The West Virginia Municipal Home Rule Proposal

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I. Past and Present

There have been four major periods, from a legal standpoint, in the development of municipal government in this country. In the colonial period charters of incorporation were granted to a score or more cities and towns. With but one exception, charters were granted by the colonial governor in the crown and proprietary colonies, apparently on the theory that the governor was an arm of the crown. The crown, of course, aside from the early grants of feudal lords, was until the nineteenth century the charter-granting authority in England. Even in colonial times, however, the legislatures were assuming an attitude of authority. Often they confirmed executive grants of charters and most of them freely enacted laws governing the internal affairs of chartered communities.

Under the first state constitutions legislative supremacy was the most notable feature of state government. Where power to incorporate local units of government was not expressly conferred it was simply taken for granted under the theory that the power of state legislatures was plenary. And in this view the courts have largely concurred. By the mid-century fair-sized cities developed. They were, of course, centers of wealth as well as pop-
ulation, which the politicians in the legislatures could not leave untouched. So great became the abuse of legislative power over municipalities, particularly large cities like New York, that, in this regard at least, early faith in the representatives of the people gave way to distrust.

The natural step to check legislative abuse of power under a constitutional system was to write restrictions upon legislative action into the state constitutions. The execution of this idea assumed various forms chief of which was the requirement that cities and towns be incorporated only under general laws. Some thirty states took this step. This type of protection against abuse was not impenetrable. Special legislation in disguise was still possible by resort to classification of cities. Moreover, incorporation under general law did not satisfy whatever sentiment existed in favor of a greater positive measure of municipal autonomy.

The home rule concept ties in with the individualistic ideas of the political theory of 1776 and 1787 — not that there was at that time either intensive or extensive local self-government but that there is a kinship between a zeal for home rule with comparative freedom from external restraint for its own sake and the revolutionary devotion to the ideal of individual liberty. There is present also in the concept, it seems, the old emphasis upon territory as the basic factor in the organization and administration of public affairs, an idea closely associated with the frontier influence in American history.

This home rule idea, expressed in constitutional form, found its way into the Missouri Constitution of 1875, extending home rule to St. Louis. Then followed California in 1879, Washington in 1889, Minnesota in 1896, Colorado in 1902, Oregon in 1906, Oklahoma in 1908, Michigan in 1909 and Arizona, Nebraska, right to select local officers which cannot be taken away by legislative action. His collection of cases, however, weigh strongly to the contrary.

There is considerable evidence to the contrary, particularly as to the election of local officers. See McBain, The Doctrine of an Inherent Right of Local Self-Government (1916) 16 Col. L. Rev. 190, 299, 304.

"Art. 9, §§ 20-25. The city of St. Louis presented a metropolitan problem, which home rule was framed to meet.

11 Cal. Const., art. 11, §§ 6-8, 11. § 8 has been amended no less than six times. (See the recent article, Cottrell, What Municipal Home Rule Means Today. I. California Since 1916 (1932) 21 Nat. Mun. Rev. 12); Wash. Const., art. 11, §§ 10, 11; Minn. Const., art. 4, § 36 (See Anderson, What Municipal Home Rule Means To-day. II. Minnesota: A Reappraisal (1932)
Ohio and Texas in 1912. Maryland granted a measure of home rule to Baltimore in 1915. Thereafter came Pennsylvania in 1922 and New York in 1923. The Wisconsin amendment of 1924 completes the list. It will be observed that this development is western in inception and, for the most part, in its expansion. Only four eastern states have embraced the idea and of these, Maryland and Pennsylvania have adopted it only in limited measure. Perhaps there is a real relation between the more individualistic and yet more politically experimental west and the fact that constitutional home rule has been largely a western institution. However, it is doubtless true that the east fought out the home rule issue long ago, though it was not presented in the form here considered.

