THE DELEGATION OF LEGISLATIVE POWER TO CITIES

II. THE GRANT OF CHARTER-MAKING POWER

I. Recapitulation

IN a previous paper[1] reasons were given why, under the modern conception of the scope and character of a municipal charter, the proposal to confer upon cities large powers of local self-government involves of necessity a delegation of some portion or the whole of the charter-making power. It was pointed out also that, although the cases involving the constitutionality of the reference of statutes to the electors are exceedingly difficult to analyze and classify, the rule is nevertheless certainly established that statutes may be submitted for the approval of local electorates. Among the statutes so submitted charters and analogous laws have been conspicuous.

Now the legislature of any state (barring those in which home rule is a matter of constitutional grant) is unquestionably competent to repeal the entire body of laws for the governance of cities and to substitute a brief general law or brief special laws under which broad powers of local government might be conferred upon a few designated corporate authorities. But a grant of home-rule powers does not of necessity involve a grant of extensive powers to the passing corporate authorities of cities. As has been remarked, our conception of the proper scope of a municipal charter has in the course of time expanded. Home rule therefore involves a delegation to the locality of power to establish a charter under which the corporate authorities created by such charter shall be restrained and controlled in their operation of the government. This means nothing less than that, for the exercise of home-rule powers, there shall be a local competence superior to the local governing officers. It means, in other words, that since the distinction between

[1] POLITICAL SCIENCE QUARTERLY, March, 1917, vol. xxii, p. 276.

that which is charter and that which is ordinance must be preserved, the local charter-making authority must be different from, and logically superior to, the local ordinance-making authority. For the most part we in the United States have established and preserved this distinction between fundamental and other laws by requiring the direct participation of the voters in the making of the former.[1] In the states which have thus far granted constitutional home rule to cities the employment of this principle of the referendum has been unexceptional. In a democracy such as ours direct action by the electors has come to be regarded as the logical method of laying down that which is fundamental in any self-governing unit of our system.

But the voters cannot act with legal regularity in this capacity without the prescription of machinery for such action; and such machinery usually entails at least the initiatory participation of the incumbent governmental authorities. It seems pertinent, therefore, to inquire into the status of the law upon the subject of the competence of the legislature to vest in the corporate authorities of cities the power to alter the terms of the charters under which they are operating.

II. The Delegation to the Corporate Authorities of Cities of Power to Alter Legislative Charters

There is probably no instance of record in which the contention has been made that the legislature may not delegate to the corporate authorities of cities the power to create, for the carrying out of powers conferred, offices *in addition* to those prescribed by the charter. At the time of the framing of the Ohio municipal code of 1902, by which all the cities of that state were placed under a mandatory and uniform charter,[2] grave doubts were expressed concerning the competence of the

[1] Our method of altering the national constitution is the only prominent exception. The making of ordinary statutes by the referendum process of course impairs this distinction in a measure.

[2] Following the revolutionary decision of State *ex rel.* Knisely *v.* Jones, 66 Oh. St. 453 (1902), which in effect declared void the whole body of laws governing the cities of the state.

legislature in this regard.[1] But such doubts are refuted not only by historical considerations but also by a very considerable present-day practice in the United States and by a number of cases in which this power of delegation has been expressly recognized although no contrary contention was made.[2] In a few instances, on the other hand, the contention has been made that the legislature may not delegate to the corporate authorities of cities the power to reorganize offices and redistribute powers where the exercise of such power involves the repeal of charter provisions or analogous state laws enacted by the legislature.

In an early Georgia case,[3] involving not a matter relating to offices but an exercise of the police power, it was declared without supporting argument that the legislature could not delegate to a city the power to repeal a state law by ordinance. "We deny," the court was content to say, "the right of the legislature to confer such a power upon a subordinate authority." So likewise in an early Missouri case,[4] which has never been overruled but which has been "distinguished,"[5] it was held, with-

[1] Proceedings of the Special Committee on Municipal Code, ex. sess., 75th General Assembly of Ohio, 1902, pp. 256–259.

[2] Sullivan *v.* Mayor etc. of New York, 53 N. Y. 652, 47 How. Pr. 491 (1873), and Costello *v.* Mayor etc. of New York, 63 N. Y. 48 (1875), construing a provision of a law of 1869 which expressly prohibited the council from "creating any new office or department." Miller *v.* Warner, 42 N. Y. App. Div. (1899) and Myers *v.* Mayor etc. of New York, 69 Hun (N. Y.) 291 (1893), in which it was said that "a public office . . . can be created only by the legislature or by some municipal board or body authorized by the legislature to create a public office." O'Connor *v.* Walsh, 83 N. Y. App. Div. 179 (1903), holding that the legislature *had* granted the power. Riley *v.* Trenton, 51 N. J. L. 498 (1889), which held that the legislature had not delegated to the city council power to re-delegate its powers to a board of excise commissioners which the council was authorized to create, but had itself delegated such powers to this board when established by ordinance. See also Buck *v.* City of Eureka, 109 Cal. 504 (1895); State *v.* Spaulding, 102 Ia. 639 (1897); Smith *v.* Lynch, 29 Oh. St. 261 (1876); and State *ex rel.* Stage *v.* Mackie, 74 Atl. 759 (1909). In this last-mentioned case, however, the court thought it "scarcely conceivable" that the state would delegate such power to cities in a "wholesale way."

