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Constitutional Considerations for Local Government Reform in West Virginia

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CONSTITUTIONAL CONSIDERATIONS FOR LOCAL GOVERNMENT REFORM IN WEST VIRGINIA

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In 1989, at the urging of Governor Gaston Caperton, the West Virginia Legislature submitted to the State's voters the County Organization Reform Amendment, which would have amended Article IX of the West Virginia Constitution to authorize the Legislature to consolidate counties with local voters' consent,[1] develop three or more alternative forms of county governance,[2] provide for county home rule,[3] create city-county governments with local voter approval,[4] and permit increases in local officials' salaries during their terms of

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1 Committee Substitute for H.R.J. Res. 12, 1989 ACTS OF THE W. VA. LEGISLATURE 1617, 1618. The proposal would have amended Article IX, § 8 to read:

> § 8. Formation and consolidation of counties; allocation of liabilities.
>
> No new county may hereafter be formed in this state except by the consolidation of counties. The Legislature shall provide by law for the consolidation of two or more counties or the division of a county and the consolidation of the division thereof with one or more other counties. No such consolidation may become effective without the consent of a majority of voters residing within each county affected who vote on the question. The former areas shall be held responsible for their respective existing liabilities as provided by law.

Id.

2 *Id.* at 1618-19. The proposal would have amended Article IX, § 13. The intended effect would have been the enactment of legislation for counties similar to W. VA. CODE § 8-3-2 (2003), which sets forth several forms for municipal governance. That section and possibilities for alternative forms of county governments are discussed *infra* at note 136.

3 *Id.* The proposal would have added "home rule for counties" to the title of Article IX, § 13 and the following sentence to its text: "Any of such forms of [county] organizations and governments may provide that counties have the power to pass such laws and ordinances relating to their local affairs as the Legislature may authorize." *Id.*

4 *Id.* at 1619-20. The amendment would have created a new section, Article IX, § 14. It would have authorized city-county consolidation upon separate voter approval from each affected municipality, county residents living outside the city or cities, and voters who live in an affected city but outside the county.

office.[5] The electorate rejected the proposal by better than a four to one margin.[6] A decade and a half later, state leaders have once again expressed interest in local government reform and, in particular, in county consolidation, regionalization, and city-county governments. For example, after considerable study, the Governor's Commission on Governing in the 21st Century[7] issued its report in November, 2004, and recommended numerous changes, some of which found their way into bills introduced in the 2005 legislative session.[8] None, however, were enacted. Numerous and diverse groups and voices have persistently advocated for, or addressed in some fashion, local government reform.[9]

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[5] *Id.* at 1620. The proposed amendment would have added a § 15 onto Article IX. Section 15 would have repealed Article VI, § 38 as applied to local government officials. Section 38 prohibits "the salary of any public officer" from being "increased or diminished during his term of office." W. VA. CONST. art. VI, § 38. *But see* note 10 *infra*. By virtue of Article VI, § 33 and Article VIII, § 7, §38 does not apply to legislators or Article VIII judicial officers. W. VA. CONST. art. VI, § 33; W. VA. CONST. art. VIII, § 38. The former contains its own restrictions on legislative pay raises. W. Va. Const. art. VI, § 33.

[6] W. VA. BLUE BOOK 440 (Darrell E. Holmes, ed., vol. 84, 2002). The vote was 201,992 against the proposed amendment to 47,847 in support of it. *Id.* For an extended discussion of the proposal, see DAVID TEMPLE, *Local Government Reorganization in West Virginia, available at* http://www.polsci.wvu.edu/ipa/par/report_6_3.html. The County Organization Reform Amendment actually fared much better than the two other reform amendments put to the voters that year. The Education Reorganization Amendment (eliminating State Board of Education and transferring its powers to the Department of Education under the Governor) and the Better Government Amendment (eliminating the secretary of state, treasurer, and commissioner of agriculture and transferring their duties to departments created by the Legislature and placed under the governor) lost by votes of 220,286 to 29,776 and 220,700 to 28,634, respectively. West Virginians were clearly not in a reform-minded mood in 1989. A 1940 referendum had also rejected a proposal very similar to the Better Government Amendment. That one lost, 311,096 to 86,402. W. VA. BLUE BOOK, *supra*, at 437.