It is noteworthy that the movement after a decided upturn in 1906 reached its peak in 1912. That is likewise the approximate time at which the subject of home rule was being most agitated in current literature. Just now writing on city government is probably chiefly concerned with specific functions of cities and


22 Ariz. Const., art. 13, §§ 1-3; Nebr. Const., art. 11A, §§ 2-4; Ohio Const., art. 18; Tex. Const., art. 11, § 5.


24 Art. 11, § 3. An interesting discussion of the Wisconsin situation, the hub of which is Milwaukee, the state's one large city, in Lynagh, Wisconsin "Unshackles" Her Cities (1929) 18 Nat. Mun. Rev. 757.

Detailed analysis of the various constitutional provisions cited above is impossible here. Mention may be made of a few significant differences. Several beginning with Missouri are self-executing. Others such as that of Michigan require legislative effectuation. Moreover, the home rule conferred has in most instances, where the courts have spoken, been deemed grants rather than limitations of power. See Consumers' Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N. W. 643 (1922). The Constitution of Texas, however, and probably that of Oregon, at least, warrant a contrary conclusion. Le Gris v. State, 80 Tex. Cr. App. 356, 190 S. W. 724 (1916). But in Oregon a home rule charter is deemed a grant and not a limitation of power. Baggage Co. v. Portland, 84 Ore. 343, 164 Pac. 570 (1918). In several instances the constitutional amendment provides simply for legislative home rule, e. g., Pennsylvania. And in Maryland home rule is granted only one city, Baltimore. A detailed study of the various amendments down to 1916 is presented in McBain, op. cit. supra n. 7. The period, 1916-28, is the subject of a forthcoming book by Professor McGoldrick of Columbia University.

This is the impression one gets from an examination of periodical indices such as the Readers' Guide to Periodical Literature.
their administration and with municipal finance. The fact that in the periodical literature of the last decade home rule has cut a very small figure is quite significant. The suggestion is that the home rule movement, in its conventional form at least, is nearly spent. True, West Virginia is not the only state with a home rule proposal in the air. However, the bare existence of such proposals spells little. Moreover, West Virginia did not participate in the movement at its height because it was not relative to her situation.

There are impressive indications that American cities are moving into a fifth period of legal development, a period in which the emphasis is upon function and administration rather than geographical areas and the legal distribution of governmental powers. Must West Virginia cities evolve, as it were, through the home rule stage before sharing in the new order?

When West Virginia first appeared on the map there was already a growing disposition alive in the other states to limit legislative abuse of the power to enact special laws. This influence left a clear imprint upon the West Virginia Constitution of 1872. That instrument enumerated eighteen cases in which the legislature should not enact local or special laws. Among other things local and special laws were forbidden in the matter of "Incorporating cities, towns or villages, or amending the charter of any city, town or village, containing a population of less than two thousand". This limitation has left all the urban centers in which could arise the knottier problems of local government subject to the special treatment of the legislature to date.

In viewing the situation in West Virginia with respect to the creation and amendment of municipal charters there arises first the old question as to the susceptibility of the power of special legislation to abuse. And assuming that this difficulty were more

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18 Reliance for this statement also is not rested upon specific data but upon general impressions derived from contacts with the literature on the subject.
17 Illinois, for example, has a proposal with several valuable features. It is reprinted in (1929) 8 ILL. MUN. REV. 114-116.
19 See McBain, op. cit. supra n. 7, c. 2 and 3.
19 Art. 6, § 39. At three other points at which the legislature might encroach upon municipalities the Constitution imposed prohibitions. They were: limitations on municipal indebtedness, art. 10, § 8; a requirement that municipal taxes be uniform, art. 10, § 9, recently construed in Mortgage Co. v. Lory, 160 S. E. 1 (1931); and a prohibition on legislative grants of street franchises for street railways without local consent, art. 11, § 5.
potential than dynamic in the present situation, the question would remain — is the present machinery reasonably satisfactory from the standpoint of effectiveness in the humdrum routine of operation? As for the first point, there is little record of legislative abuse. Apparently West Virginia has been relatively free from legislative "tinkering" with municipal charters. This being so the second question alone warrants detailed treatment.

