law-making power it is not acceptable and the objection might be removed in redrafting the whole proposal, which, it is believed, is in order.

3

Undoubtedly the drafting of a home rule amendment is an extremely difficult undertaking. Only a relatively certain and smooth-working formulation is attainable. Nevertheless the West Virginia proposal could be improved in this regard. The specific difficulties in interpretation which have been discussed could surely be met in part. To this end the suggestion that the amendment be framed in sections may be reiterated. Thus one section might be devoted to abolishing special chartering, another to the matter of providing by general law for incorporation of municipalities not within the home rule class or not electing to exercise charter-making powers, a third to providing for legislation rendering home rule available and to indicating broadly the relation of the provision to the system of incorporation under general law, and so on. Some elaboration of statement would be desirable. Thus the doubt as to the meaning of "general laws" as used in the proviso requiring consistency with general laws could be ironed out. The provision with respect to limiting municipal indebtedness, moreover, should either be expressly harmonized with the present constitutional provision or omitted.

In the drafting of the present proposal one can readily see that the draftsman has made use of the constitutional material of other states. The writer does not know, however, to what extent the judicial experience with home rule in other states has been

consulted. It is believed, in any event, that the home rule decisions are the most significant comparative legal materials in home rule drafting because they bring to light the virtues and defects of home rule amendments in operation.

Conclusion

The writer makes no claim to have spoken with finality upon his subject. What has been said is offered chiefly as a means of airing an important and difficult problem and suggesting an attitude in dealing with it. Something by way of summary, however, may be warranted. The writer believes:

1. Special legislative chartering of municipal corporations in West Virginia has been expensive, a thief of legislative time and a negative influence in shaping governmental development. It ought, therefore, to be abolished.

2. Incorporation under general law for all cities would be preferable to the present system. In fact, that system with the common feature, optional charter privileges, would probably best suit the peculiar needs of the state.

3. There is neither a strong demand nor a conspicuous need for any form of municipal home rule in West Virginia.

a. Constitutional home rule would not be desirable. It is considered unsound in principle, at least, insofar as applied to cities of modest size. The idea, at best, is useful in states containing large metropolitan communities, which present complex regional problems.

b. There is no serious objection to legislative home rule for West Virginia cities. The proposed constitutional amendment, however, should be redrafted in behalf of clarity before being submitted to the people, if ever it should reach that point.