[3] Haywood *v.* Mayor etc. of Savannah, 12 Ga. 404 (1853).

[4] State *v.* Fields, 17 Mo. 529 (1853).

[5] State *ex rel.* Dorne *v.* Wilcox, 45 Mo. 458 (1870).

out the presentation of any argument of interest in this connection, that an act authorizing county courts to suspend the operation of a state road law and thus to revive previously enacted laws on this subject, was not at all comparable to the delegation of local legislative power to municipal corporations, but was an unconstitutional delegation of power.

In a much later New Jersey case [1] it was held that an act authorizing the legislative body of a city "to consolidate any two public offices of said city, or any of its departments," which offices and departments were created by statutory provisions, was void on the ground that "it attempts to delegate to municipal bodies powers which can only be exercised by the legislature itself." The court said that under the terms of the act the council could "concentrate most, if not all, the functions of government in one and the same person." Influenced apparently by a consideration of this extreme possibility rather than by a consideration of legal principles, the court concluded that this was an unconstitutional delegation of legislative power.

In New York the question whether the legislature can give cities the power to repeal provisions of their charters has arisen in connection with two recent statutes. One of these—the so-called "home rule" act of 1913 [2]—deserves brief analysis. It is an anomalous act, superimposed upon the existing complicated special and general laws regulating the government of the many cities of the state. It purports to confer upon all cities powers both in supplement of those already granted and in conflict with limitations previously imposed. There is at the outset a broad grant to every city of undefined "power to regulate, manage and control its property and local affairs" [3] —whatever that may mean—and elsewhere there is an additional grant of authority "to exercise all powers necessary and proper for carrying into execution the powers granted to the city." There is also a grant, in somewhat general terms, of a

[1] Dexheimer *v.* City of Orange, 60 N. J. L. 111 (1897).

[2] Laws of N. Y., 1913, ch. 247.

[3] A similar expression employed in the New York constitution of 1894 (art. xii, sec. 2) has received scarcely any definition by the courts. For the reason, see McBain, The Law and the Practice of Municipal Home Rule, p. 102.

wide variety of powers specified under twenty-three subdivisions. The general grant of powers (to the extent that it may include anything not covered by existing charter laws or by the elaborate enumeration included in the act itself) awaits judicial construction whenever any city shall have summoned sufficient courage to embark upon the uncharted seas to which it extends invitation. The specific enumeration of powers doubtless confers certain substantive powers not embraced within the charters of some of the cities of the state. Indeed this has been clearly indicated in at least one case, which sustained and applied, without comment on the act as a whole, the clause granting the specific power "to pay or compromise claims equitably payable by the city, though not constituting obligations legally binding on it."[1]

In two respects this law apparently confers upon cities the right to exercise powers in conflict with limitations previously established—the right, in other words, to repeal state laws. In the first place the power is granted, among the so-called "specific powers," to "determine and regulate the number, mode of selection, terms of employment, qualifications, powers and duties and compensation of all employees of the city and the relations of all officers and employees of the city to each other [*sic*], to the city and to the inhabitants." If this clause means anything substantial, it means that the power of reorganizing city departments and official relationships generally (matters usually regulated by charter provisions) is delegated to the local corporate authorities—and this is not to mention the fact that matters relating to the "terms" of municipal employment, such as wages, hours of labor, protection, welfare and safety, are by a constitutional amendment of 1905 made specifically subject to legislative control.[2] In the second place, in possible recognition of the usual confusion in charters between the grant of powers and the provisions relating to governmental organiza-

[1] Mollnow *v.* Rafter, 89 N. Y. Misc. 495 (1915). In such instances curative acts of the legislature had previously been considered necessary. Under this grant of power the corporate authorities of cities may apparently pay claims arising out of contracts entered into in flagrant violation of charter requirements.

[2] Amendment to sec. 1 of article xii.

tion, and of the related fact that powers are usually delegated to specified corporate authorities and not to cities as such, attempt is made to designate the authorities who shall exercise the powers conferred by this act. Of special interest is the declaration that "any provision of any special or local law which in any city operates, in terms or in effect, to prevent the exercise or limit the extent of any power granted by this article, shall be superseded." Obviously such supersession could result not directly from the law itself but only from local action in the exercise of some power conferred by the law.