[7] The Commission was appointed by Governor Wise in January, 2004, to consider whether local governmental restructuring could help the State "to provide the most effective and efficient services," "to increase economic development and provide good jobs," and to "increase[] opportunities, minimize[] duplication of services, and alleviate[] financial burdens." W. VA. EXEC. ORD. No. 1-04 (2004); *see also* Minutes, 4/13/04 Meeting of the Governor's Commission on Governing in the 21st Century (State must review local government structure to see if changes are needed to "attract new businesses, create jobs and provide the most effective services and programs") (quoting Governor Bob Wise) (copy on file with the author). The Commission included state legislators, state officials, local government officials, and representatives from business, labor, and the public.

[8] S.B. 158, 79th Leg., Reg. Sess. (W. Va. 2005) (relating to consolidation of municipalities); S.B. 159, 79th Leg., Reg. Sess. (W. Va. 2005) (creating Consolidation of Local Governments Act); S.B. 160, 79th Leg., Reg. Sess. (W. Va. 2005) (relating to county consolidation). All are available online at http://www.legis.state.wv.us/.

[9] *See, e.g.*, Beth Gorczyca, *Talk of Government Consolidation Getting Attention*, THE STATE JOURNAL, June 25, 2004, at 4; Editorial, *Our Views Combining Farsighted Leaders Should Position Kanawha County for the Future,* CHARLESTON DAILY MAIL, June 25, 2004, at A4. Tom Witt, *Commission Takes Critical Look at Government*, THE STATE JOURNAL, June 4, 2004, at 31. Another indication of renewed interest in reform is the fact that the core of this article, or some aspect of it, has now been publicly presented by the author on ten occasions: Meeting of subcommittee A of the Joint Comm. On Gov. Operations of the W. Va. Legislature, Charleston, W. Va. (Oct.

This article takes the position that neither the 1989 vote rejecting local government reform nor the State Constitution precludes such reform, including most all of those measures rejected in 1989.[10] Ironically, the Legislature did not, and does not, need statewide voters' approval to proceed to restructure local governments; if it wants to create the opportunity for reform, it can. What is constitutionally required, however, is voter approval at the local level.

The article begins with a brief history of local governments and constitutional reform in West Virginia, describes pertinent constitutional basics, and then turns to its principal focus, a rendition on each of the provisions of the West Virginia Constitution that could potentially affect restructuring local governments in the state. Along the way, the discussion spills onto diverse issues around local governance that, it is hoped, will leave the reader with more than he or she wanted to know about local government law in West Virginia.

I. HISTORY OF LOCAL GOVERNMENT REFORM AND CONSTITUTIONAL REVISION IN WEST VIRGINIA

Local government reform has been a recurrent theme in West Virginia's history. Even before the State's formation, the western Virginia delegates attending the "Reform Convention of 1851"[11] made reformation of the Commonwealth's county court systems a high priority. Prior to that time, the courts' "justices," who performed a county's legislative, executive, and judicial func-

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4, 2005); W.V.U. Institute for Public Affairs Forum for Local Government Officials, Charleston, W. Va. (Sept. 17, 2005); 2nd Annual W. Va. Policy Forum, Charleston, W. Va. (Jan. 9, 2005); Governor's Comm. on Governing in the 21st Century, Fairmont, W. Va. (June 30, 2005); Constitutional Revision Committee of the W. Va. House of Delegates, Charleston, W. Va. (Jan. 28, 2004 & Jan. 16, 2002); Seminar for the W.V.U. Institute for Public Affairs Training for Local Government Officials, Charleston, W. Va. (Sept. 15, 2001); Joint Conference of the W. Va. Counties Association, the W. Va. School Boards Association, and the W. Va. Municipal League, Flatwoods, W. Va. (Sept. 7, 2001); Joint Meeting of the W. Va. Senate and House of Delegates Committees on Government Organizations, Charleston, W. Va. (June 11, 2001). *See also* R. Bastress, *Constitutional Issues Regarding Creation of Multi-County School Districts* (2002), (copy on file with author).