The merits of the present machinery may first be examined from the standpoint of the state at large. Without doubt the special chartering of cities absorbs a considerable part of the time of the legislature. Thus over the period 1921-1931 inclusive, during which the legislature held six regular sessions, 2051 pages of the statutory output were devoted to municipal charters as against 2863 pages of all other acts, that is, over 42 per cent of the total was absorbed by municipal charters. In 1921 and 1929 municipal charter material covered over 50 per cent of the total page output. For the total period 135 acts, or over 13 per cent of the total of 1035, related to particular municipal charters. These figures must be considered in the light of the fact that charter acts substantially exceed other acts in average length. Moreover, in view of the fact that the normal length of a legislative session is two months it is apparent that the theft of even one week's time would be important.

If no local opposition is voiced against a proposed charter amendment it is commonly disposed of in a brief, perfunctory fashion. If local opposition carries the fight to the legislature then the time of committees and the general body is taken up by hearings and, to a lesser degree, debates. In some instances several whole days of a session will be stolen by a city charter contest. That occurred at the last session with respect to a proposed amendment to the Charleston charter.

If this process were a beneficial one it would be due a reasonable share of legislative time. But that is not the case. The members of the legislature look upon it as a way of dealing with local matters. If it offers opportunities for advancing the general interest in improved administration in the state they are not ex-

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23 What may be deemed an example of such abuse is recorded in Booten v. Pinson, infra n. 36. It must be observed that under the existing system there is always the possibility of special interests obtaining municipal charter amendments. The usual safeguard is a referendum clause shifting the final determination to the people.

24 It is customary for municipal charter amendments to be published in a separate volume.
The theoretical advantage of special chartering, that it enables the legislature to exercise a co-ordinating influence in adjusting the local agencies of government to the state administration is not peculiar to that system. The power could be exercised by general laws, though with less nicety as to particular municipalities. And, as will appear, even where much legislative time is devoted to a given charter bill the time is ill spent because the body of members will usually act in accord with the wishes of the member or members from the community in interest.

If special chartering is not conducive to the better government of the state in general it is doubtless even less of a positive aid to local government. That is, it achieves nothing in this behalf, emanating from the legislature itself, which could not be done by general laws. The legislature is at a disadvantage with respect to such matters in framing municipal charter provisions for want both of information concerning and live interest in the given community. What has been the result? As members of the legislature will freely affirm, legislative action on municipal charters is to high degree perfunctory, serving at best only as an awkward gesture. What takes place is nothing more than is to be expected. When any changes in the charter of a given city are desired they are drafted by the parties interested and presented to the legislature by a member from the legislative district in which the city is located. The members from that district are almost uniformly the key to the situation. And that is true even where the bill is hotly contested by local interests. For even there, in the last analysis, the general body takes its cue from the members from the locality interested. Such a member may end a charter bill by letting it die in committee. If he does not want it brought out the matter is of no concern to his fellows. Moreover, it is a common practise, particularly where the member from the district involved is undecided whether to favor the measure, to attach a referendum clause. That is a desirable step under the circumstances but it goes to show what a formal part the legislature plays in the charter-making process.

It is not difficult to understand why the legislative process is largely perfunctory in this matter. A member from Bluefield will have no interest in a proposed amendment to the Wheeling charter and has good reasons for voting automatically, as it were,

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*The impressions here set out have been gained in part from discussions with present and past members of the State Legislature.*
for the measure. He does not feel qualified to deal with the problem for want of information concerning the local situation and the wishes of Wheeling citizens. And there would be, in any event, a natural reluctance to offend the Wheeling member whose vote he might want on some measure of his own. And so it goes.

The story of a given session may be of illustrative value. An examination of the journals of the legislature for the session of 1925, chosen for the purpose at random, disclosed that action was taken on thirty-five municipal charters. Both houses passed thirty-three of the measures without a dissenting vote. And in no case were there over two negatives. The House waived the requirement that a bill be read on three separate days in thirty-two instances and the Senate in twenty. Ten of the bills were not referred to committee in the House and thirteen in the Senate. There were ten amendments in each house, the majority of which were made in committee.