It is needless to say that the cities of New York have not hastened to avail themselves of the opportunities afforded by this unique statute, the ramifications of which have been quite inadequately described here. In an opinion construing the law very generally the attorney general has held that "the rule of [strict] construction in respect to municipal powers seems to be changed" by the clause which asserts that "no enumeration of powers in this or any other law shall operate to restrict the meaning" of the *general* grant of powers that is made by the act.[1] This, in his view, was "the most important feature" of the law.[2] There are in the act, he declared, "specific grants of power that seem to reach the limit, at least, of the right of the legislature in dealing with cities;" and he expressed the opinion that the act, being "a long step in the direction of genuine home rule," apparently conferred upon cities "all the power that the legislature possesses in respect to the general management and control of municipal affairs." He believed, in consequence, that it would "do away with constant application to the legislature for enabling acts to exercise purely municipal affairs [*sic*]." While he thus regarded the act as of far-reaching importance, the attorney general nevertheless sounded the note of warning that legislative power could not be delegated. "A perfect home-rule bill" could not be passed without a constitutional amendment. Certain it was that the law did not intend, and "any such power would be ineffectual if

[1] Report of the Attorney-General of New York, 1913, vol. ii, p. 375.

[2] The courts have not as yet passed upon this point.

attempted to be granted," to allow cities to regulate all matters relating to the conditions and relationships of corporate authorities or to delegate the power to change the form of government of the city.[1] In other words the power to amend the local charter and thus repeal a state law had not been and could not be delegated.

Although it is difficult to place a just estimate upon this unusual and highly complicated statute, it is probably fair to say that if it does not confer the power of charter amendment it is of no great significance, and that if it does confer such power it is, at least in the attorney general's opinion, unconstitutional. That the cities of the state have not to any appreciable extent availed themselves of its opportunities, and have not, in spite of the attorney general's prediction, ceased to apply to Albany for special legislation, is eloquent of the uncertainty of the meaning of the statute, as well as of the difficulty, if not impossibility, of dealing with the powers of a city as a thing easily separated from the matter of organic structure.

In 1914 the legislature of New York enacted a statute known as the optional city-government law.[2] By the terms of this law any city of the second or third class might upon a referendum vote adopt one of six plans of government offered. The legislature naturally hesitated to provide that the adoption of one of these plans should operate to repeal *in toto* all the general and special

[1] Two further points in this opinion call for incidental remark. The support which was sought in the constitutional provision declaring that "it shall be the duty of the legislature to provide for the organization of cities . . . and to restrict" their financial powers was manifestly unfortunate. Clauses of this kind, found in a number of constitutions, are not positive limitations but are patently of a directory character only: People *ex rel.* Blanding *v.* Burr, 13 Cal. 342 (1859). It is impossible to concede, moreover, that the legislature "can delegate powers of legislation only in respect to those affairs that are purely municipal;" that "no state function can be delegated by the legislature to a city." As examples of such non-delegable powers the attorney general cites "the right to regulate the franchise, the right to control the sale of liquor, the right to regulate the civil service, or any other subject covered by state statutes and common to the whole state or necessary in the exercise of the police powers of the state." It is sufficient to remark that, with the exception of suffrage, all of these are subjects in respect to which there are frequent delegations of power to cities.

[2] Laws of New York, 1914, ch. 444.

laws applicable to the adopting city. Instead of this, provision was made for the direct repeal of laws and provisions only that were actually inconsistent with the newly adopted law.[1] But in order that the principle or scheme of the new government might be ultimately worked out with consistency, and not defeated in part by the continuance of offices and employments established by unsuperseded sections of the old charters or other applicable laws, power was conferred upon the new council to abolish offices, to transfer powers and duties, and to regulate generally the exercise of official powers and the performance of official duties.[2] The exercise of this power involved, of course, the repeal by ordinance of provisions of existing laws so far as they related to the powers and duties of officers.

Upon application the attorney general held that this section of the law delegated legislative power in violation of the constitution.[3] The legislature "cannot secure relief from its duties and responsibilities by such a general delegation of legislative power to some one else."[4] It "cannot authorize a municipal corporation to repeal by ordinance a statute of the state." While there is "no objection to the submission to a city, for its acceptance, of a charter as such," there is objection "to any attempt to delegate to the council of such city the power to say which part of the existing charter shall be retained and which part of it rejected."

In a somewhat unusual New Jersey case, otherwise admirably argued, it was recently held that a provision of the law, which was in effect an optional charter amendment, authoriz-

[1] Laws of New York, 1914, ch. 444, sec. 23.

[2] *Ibid.*, sec. 37.

[3] Opinion dated January 11, 1916. Following the reasoning of his predecessor, *supra*, p. 397, note 1, the attorney general held that since the poor law, which had to be enforced by the overseer of the poor of Niagara Falls (the officer who applied for the opinion) was a general law regulating a "state function," the "power cannot be delegated by the legislature to the city to regulate it even though the existing provisions of law had been repealed."