[10] The one reform (other than the elimination of some statewide constitutional offices) that was proposed in 1989 and that is expressly precluded by the Constitution is the authority to raise the salaries of local government officials during their terms of office. As noted in note 5, *supra*, Article VI, § 38 bars such in-term adjustments. As a further irony, that is the one 1989 proposal that the Legislature has enacted regardless of the vote; it has (twice since 1989) raised the salaries of county officials by finding that it has imposed upon each of them new and additional duties that justify immediate increases without violating § 38. W. VA. CODE § 7-7-1 (2003); *see also* Act of Mar. 8, 1996, H.B. 4864, 1996 Acts of the Legislature of W. Va. 196. The Supreme Court has sustained that rationale, at least where the new duties are substantial or are beyond the scope or range of prior duties. *See generally,* State *ex rel.* Goodwin v. Rogers, 158 W.Va. 1041, 217 S.E.2d 65 (1975); Delardas v. County Court, 155 W.Va. 776, 186 S.E.2d 847 (1972); Springer v. Board of Educ., 117 W.Va. 413, 185 S.E. 692 (1936).

[11] ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION: A REFERENCE GUIDE 8 (1995).

tions, were appointed to office and served for "good behavior" – which amounted to life terms – and frequently controlled the appointments of both their successors and other county officers.[12] These "self-perpetuating oligarchies"[13] were described by Thomas Jefferson as "the most afflicting of tyrannies."[14] The 1851 Constitution of Virginia addressed some of the problems by providing for the election of justices and other county officials, but it continued to confer mixed powers on the justices.[15] West Virginia's first constitution, adopted in 1863, looked a lot like its predecessor Virginia Constitution,[16] but one of the significant changes was the elimination of the county courts and the installation of a township system modeled after those in New England. Apparently, consensus existed among the framers that the concentration of power in the county courts was not productive of good government.[17] Under the new system, each county was divided into three to ten townships. Voters in each township met as in a New England town meeting to conduct business and to elect a supervisor, other executive officers, and – separately – justices of the peace.[18] The supervisors elected by the townships then served on the Board of Supervisors, which functioned as the county's legislative and administrative body.[19] Voters were given responsibility to elect the sheriff, prosecutor, and other county officials,[20] and several provisions set forth the operation of the justice of the peace courts.[21]

The system had a short life. The Reconstruction period in the State continued the hostile feelings created by the war. The Republican-controlled government imposed civil disabilities on former rebels, including loss of the right to vote. The ex-confederates bitterly resented the retaliation, and many were also upset about leaving Virginia. Thus, when the southern-leaning Democrats took over in 1871, following a clearly incorrect ruling by a federal court that the disenfranchisement of former rebels violated the Fifteenth Amendment to the United States Constitution, they immediately put in motion the submission to the voters of a referendum on whether to call a constitutional convention.[22] The

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12 DEBATES & PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION OF WEST VIRGINIA 443 (C. Ambler ed., Gentry Brothers Printing 3d ed. 1861-63).

13 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 787 (2d ed. 1974).

14 *Id.*, *quoting* Letter to John Taylor, July 21, 1816, *in* WRITINGS OF THOMAS JEFFERSON 53 (Ford ed., vol. 10).

15 HOWARD, *supra* note 13, at 787-88.

16 BASTRESS, *supra* note 11, at 10-11.

17 DEBATES & PROCEEDINGS, *supra* note 12, at 439-43.

18 *Id.* at 445-50, 874-75.

19 *Id.* at 875.

20 *Id.*

21 *Id.* at 876-77.