Thus, apart from possible changes made in committee proceeding from a member who does not represent the city in interest, the legislature shares little in the shaping of the charter amendments. It hardly can be contended with effect, then, that special legislative chartering is a constructive agency in local government in West Virginia. Moreover, it is quite possible, though less probable, that the body of local citizens may not even know of a proposed charter amendment, much less have a share in initiating or framing it.

An important consideration with respect to the present system is its effect on the interest taken by local people in local affairs. In the present state of the American mind it is probably true, as the writer has heard it charged, that the plain citizen will never get exercised about the conduct of public affairs so long as the more or less routine services for which we look to our public agencies are satisfactorily continued. He is too much taken up with his own affairs to be concerned about public problems until he is himself immediately affected. In any event the special chartering of cities simply fosters this lethargy. The responsibility of home rule might be a wholesome stimulant.

An ameliorating factor in the present situation in West Virginia is the existence of a fairly comprehensive chapter on municipal corporations in the Revised Code, the provisions of which
are available to specially chartered cities. The simple form of government provided therein was framed to meet the needs of towns with populations of less than 2,000 and thus has little applicability to the more complex requirements of larger special charter cities. But the extensive grant of powers to city councils, the new articles on zoning and city planning and aviation, and many other provisions on important municipal matters are quite significant to the larger urban centers. The code expressly provides that to the extent of powers granted thereby additional to those conferred in a special charter this chapter should constitute an amendment to the charter and, further, authorizes city councils, save where other municipal action is specifically required to adopt code provisions on matters covered in special charters in place of the special charter provisions. Thus the whole chapter is made available to special charter cities, and since the adoption of the Revised Code may be taken over either wholly or in part. Before 1931 a special charter city had the same advantages except that it could not adopt particular code sections on matters covered in its charter, though it could adopt the code sections in their entirety.

Notwithstanding these general statutes special legislative action on city charters goes on apace. In the six sessions 1921-1931 inclusive a total of sixty-one different cities obtained charter amendments. Three cities: Charleston, Huntington and Moundsville, obtained charter amendments at five out of the six sessions. The charters of four cities: Wheeling, Bluefield, Princeton and Wellsburg, were amended at each of three sessions, and those of eighteen others at each of two sessions. Thus thirty-six cities had their charters amended by the legislature at two or more separate sessions.

From these figures it does not appear likely that our general municipal corporations statutes will minimize, or even greatly reduce, special legislative amending of municipal charters. It cannot be said, however, that the legislature is responsible. It deserves credit for enacting the general law.

23 W. VA. REV. CODE (1931) c. 8.
24 Ibid. art. 1, § 2.
25 W. VA. CODE ANN. (Barnes, 1923) c. 47, § 1.
26 There are not now this many towns in the state with a population exceeding 2,000 but presumably the special charter cities with less than 2,000 were found to have that number when their charters were granted.
An unsuccessful attempt has been made in West Virginia to obtain judicial confirmation of a right to local autonomy. I refer to the judicial doctrine of the "inherent" right of towns and cities to local self-government. That doctrine was examined and rejected by the Supreme Court of Appeals in Booten v. Pin-son. By an act taking effect May 9, 1915 the legislature changed the form of government of the city of Williamson by provided a bi-partisan commission system of five commissioners. The first commissioners were to be appointed by the governor to hold office for two years from July 1, 1915. Thereafter the commissioners were to be elected every two years. Booten, Dudgeon and three others were appointed commissioners under the act and as provided therein they elected Booten mayor and Dudgeon city clerk. Booten and Dudgeon sought admission to their offices by mandamus. The incumbents sought injunctions against interference pending the determination of the mandamus proceedings. These proceedings were heard together; the court found the charter amendment valid; awarded the writs of mandamus and dissolved temporary injunctions against Booten and Dudgeon. The decisions were affirmed on appeal by a four to one vote.