[4] Relying especially on People *v.* Klinck Packing Co., 214 N. Y. 121 (1915), holding void an amendment to the "one day of rest in seven" law which vested in the commissioner of labor power to grant exemptions, but which set no standards for the exercise of his discretion.

ing its acceptance by the corporate authorities of any city, was void as being an unconstitutional delegation of legislative powers.[1] Such acceptance may or may not have involved the repeal of charter provisions; this point was not discussed. But the situation was aggravated by the introduction of a plan of alternative acceptance, either by the authorities or by the voters upon petition; and apparently an adverse vote by the electors could be overridden by action of the authorities. However, the decision went to the broader proposition stated. Briefly put, the argument was that while a reference to the voters of charters and similar laws, which the court called "referendum statutes," had been sustained as not being a delegation of legislative power at all but merely a referendum on acceptance *qua* corporators by the people who are to be governed by such laws;[2] and while the delegation of legislative power either to the local government (to be exercised or not) or to the local voters (to be ratified or not) had been sustained;[3] and while the power to create a municipal office (such as an excise commission) could also be delegated, this being denominated a "statute delegating legislative power;"[4] yet a charter or similar law referred for acceptance by the corporate authorities of a city could not be sustained.[5] Apparently the ground for the latter ruling was that the only justification for a referendum to the voters on a charter or analogous law was that they might accept the law *qua* corporators and not *qua* legislators. But the corporate authorities, not being the corporators, represented in such matter an "alien will, even though it be that of the governing body for the time being of the municipality."

[1] Attorney General *ex rel.* Booth *v.* McGuinness, 78 N. J. L. 346 (1909).

[2] POLITICAL SCIENCE QUARTERLY, March, 1917, vol. xxxii, pp. 292, 293.

[3] Sanford *v.* Morris Pleas, 36 N. J. L. (7 Vroom) 72 (1872); Paul *v.* Gloucester County, 50 N. J. L. 585 (1888); Noonan *v.* Hudson County, 52 N. J. L. (23 Vroom) 398 (1890).

[4] Riley *v.* Trenton, 51 N. J. L. (22 Vroom) 498 (1899); Schwarz *v.* Dover, 70 N. J. L. (41 Vroom) 502 (1904).

[5] Specifically overruling De Hart *v.* Atlantic City, 62 N. J. L. (33 Vroom) 586 (1898).

This decision is illustrative of the refinements of argument into which the pronouncements of the courts have compelled them to drift. If, as has been indicated,[1] the doctrine that the voters do not exercise legislative power in accepting or rejecting a charter or similar law cannot reasonably be sustained by the analogy of the acceptance of private charters, the structure of argument in this case, based as it probably was largely upon the desire to follow previous decisions, must of necessity fall.

In respect to the soundness of the arguments in these decisions involving a delegation to the corporate authorities of power to repeal a charter provision or to accept or reject such a provision, it may again be noted that the legislature is unquestionably competent to make the charter of a city a very brief instrument, vesting in the charter authorities large powers to elaborate the local government by ordinance. In the case of existing charters the legislature may certainly accomplish this by direct repeal of specified charter provisions. Why, then, may not the legislature vest in the local authorities of a city the power to repeal designated provisions of the charter under which the city is at the time operating or to accept new provisions for such charter? "It makes no difference," says the attorney general of New York, "whether they [city charters] contain provisions which the legislature might in first instance have delegated the power to enact to the local council. The answer is that the legislature did not delegate the power in the existing charter but made its own special provisions."[2] In the matter of accepting a charter provision enacted by the legislature, says the highest court of New Jersey, the corporate authorities represent an "alien will." If one looks at the substance of things, each of these declarations appears somewhat attenuated. The first amounts to this—that having occupied a particular field of regulation through the medium of a charter provision, the legislature cannot thereafter retire from that field by delegating to the local authorities a competence which in first instance it might have delegated with impunity. The

[1] Political Science Quarterly, March, 1917, vol. xxxii, pp. 292, 293.

[2] Opinion dated January 11, 1916.

second amounts to this—that although the legislature may and frequently does empower the corporate authorities of a city to act upon their own discretion in respect to a wide realm of matters, it may not empower them to accept or reject a charter provision regulating one of these matters.

It is manifest, of course, that the corporate authorities of a city would never be vested with power to repeal a charter *in toto*. Only a partial power would be conferred. Otherwise, since whatever the corporate authorities enact is in the nature of ordinance, and therefore subordinate, the distinction between the charter and the ordinances of the city would be completely destroyed. Something of the charter enacted by the legislature would have to remain, even though it were nothing more than the provisions creating those corporate authorities who were empowered to repeal the rest of the charter and thus reduce its provisions to the status of ordinances.[1] The corporate authorities might, on the other hand, be endowed with power to accept a completely new charter.[2] While the statutory delegation to such authorities of power to accept a charter has certainly been rare, it is nevertheless difficult to see why it should be interdicted on constitutional grounds, when it is considered not only that such power may be vested in the local electors but also that the legislature may, by the enactment of a brief and simple charter, vest in the corporate authorities an ordinance power that is almost as extensive as the charter-making power itself.