22 BASTRESS, *supra* note 11 at 15-18; Milton Gerofsky, *Reconstruction in West Virginia, Part I*, 6 W. VA. HISTORY 308 (1945), and *Reconstruction in West Virginia, Part II*, 7 W. VA. HISTORY 6 (1945).

referendum passed, the convention began in January, 1872, and the voters later that year ratified its work. Dominated by former confederates intent on eliminating every vestige of Yankee influence in the Constitution, the convention eliminated the township system and re-instated Virginia's county courts with their judges exercising legislative, executive, and judicial duties.[23] That arrangement was also quickly changed. In 1880, the first amendment to the 1872 Constitutions set up the three-judge court and took away most of the county judges' judicial powers and assigned them to justices of the peace and circuit judges.[24]

Calls for reform arose periodically throughout the twentieth century. In 1903, Governor Albert White contended in a legislative address that the State's Constitution "creaks at almost every joint."[25] Although five amendments were proposed and ratified,[26] further reform did not ensue. In 1929, Governor William Conley appointed a Constitutional Review Commission, which filed its final report with him on December 1, 1930. Four of its proposals had in the preceding month been submitted to the people and rejected.[27] Among other things, the Commission recommended several provisions regarding local government. They included the reallocation of county courts' probate duties to the circuit courts and the creation of the office of county treasurer to collect and handle county funds.[28] More significantly, the Commission proposed authorizing counties to consolidate and to permit two or more of them to combine offices (such as sheriff or prosecuting attorney).[29] None of those was submitted to the voters, at least not before 1988. Three other proposals -- one creating a more unified executive branch, establishing "summary courts" in each county, and modernizing the budget process – were put to the voters in 1940 but were soundly defeated.[30] Only one Commission recommendation was enacted, al-

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23 BASTRESS, *supra* note 11, at 20-21.

24 Act of Mar. 7, 1879, ch. XLIX, 1879 Acts of the Legislature of W. Va. 72; Joint Resolution No. 10, 1879 Acts of the Legislature of W. Va. 175; W. VA. BLUE BOOK *supra* note 6, at 435.

25 BASTRESS, *supra* note 11, at 21 (quoting MAUD FULCHER CALLAHAN, THE EVOLUTION OF THE CONSTITUTION OF WEST VIRGINIA (1909)).

26 W. VA. BLUE BOOK, *supra* note 6, at 435. The amendments authorized a voter registration law, provided for the election of a secretary of state, authorized the Legislature to set salaries for officials (other than the Legislature), expanded the Supreme Court of Appeals to five justices, and amended the irreducible school fund provision. *Id.*

27 *Id.* at 436; Letter from Gov. William G. Conley to the W. Va. Legislature, Jan. 28, 1931, J. OF THE HOUSE OF DELEGATES OF W. VA. 107-14 (1931 Reg. Sess.). The rejected amendments would have authorized the Legislature to increase the number of circuit judges, created the position of lieutenant governor, reallocated county courts' probate duties, and revised the budget process.

28 *Id.* at 108-09, 112. Governor Conley argued that establishing a county treasurer's office would "avoid much duplication of offices and effort and should result in improved financial methods and accounting." *Id.* at 112.

29 *Id.* at 114.

30 W. VA. BLUE BOOK, *supra* note 6, at 437. Each was defeated by about a 3-1 margin.

though it was an important one. In 1936, the voters ratified the Municipal Home Rule Amendment, which authorized cities to create their own charters and enhanced their law-making powers.[31]

After the war, new cries for reform were heard. Writing in 1950, West Virginia University political scientist Albert Sturm contended that the Constitution's Article IX on local government

> outlines an antiquated plan of county government for an era and conditions long past. With rigid requirements of ancient vintage frozen into the basic law, almost insuperable obstacles to reorganization of county government are presented. The great variation in local needs of West Virginia's fifty-five counties cannot be taken into account, for the Constitution pours them all into one mould. Nor is there any definite constitutional basis for consolidation of local units or for cooperative arrangements between political subdivisions of the State. In West Virginia, considerable economy and greater local efficiency could be achieved by elimination of unnecessary units and by cooperative agreements for functional consolidation.[32]