The objection to the act, of course, was that it deprived the local electorate of the opportunity to choose its own officials. Judge Williams, writing for the majority, relied first on the familiar theory of the complete legislative control over the existence and powers of municipal corporations, which, of course, excludes any notion of an "inherent" right to local self-government. The basis of this idea is that the power of the legislature is plenary and not delegated, and there being in this instance no constitutional restraint on the power Judge Williams after consideration of cited cases rejected the doctrine of the "inherent" right to local self-government. His second ground for upholding the act was that assuming the "inherent" right existed it was not violated in this instance because the appointments by the governor were provisional.

The provision for appointment of the first commissioners by the governor was doubtless an unwarranted and unwise measure. It would have been a simple matter to have allowed more time between the effective date of the act and the date the new government was to be set in operation in order to permit the people of

\[77 W. Va. 412, 89 S. E. 985 (1915).\]
the city to elect their officers. Doubtless a feeling that there had been a distinct abuse of legislative power influenced the views of President Poffenbarger, who dissented. In any event, he expressed very ably the view that though there was not an inherent right to local self government in the sense of an intrinsic quality there was a right to local autonomy in the election of local officials, at least, guaranteed by the Constitution by implication. The implication arose necessarily, he thought, from the asserted fact that at the time of the adoption of the Constitution the very idea expressed by the phrase "municipal corporation" involved a local agency of government that was self-governing, which idea was fixed in the Constitution by the use of the terms "cities" and "towns". He insisted that the act could not stand as a provisional measure because there was ample time for an election between the time it became effective and the date the first commissioners were to take office.

Since there were two independent grounds for the decision, someone may be expected to urge that the statement of the first ground denying the "inherent" right concept was dictum since not necessary to the decision of the case. The difficulty with that position is that the same could be said as to the second ground, since the first ground was sufficient to support the decision. If emphasis in the opinion has any bearing on the point it seems that the court was relying primarily on the first ground and simply threw in the second for good measure. However that may be, since the court did not expressly select one of the grounds as the basis of the decision it would be entirely arbitrary for a commentator to assert that only one of the grounds stated was necessary to the decision and then lop off as a dictum the one he least likes. The effect of the presence of two independent grounds for the decision was simply to dilute, though not to deny, the authority of the holdings on both points. The case, it is believed, is authority for the point that in West Virginia municipal corporations have no "right," binding on the state legislature to select their own local officials. The writer believes that the court is not likely to reverse itself.

29 That there is considerable doubt that such was the fact see McBain, op. cit. supra n. 9.
30 This is the loose language of the cases but it has some justification since the interest is legal to the extent that it has in Michigan, for example, been judicially recognized and protected. However, "power" or "authority" would doubtless be preferable as referring more definitely to the political character of the matter.
The merits of the contention that the courts should recognize an "inherent" right in cities to local self-government have been investigated rather thoroughly by other writers so no independent inquiry will be launched here. The facts of the West Virginia case are quite typical, the fight in most of the cases having arisen in support of the claim to an inherent right in cities to select their own officers. Professor McBain after a thorough study of case materials has found that not over five states at best have judicially accepted the doctrine. Moreover, it seems to this writer that McBain's reasoning in rejecting the doctrine on its merits is sound. If a court is to adhere to the generally accepted notions that the legislative power of American state legislatures is plenary and that the organization and powers of local agencies of government are proper subjects for legislative action there is simply no room for the notion of an inherent right to local self-government. The abuse of legislative power hardly justifies the erection of a vague judicial standard given the force of constitutional provisions in defense of local self-government. The problem is largely political and should be dealt with on that basis.

It should be observed, moreover, that judicial application of the doctrine of "inherent" right does not afford a positive measure of home rule. That is, it would not assure to municipalities the self-determination of the machinery and powers of local government but would give positive assurance of no more than local control of the selection of local officers.

The conclusion that special legislative chartering of cities in West Virginia is decidedly unsatisfactory seems inescapable. It has been shown to be both a great theft of the time of the legislature and at the same time a process of no positive value in meeting municipal problems, not to mention the added expense in the form of printing, for example, that it entails. It follows that the system should be abandoned. Either of the alternatives suggested by the experience of other states would be preferable, that is to say, incorporation under general law with or without optional charter privileges or municipal home rule.