Over against the few opinions of record in which it has been denied that the legislature is competent to authorize the local authorities to transform specified provisions of a charter into ordinances, may be set many important instances in which the legisla-

[1] State constitutions occasionally contain provisions that are expressly made subject to alteration by the legislature. When the legislature acts under an authority of this kind it does not, strictly speaking, amend the constitution; it merely transforms a subject of constitutional regulation into one of statutory regulation. But if the legislature were empowered to do this with *every* provision of the constitution, there would no longer be any distinction between the constitution and the statutes of the state.

[2] They are in fact endowed with such power by the exceptional provisions of the constitution of New York.

ture has actually exercised this competence without any resulting judicial controversy. The citation of one or two such instances will suffice. In spite of the elaborateness of the Greater New York charter of 1897,[1] there were a number of instances in which power to alter charter provisions was conferred upon the municipal assembly (now the board of aldermen). Thus salaries could be fixed by ordinance "irrespective of the amount fixed by this act."[2] So also upon the enactment of a building code by the municipal assembly all statutes relating to buildings were to be repealed, "but such repeal shall not take effect until such 'building code' shall be established."[3] When the charter of the city was revised and re-enacted in 1901, there was attached to the statute a so-termed "second schedule" which listed no less than fifty-six sections of the previous charter as "sections to remain in force until changed by the board of aldermen."[4] Again, the Boston charter of 1909[5] conferred upon the mayor and city council extensive power to reorganize the administrative departments of the city government regardless of provisions of the existing charter. It does not appear that these very important instances in which the power of charter amendment has been delegated to the local authorities have ever been contested before the courts. This is passing strange if it be true that there exists in the body of our constitutional law a rule denying the competence of the legislature to make such a delegation.

III. The Delegation of Charter-Making Power to Corporate Authorities and the Electors

We are in search of a line of consistent legal reasoning that will sustain the competence of the legislature to delegate to cities the power to make their own charters within such general scope and subject to such general limitations as the legislature

[1] Laws of New York, 1897, vol. iii, pp. 1–559.

[2] *Ibid.*, sec. 36.

[3] *Ibid.*, sec. 647.

[4] Laws of New York, 1901, vol. iii, p. 663.

[5] Acts of Massachusetts, 1909, ch. 486, sec. 5.

may set. The distinction between that which is charter and that which is ordinance has always rested solely upon a difference in the enacting authority. What the legislature enacts is charter, no matter how trivial may be its subject. What the municipal authorities enact is ordinance, no matter how high and important its subject. Both are acts of legislation. In respect to the former we have seen that the courts hold the legislature to be constitutionally competent to submit a proposed charter or analogous law to the voters of the city for acceptance or rejection; and although it must be admitted that the grounds usually advanced in support of this rule of competence are far from satisfactory, there seems to be no reason why the courts, freely conceding that this is a delegation of legislative power, might not simply take the stand that the constitution does not of necessity imply that such a delegation is prohibited. We have seen also that the delegation of power to reduce designated charter provisions to the status of ordinances is supported by important practice as well as by weight of reason, although in a few opinions the power of the legislature to make such a delegation has been denied. If the validity of both these acts of delegation be conceded, why may not the legislature divest itself completely of the charter-making power and vest such power in the local corporate authorities and the local electors acting in combination? If the legislature may devolve a portion of its power, why may it not devolve the whole of it? The combination of proposal by some existing or specially constituted corporate body and ratification by the electors would offer adequate solution of both the legal and the practical problem. The distinction between charter and ordinances would be preserved. What the voters acted upon in the prescribed manner (instead of what the legislature enacted) would be charter—the superior law of the city. What the corporate authorities alone enacted would be, as at present, ordinance.

There is another way of looking at this matter. In granting the charter-making power to cities it is not necessary and probably not desirable that the legislature should prescribe only the machinery for the exercise of the power. There are a number of moot questions concerning the local competence

that ought to be settled by statute, if for no other reason because the city should not be left in uncertainty as to the metes and bounds of its powers in respect to dubious matters. In Michigan and in Texas the power to frame their own charters is granted to cities by constitutional provision; but the legislature may determine not only the manner of exercising this power but also its scope. In each of these states the legislature has enacted a somewhat elaborate "home rule" or "enabling" act.[1] If such a law were enacted in a state having no constitutional provision upon this subject, why might not this law itself be regarded as the fundamental law of every city? Such it would be in fact, no matter what it were called. It would not do perhaps to call it the charter of the city; for this would doubtless result in a confusion of terms, and it is probably desirable to retain the term charter as descriptive of the instrument which actually provides the organization of the local government. It might readily be argued, however, that the legislature, in enacting such a law, had exercised all the legislative power necessary for the creation and regulation of municipal corporations; that it had merely delegated a larger degree of local legislative power than has been customary; and that it had provided for the division of the power so delegated into two parts—namely, the power of charter making, in which the voters should participate, and the power of ordinance making, which should be regulated by the provisions of the locally made charter.