A leading textbook on West Virginia government in 1963 contained this characterization:

> In any study of West Virginia county government, a student will be particularly impressed by the scattered, disjointed, and irresponsible type of organization that exists in all fifty-five counties. The present county government has no responsible head; it is without a chief administrative officer and the county court controls through appointment only a small part of the county administration. The voters of the county have very little power in the determination of county policies. In fact, there is nothing to commend the present form of county government in West Virginia.[33]

Meanwhile, the Legislature took some action. In 1957 it created a Commission on Constitutional Revision, which ultimately filed five annual reports between 1959 and 1963.[34] Included among the Commission's recommen-

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[31] The Municipal Home Rule provision, W. VA. CONST., art. VI, § 39a, is discussed in the text at notes 104-107, *infra*.

[32] ALBERT L. STURM, THE NEED FOR CONSTITUTIONAL REVISION IN WEST VIRGINIA 54 (1950).

[33] CLAUDE J. DAVIS, et al., WEST VIRGINIA STATE AND LOCAL GOVERNMENT 466 (1963).

[34] FIFTH REPORT OF THE W. VA. COMMISSION ON CONSTITUTIONAL REVISION (1963) (on file with the W. Va. Collection of the W.V.U. Libraries) (proposing changes to Articles III & IV of the Constitution); 1962 J. OF THE W. VA. SENATE 261; 1961 J. OF THE W. VA. SENATE 153 (propos-

dations was a rewrite of Article IX, the article on local governments. The proposal advocated converting the old Article VIII county courts into Article IX county commissions, a proposal that eventually became part of the ratified Judicial Reorganization Amendment of 1974.[35] The Commission also proposed authorizing the Legislature to enact laws for the consolidation of counties, for the creation of optional forms of county governance, and for consolidated city-county governments,[36] and those sections eventually became the substance of the three sections rejected by the voters in the 1989 referendum on the County Organization Reform Amendment.

A persistent proponent for constitutional change throughout the sixties was Hewlitt Smith, who was governor from 1965 until 1969. Smith advocated a constitutional convention to overhaul the constitution and to act on the recommendations of the Commission. His support of a convention was a major part of his platform in the 1960 gubernatorial primary,[37] which he lost to Wally Barron. Four years later, he again campaigned on the promise to push for a convention and delivered on that promise in his first state-of-the-state address when he told legislators:

> The operation of our state government today is severely limited and often made more costly by provisions of a state constitution written over 93 years ago. . . . In an effort to strengthen our governmental structure, I am recommending a constitutional convention, . . . and I urge you to take appropriate legislative action to accomplish this purpose.[38]

The Legislature responded. On the last day of the 1965 session, it passed a bill that called for submission to the voters the question of whether to call a conven-

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ing changes to Articles VII - IX); 1960 J. OF THE W. VA. SENATE 199; 1959 J. OF THE W. VA. SENATE 902 (proposing a Preamble, modification of sovereign immunity, changes to the amendment process, and offering a draft for a new Article VIII). The voters in 1960 approved the Commission's proposals for a Preamble and alterations to Article XIV's procedures for amendments. The Commission's work also contributed substantially to subsequent adoption of the Modern Budget Amendment (1968) (adopting the Commission's proposal but adding a line item veto procedure), the Governor's Succession Amendment (rejected in 1966 but ratified in 1970), and the Judicial Reorganization Amendment (1974). In addition to proposing those later-adopted changes, the Commission endorsed some of the concepts rejected by the voters in the 1989 referenda on reorganizing county governments and the executive branch. *See* notes 3-6, *supra.*

35 1961 J. OF THE W. VA. SEN. 188-89. Those proposed revisions now form parts of Article IX, §§ 9 & 10 of the West Virginia Constitution. The 1974 recasting of county courts as county commissions did not significantly alter county governance, however.

36 *Id.* at 190-91.