Two great obstacles stand in the path of any change, name-
ly, too much politics and the conservatism and inertia of the public mind. The first obstruction is a problem for those who know the devious paths of the game. The removal of the second lies with uncertain assurance in the lap of time and education. The purpose of the present inquiry, however, is not to suggest how to effect a change but to consider the desirability of a change, particularly that embodied in the home rule proposal of Governor Conley's Constitutional Commission.

Undoubtedly the focus of home rule agitation in other states has, for the most part, been metropolitan areas. In a number of well-known instances it has been a matter of a single dominating city pitted against the rest of the state. New York City, Chicago and Milwaukee are notable examples. The problem there is not alone the complex task of metropolitan government but in addition that of wresting independence from a legislature controlled by jealous representatives of smaller communities bent on keeping the big city politically subordinate.

The 1930 census credits West Virginia with two metropolitan areas: the Wheeling and the Charleston districts. Wheeling with its cluster of suburban communities and its regional association with trans-river Ohio towns is most likely to confront special problems. Under the proposed amendment only cities of over 5,000 would be eligible for home rule. As of the 1930 census twenty-two communities qualify for the honor. Only ten have population exceeding 10,000 and only five in excess of 25,000. Huntington tops the list with 75,000. The state remains largely a region of small communities.

Home rule for the smaller cities is quite a different matter from metropolitan home rule. The problems of the former are pretty much the same the state over. Moreover, the small city is not likely to be the prey of an overreaching legislature, especial-

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34 And undoubtedly a strong case can be made for extensive autonomy for metropolitan cities. See, for example, Brooks, Metropolitan Free Cities (1915) 30 Pol. Sci. Q. 222. This writer goes so far as to advocate the erection of metropolitan free cities comparable to the free cities of Germany.
35 See Lynagh, op. cit. supra n. 14.
36 The Fifteenth Census of the United States: 1930, Metropolitan Districts, Advance Summary, lists two West Virginia districts, Charleston and Wheeling. Charleston with 60,408 and the outside area 47,752 gave that district a population of 108,160. Wheeling proper with 61,659 and the outside area with 128,964 made up a district of 190,623 population.
37 Bluefield, Charleston, Clarksburg, Fairmont, Huntington, Martinsburg, Morgantown, Moundsville, Parkersburg and Wheeling.
38 Charleston, 60,408; Clarksburg, 28,866; Huntington, 75,572; Parkersburg, 29,623; and Wheeling, 61,659.
ly so in view of the fact that the smaller communities usually control the legislature. This is not to suggest that small municipalities lack capacity for self-government. Doubtless they want the resources both in human ability and material advantages possessed by large cities. But they could get along after a fashion with home rule. The most serious objection remains to be stated. It is the thought that intensive local autonomy might bolster localism, a barrier to progress West Virginia is just overcoming. With the advent of improved roads the state is fast effacing sectionalism. There is reflected in this development a growing interdependence and a leveling process which necessarily carry over into the administration of public affairs. Diffusion of the benefits of new ideas, higher standards, and improved administrative technique should be the order of the day.

One of the most serious concerns of the people of the state today is the tax burden. Many shots have been fired at the general property tax and suggestions made as to a redistribution of the burden. But little thought has been given to that more fundamental problem — the reduction of the cost of public administration. Sectionalism and localism have contributed as much as anything else to the expensive duplication of governmental agencies, equipment and personnel. Doubtless the state has too many counties, too many independent school districts, too many local offices. This is only a suggestion. It would take a careful independent investigation to present this phase of the background. The point is — municipal home rule cannot be considered realistically or very helpfully apart from its relation to such conditions.

However much we may admire our federal system of government one cannot fail to observe how its constitutional structure time after time increases the difficulty of adjusting problems that know not the division of powers between federal and state authorities. Municipal home rule is suggestive of the federal idea within a state. In approaching the consideration of the West Virginia proposal it may be well to ponder the desirability of a constitutional system apportioning the powers of government between general state and local agencies by vague legal definition.

(To be concluded).

McBain, op cit. supra n. 7, e. 4.