The difficulty of following this argument, if any there be, arises from the use of old terms to describe a somewhat new statutory situation. If the home-rule act passed by the legislature were called the charter of the city, if the charter ratified by the voters were called—let us say—the "fundamental ordinance" of the city, and if the ordinances enacted by the corporate authorities were called by some appropriate name to indicate their inferiority, the difficulty of sustaining the constitutionality of such a legislative act, at least so far as established nomenclature is concerned, would be largely, if not entirely, overcome.

[1] Public Acts of Michigan, 1909, no. 279; General Laws of Texas, 1913, ch. 147.

IV. *Legislative Attempts to Grant the Charter-Making Power*

There remains only to mention the few instances in which legislatures have, without express constitutional sanction, attempted to delegate to cities a more or less complete charter-making power.

In the year 1828 a charter proposed by the legislature for the city of New York was submitted to a local referendum and was defeated at the polls.[1] Thereafter the corporate authorities of the city, without express sanction of law, provided for the election of members of a so-called municipal convention which should draft a charter for the city. In 1829 the charter thus drafted was submitted to and approved by the voters. At its next session the legislature enacted this charter without amendment.[2] In 1846 the legislature itself made provision for the election of a similar municipal convention to revise the charter of New York.[3] The charter that was framed by this convention was rejected at the polls; but shortly afterward a charter proposed by the board of aldermen of the city was enacted by the legislature, submitted to the electors, and by them approved.[4] In Brooklyn also a charter convention met in 1847 under statutory sanction[5] and, having drafted a charter, caused it to be "printed for distribution among the inhabitants of said city" as was required by the law. This charter was submitted to the local electors for approval *after* it had been enacted by the legislature.[6]

These are early instances in which the propriety of permitting localitites to draft their own charters was recognized apparently without hesitation. Certain later instances of a similar character may also be mentioned. By an Oregon law of 1901 twenty-three designated voters of the city of Portland were empowered to draft a charter which upon approval by the

[1] Laws of New York, 1828, 1st sess., ch. 249.

[2] *Ibid.*, 1830, ch. 122.

[3] *Ibid.*, 1846, ch. 172.

[4] *Ibid.*, 1849, ch. 187.

[5] *Ibid.*, 1847, ch. 246.

[6] *Ibid.*, 1849, ch. 47.

electors should be submitted to the legislature "for its approval or rejection as a whole, without power of alteration or amendment."[1] Thus was the Portland charter of 1903 framed and enacted. So also a statute Virginia[2] passed in 1914 authorizes cities of more than 100,000 inhabitants (Richmond) to *propose* new charters to the legislature, the procedure for proposal being that such charters shall be adopted by ordinance and submitted to a vote of the people.[3] In 1915 a law of the same state authorized fifteen per cent of the electors in cities having a population of from 75,000 to 100,000 inhabitants (Norfolk) to petition for the election of a charter commission. The charter drafted by this commission shall, upon approval by the voters, "constitute a request to the general assembly to grant the said special charter or form of government provided therein."[4] Each of these Virginia statutes establishes a continuous procedure for local initiative in the matter of charter making.

So far as legal principles are concerned it is manifestly important to note that each of the instances just mentioned involved or involves direct action upon the charter in question by the legislature itself. From the viewpoint of political psychology it is nevertheless apparent that a legislature would hesitate to amend or refuse to enact a charter which had been approved by the voters of a city.[5] It is interesting in this connection to note that the New York municipal convention of 1846 regarded the legislative ratification as of so little importance that they incorporated into the charter which they drafted

[1] General Laws of Oregon, 1901, p. 296. It is obvious, of course, that the Oregon legislature of 1901 had no authority to bind its successor of 1903 to accept or reject the proposed charter without power of amendment.

[2] Sec. 117 of constitution, amended in 1912, authorized special charters by "request."

[3] Acts of Assembly of Virginia, 1914, p. 81; amended, *ibid.*, 1916, p. 116.

[4] Acts of Assembly of Virginia, ex. sess., 1915, p. 80d; re-enacted in revised form as applicable to cities of from 65,000 to 100,000, *ibid.*, 1916, p. 62.