37 Thomas F. Stafford, *Refurbished Rural Housing Smith Aim*, CHARLESTON GAZETTE-MAIL, Jan. 17, 1965, at A1.

38 *Text of Gov. Smith's Address to Legislature*, CHARLESTON GAZETTE, Jan. 20, 1965, at 22; *see also* Thomas F. Stafford, *Smith Asks for Better State*, CHARLESTON GAZETTE, Jan. 20, 1965, at 1.

tion and that established the process for holding the convention if the vote was positive.[39] Unfortunately, the less populated counties insisted that every county have at least one delegate in the constitutional convention, which caused a substantial deviation from one-person-one-vote principles in the apportionment of convention delegates.[40] The Smith administration recognized that action threatened the constitutionality of the convention, since Article II, § 4 provides that, "in all apportionments of representation, equality of numbers of those entitled thereto, shall as far as practicable, be preserved."[41] Smith therefore brought a test case to determine the Act's constitutionality. The Supreme Court ruled that the malapportionment rendered the Act invalid; citizens were entitled to equal representation at the convention.[42] Smith considered calling a special legislative session to correct the defect and authorize a new convention[43] but ultimately decided to wait until the 1966 legislative session and reintroduce the convention bill.[44]

At that time, sessions in even-numbered years ran for only thirty days and the Legislature could only consider the budget and subjects specified by the Governor in a pre-session proclamation or by a joint resolution receiving at least

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[39] Act of Mar. 13, 1965, H.B. 861 1965 Acts of the Legislature of W. Va. 109; *Schools Gain: $35 Million Educational Package Given Approval, Sent to Governor*, CHARLESTON GAZETTE-MAIL, 1965, at 1 (on file with author). Part of the difficulty of proceeding by the convention route was that Article XIV, § 1 requires three separate statewide votes to successfully enact a convention-drafted constitution or constitutional changes: one to decide whether to have a convention, one to elect delegates to the convention, and one to vote on the convention's proposals.

[40] Act of Mar. 13, 1965, H.B. 861 1965 Acts of the Legislature of W. Va. 109; *Court Hands Down Convention Opinion*, CHARLESTON GAZETTE, Sept. 8, 1965, at 1; *Six to Join in Court Test*, CHARLESTON GAZETTE, July 17, 1965, at 13.

[41] In the preceding year, the State Supreme Court had ruled that the 60 year practice of ensuring at least one delegate per county violated Article VI, § 6, to the extent that any county's population fell below three-fifths of the mean population for a delegate. Robertson v. Hatcher, 148 W.Va. 239, 258, 135 S.E.2d 675, 687 (1964). That decision also portended the invalidity of the convention's apportionment. *Id.*

[42] State *ex rel.* Smith v. Gore, 150 W.Va. 71, 76, 143 S.E.2d 791, 795 (1965). The Court issued its decision in July, 1965, and followed with an opinion explaining its reasoning in September of that year.

[43] *Smith to Air Convention Next Week*, CHARLESTON GAZETTE, July 31, 1965, at 11; John G. Morgan, *Governor to Ask Solons for New Delegate Setup: Extra Legislative Session Studied*, CHARLESTON GAZETTE, July 28, 1965, at 1; *see also Special Session on Constitution Proposal Urged: Rep. Moore Suggests Gov. Smith Act Fast*, CHARLESTON GAZETTE, 1965, at 1 (on file with author). Meanwhile, a private citizens group organized to campaign for constitutional revision and editorials endorsed it. *E.g.*, *Constitutional Convention Resought*, CHARLESTON GAZETTE, Jan. 17, 1966, at 19; Editorial, *Silence Won't Produce Constitutional Changes*, CHARLESTON GAZETTE, Dec. 28, 1965, at 4; *Supporters of Constitutional Convention Launch Mail Drive*, CHARLESTON GAZETTE, Dec. 12, 1965, at A15; *Ills Blamed on Old Constitution*, CHARLESTON GAZETTE, Dec. 5, 1965, at B5; *Constitutional Parley Backed*, CHARLESTON GAZETTE, Dec. 1, 1965, at A15; *see also* Editorial, *Half a Loaf or Even One Slice Is Better than Nothing at All*, CHARLESTON DAILY MAIL, Feb. 1, 1968, at 14.