[5] In California, under the constitutional provision granting home rule to cities, all charters and charter amendments must, after being locally drafted and adopted, be submitted to the legislature for approval, without power of amendment. In the entire history of home rule in that state, covering the enactment of numerous charters and amendments, the legislature has never refused its approval. See McBain, The Law and the Practice of Municipal Home Rule, pp. 218–220.

and which was defeated at the polls a provision for future amendment without legislative approval.[1]

Of much greater importance than the instances above mentioned are those in which the legislature has delegated to cities the complete power of charter making without reserving to itself the right of direct action. Probably the earliest instance of this was found in an Iowa law of 1858 which conferred upon existing cities the power to amend their charters by initiative petition and referendum vote.[2] Without any consideration whatever of the question of the delegation of legislative power this law was enthusiastically approved by the supreme court of Iowa,[3] and it still remains upon the statute books as applicable to cities which have not voluntarily adopted the general charter law.[4] So also in Mississippi a law which provides for the amendment of city charters by local action without legislative ratification has been approved by the supreme court of the state.[5] So also the supreme court of Illinois has expressed the opinion *arguendo* that the legislature might provide for the incorporation and alteration of the charters of cities "in the discretion and through the agency of those affected;"[6] but the legislature of that state has never adopted any such policy.

[1] Journal of the City Convention, 1846, p. 715.

[2] Laws of Iowa, 1858, ch. 157, sec. 111.

[3] Von Phul *v.* Hammer, 29 Ia. 222 (1870); *Ex parte* Pritz, 9 Ia. 30 (1859); Davis & Bro. *v.* Woolnough, 9 Ia. 104 (1859); Hetherington *v.* Bissell, 10 Ia. 145 (1859).

[4] Iowa Code of 1897, sec. 1047.

[5] Code of Mississippi, 1892, sec. 3039; amended by Laws of 1900, ch. 69; Code of 1906, sec. 3444; sustained in Yazoo City *v.* Lightcap, 82 Miss. 148 (1903). The procedure provided is enactment by the mayor and council, approval by the governor and attorney general, and ratification by the electors only in case a protest is filed signed by one-tenth of the voters. In possible support of such a law attention may be called to the unusual phraseology of section 88 of the Mississippi constitution of 1890, which reads: "The legislature shall pass general laws . . . under which cities and towns may be chartered and their charters amended." The only constitutional question discussed in the Yazoo City case was whether the law providing for the amendment of charters by local action was a "general law" within the meaning of the constitution.

[6] People *ex rel.* Miller *v.* Cooper, 83 Ill. 586 (1876).

In Louisiana under a law of 1886 any city except New Orleans may amend its own charter or adopt an entirely new charter upon a petition by taxpayers or property owners, and ratification by the electors. This law appears never to have been contested before the courts and probably has been infrequently used in consequence of the large number of petitioners required.[1] In South Carolina by statutory allowance amendment to any special charter or general act of incorporation may be initiated by a majority of the freeholders of the city and ratified by a majority of the electors.[2] This law also seems never to have been contested. Probably for the same reason as in the case of the Louisiana statute it has seldom if ever been made use of. In Florida, charter-making power has been extended to certain specific cities by the terms of special charters;[3] and although the power thus conferred has certainly been exercised in some instances by Florida cities, the competence of the legislature to confer such power has apparently not been judicially questioned.

Within the last few years the legislature of Connecticut has granted the charter-making power to certain cities. Thus in 1913 the city of New Haven was authorized to amend its charter by initiation of the board of aldermen or a voters' petition, and subsequent ratification by the voters.[4] A similar law was enacted for Waterbury in 1915.[5] It remains to be seen whether the Connecticut courts will sustain such delegations of power if any judicial contest is raised over an attempted exercise.

From the instances cited it appears that complete home rule, or charter-making power, has been delegated to cities by statute in at least six states—Iowa, Mississippi, Louisiana, South Carolina, Florida and Connecticut. In two of these—Iowa and Mississippi—the courts have sustained such delegation; in the others the question of legislative competence has not been

[1] Acts of Louisiana, 1886, p. 138; *ibid.*, 1896, p. 190.

[2] Acts of South Carolina, 1899, p. 70.

[3] See, for example, the charter of Gainesville; Laws of Florida, 1907, p. 399.

[4] Special Laws of Connecticut, 1913, p. 817; amended by *ibid.*, 1915, p. 335.

[5] *Ibid.*, 1915, p. 439.

raised. In two other states, however, the courts have refused to uphold statutes of this kind. Thus in Michigan, prior to the grant of home rule by the constitution of 1908, a law was declared void which provided for amending the charter of Detroit by a proposal of the mayor, ratification by a three-fourths vote of the council, and approval by the electors; or, as an alternative method, by a proposal of five hundred petitioners and approval by the electors.[1] The court said that in delegating legislative power to cities the legislature "must point out specifically the powers delegated, and the extent of those powers." Whether this act was regarded as delegating power to the corporate authorities, or to a limited number of petitioners, or to the electors, it was equally unconstitutional. This was true as a general proposition, but it was especially true in Michigan because of a clause of the constitution which specifically authorized the delegation of "such powers of a local legislative and administrative character" as the legislature might deem proper. This act, the court argued, gave the city of Detroit such legislative and administrative powers as the local electors, and not the legislature, thought proper.

So also in a recent Wisconsin case[2] a law was held invalid which attempted to confer upon the cities of the state power to amend existing charters and to adopt new charters by a procedure which was patterned after that provided in most of the twelve states that have conferred such power by constitutional provision. The making of charters, said the court, was not only "a legislative function at common law," as was shown by the history of its exercise in this country, but was also made "exclusively such" by express constitutional provisions vesting in the legislature the power to "form municipal corporations" and to "provide for the organization of cities."[3]

[1] Elliott *v.* City of Detroit, 121 Mich. 611 (1899).

[2] State *ex rel.* Mueller *v.* Thompson, 149 Wis. 488 (1912).

[3] In 1913 the supreme court of Vermont held void an act which conferred upon the public service commission power to incorporate villages and to amend city and village charters upon petition; Acts of Vermont, 1910, no. 115. That act, said the court, "goes too far when it leaves it to the commission to determine the plan and frame of government of the proposed village, what powers and functions it may exercise,

V. Conclusion

It seems fair to conclude that the law upon this subject of the competence of the legislature to delegate the charter-making power to cities is, to say the least, not as yet settled. It is earnestly to be hoped that in the process of bringing it to settlement the courts will not take a pinched and narrow view of legislative practices and possible constitutional implications. So far as the practical problem is concerned, they should recognize: that the demand for municipal home rule is fairly irresistible; that the generic term "municipal charter" is applied to a wide variety of instruments; that while there is no accepted standard for marking the proper content of a city charter, a very brief instrument conferring large discretionary powers on a few designated authorities is probably no longer feasible; and that in consequence of this the proposal to extend a larger measure of self-governing powers to cities involves of necessity a grant of some part or the whole of the charter-making power. So far as legal principles are concerned, they should concede that the rule against the delegation of legislative power to cities is at best only a *possible* implication of the constitution; that the delegation to the local voters of power to accept or reject a proposed charter can logically be regarded only as a delegation of legislative power and therefore as a refutation of the rule in its application to laws which are charters;

and what shall be the limit of its expenditures and indebtedness, for these are questions of legislative judgment and discretion, and therefore their determination cannot be delegated." Opinion of Justices, 86 Atl. 307 (1913).

So also in St. Mary's *v.* Woods, 67 W. Va. 110 (1910), it was held that the legislature could not vest in the circuit court power to amend a special city charter. However, there appeared to be no question concerning the validity of section 1896 of the code of 1906, which vested in the circuit court power to incorporate and to amend charters of cities of less than 2000 inhabitants. It was apparently the view of both the legislature and the court that the constitutional prohibition against the enactment *by the legislature* of special charters for such cities justified the delegation of this power, although it is manifest that the legislature might have met the situation by enacting a general charter law.

Neither of the laws involved in these Vermont and West Virginia cases is directly in point with the discussion of the text. They involved no question of home rule, but a question of the delegation of charter-making power to administrative and judicial officers of the state.

that the delegation to municipal authorities of power to reduce specified charter provisions to the status of ordinances is clearly a delegation of legislative power; and that the competence of the legislature to make such a delegation, although denied in a few opinions, is supported by a considerable legislative practice as well as by sound reason. In the light of these far-reaching exceptions to the rule of non-delegation to cities the courts would be justified, it would seem, in establishing the rule that the legislature is fully competent to delegate the charter-making power itself, preserving the desirable distinction between charter and ordinances by requiring a referendum vote upon the former.

HOWARD LEE MCBAIN.

COLUMBIA UNIVERSITY.

THE TRAINMEN'S EIGHT-HOUR DAY. II

IN a former article[1] dealing with the Trainmen's Eight-Hour Day, the writer discussed the early phases of the movement, giving a brief historical account of the railroad brotherhoods, and tracing the recent eight-hour issue from its inception in July 1915 to the close of the conference between the railroads and the men held in June 1916. The present paper is concerned with later developments.

IV. *Voting to Strike*

When the public learned that the conferees had broken off negotiations and that a strike vote would be taken, considerable discussion arose concerning the inability of the parties to agree. The press in general supported the railroads, condemning the men for refusing to arbitrate. Much of this criticism was caused by failure to perceive that the managers had suggested arbitration, not for the eight-hour day *per se*, but only as modified by their own "contingent proposition," and even today the public has never had opportunity to study critically this proposed modification. Yet it was the indefinite nature of the railroads' proposal that caused the break in negotiations. Had the managers genuinely wished to continue the conference, they could probably have re-worded their "contingent proposition" so as to make it specific in its application. The "yardstick," which they offered as an explanation, was virtually as equivocal as the original, and only tended to heighten the suspicion of the men that in case of arbitration it might be used by the roads to nullify many advantages in existing trade agreements.

On the very day that the conference ended, strike ballots were sent out to all train-service employees, union and non-union. Accompanying each ballot was a statement by the brotherhood leaders giving their explanation of the failure of

[1] POLITICAL SCIENCE QUARTERLY, December, 1916, vol. xxxi, p. 541.