[44] *Revision Killed for 1965*, CHARLESTON GAZETTE, Sept. 28, 1965, at 1.

a two-thirds majority in each house.[45] Smith gave the Legislature 46 issues to address in his call for the 1966 session, and they included submission to the voters of two constitutional amendments approved by the 1965 Legislature and the question of calling a constitutional convention.[46] Smith's state-of-the-state address again highlighted the need for the convention, and its urging prompted one of only six interruptions for applause during the talk.[47] Despite that initial enthusiasm and support from legislative leadership,[48] the bill to set the convention process in motion failed to gather the momentum it needed to be passed in the short session.[49]

A year later, Governor Smith was again pushing for a convention bill and expressing particular concern "about needed constitutional reforms to remove the handicaps under which county and municipal governments now function."[50] His bill passed the House of Delegates and had strong support in the Senate, but it did not emerge from committee until only two days remained in the session. It then fell one vote shy of garnering the four-fifths vote required to waive the constitutional requirement that a bill must be read on three separate days.[51] The administration's bill was re-introduced the following year by the Senate President and the Speaker of the House,[52] but the bill died in committee.[53]

Meanwhile, the Legislature put before the electorate several proposed amendments to implement the recommendations of the Constitutional Revision Commission and to modernize the Constitution, but the voters persistently re-

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45 That remained the practice until the Legislative Improvement Amendment of 1970 changed Article VI, § 22 to adopt annual 60 day sessions without subject matter restrictions. *See* BASTRESS, *supra* note 11, at 145-46, for the various permutations that § 22 has gone through.

46 *Here Are Issues in Call to Legislature*, CHARLESTON GAZETTE, Dec. 31, 1965, at 5.

47 John G. Morgan, *Smith Urges Fund to Aid Institutions*, CHARLESTON GAZETTE, Jan. 13, 1966, at 1.

48 *E.g.*, James F. Dent, *Legislature Budget Session Held Inadequate by Carson*, CHARLESTON GAZETTE, Jan. 15, 1966, at 11 (Senate President says the short session was "only one of the points in favor of a constitutional convention to redraw West Virginia's Constitution").

49 *E.g.*, Post-session review, *Legislature Left Several Major Bills in Hopper*, CHARLESTON GAZETTE, Feb. 11, 1966, at 17; *Smith Not Supporting Drive for Convention*, CHARLESTON GAZETTE, Feb. 2, 1966, at 2 (Governor said the administration had not "been able to rally enough popular support . . . to bring it to an issue" at that time); John G. Morgan, *Convention End Sealed in Senate*, CHARLESTON GAZETTE, Jan. 28, 1966, at 17.

50 John G. Morgan, *Full Circle: Governor Expected to Push Constitutional Convention*, CHARLESTON GAZETTE, Jan. 8, 1967, at 1; *see also* John G. Morgan, *State Needs More Cash, Smith Says*, CHARLESTON GAZETTE, Jan. 12, 1967, at 1 (reporting on state-of-the-state address's call for convention); *Complete Text of Gov. Smith's Speech to the Legislature*, *id.* at 5.

51 John G. Morgan, *Effort to Rescue Convention Bill Fails in Senate*, CHARLESTON GAZETTE, Mar. 11, 1967, at 1; *see also Killed: Constitutional Convention Bill Put to Death by Senate*, CHARLESTON GAZETTE-MAIL, Mar. 12, 1967, at 1. The three-reading requirement appears in W. VA. CONST., art. VI, § 29.

52 *Legislature Gets Two Convention Bills*, CHARLESTON DAILY MAIL, Jan, 23, 1968, at 2.

53 *Constitution Reform Bill Stays Buried*, CHARLESTON DAILY MAIL, Feb. 2, 1968, at 9.

jected them. In 1962, the people turned down proposals for an executive budget and for improvements in the legislative process.[54] The 1966 Legislature sent five major reform amendments to the polls, where they all lost, four of them decisively.[55] If adopted, the amendments would have streamlined the amendment process, provided for gubernatorial succession, modernized the judiciary, improved the amendment process, and reduced the vote necessary to enact excess levies and school bonds.[56]

The tide finally turned in 1968, which started a run on modernizing amendments that succeeded over the ensuing six years in accomplishing a large portion of the agenda of the Commission and other reformers – all but the proposals regarding local governments. The Modern Budget Amendment of 1968 greatly streamlined the budget process and enhanced gubernatorial powers.[57] In 1970, voters ratified two more important amendments. The Legislative Improvement Amendment established the sixty day annual legislative session[58] and finally resolved the long-standing problem of legislative pay by creating the Citizens Legislative Compensation Commission.[59] The other amendment provided that a governor could serve two consecutive terms.[60] The Judicial Reorganization Amendment of 1974 completely overhauled the judiciary, providing for an integrated judicial branch with considerable rule-making and administrative authority for the Supreme Court and setting up a chief judge (or the circuit judge in single-judge circuits) as a responsible administrator within each circuit.[61] The amendment also eliminated the justice of peace system and replaced it with the magistrate courts, a considerable improvement.[62] In addition to other

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54 W. VA. BLUE BOOK, *supra* note 6, at 438.

55 *Id.* One amendment, that which would have eliminated the supermajority requirement to pass excess levies and bonds for support of schools, failed by a margin of 50.7% to 49.3%. *Id.* The majorities defeating the other four ranged between 58% and 73%. *Id.*

56 *Id.* The cores of all of the rejected proposals were later adopted in some form.

57 *See* BASTRESS, *supra* note 11, at 466.

58 That portion of the amendment changed Article VI, § 22, which had previously provided for 60 day sessions in odd-numbered years and 30 day sessions in even-numbered years. During the latter, the Legislature could consider only the budget bill or subjects identified in a gubernatorial proclamation or in a joint resolution approved by at least two-thirds of the members in each house. BASTRESS, *supra* note 11, at 145-46.

59 W. Va. Const. art. VI, § 33. The Commission consists of seven gubernatorially appointed citizens who are not legislators or their family members or public employees. The Commission must follow a specific procedure in making recommendations to the Legislature on compensation issues. *See* State *ex rel.* Holmes v. Gainer, 191 W.Va. 686, 689, 447 S.E.2d 887, 890 (1994). The Legislature may enact the recommendation, provide for smaller increases, or do nothing. Prior to the amendment, § 33 set the legislative pay, which meant that the voters had to approve any pay increase by statewide referendum amending the Constitution. In the nearly 100 years between the ratification of the Constitution and this amendment, the State had but two legislative pay increases. *See generally* BASTRESS, *supra* note 11, at 157-58.

60 W. VA. CONST. art. VII, § 4.

61 *See* W. VA. CONST. art. VIII, §§ 1-6; BASTRESS, *supra* note 11, at 202-11.

62 W. VA. CONST. art. VIII, § 10; *see* BASTRESS, *supra* note 11, at 216-19.

advances, the amendment changed the name of county courts to county commissions. The substantive changes in local government administration, however, were not significant.

There have been a few constitutional changes of note since 1974. Responding quickly to the State Supreme Court's decision in *Killen v. Logan County Commission*,[63] the Legislature proposed and the voters approved the Tax Limitation Amendment of 1982, which provided that property shall be assessed at sixty percent of full value and also called for a statewide reappraisal. Eventually, the amendment, along with litigation,[64] produced a much fairer and more effective property tax system. Regardless of whether it is viewed as progress or retrogression, there is no denying that the 1984 amendment authorizing the Legislature to create a state lottery has had a significant impact on state revenues.[65] More recent amendments have continued to provide for greater flexibility and modernization in government financing.[66] Finally, a 2000 amendment addressed another persistent problem and created the system of family courts.[67]

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[63] 170 W.Va. 602, 295 S.E.2d 689 (1982). *Killen* held that Article X, § 1's "equal and uniform" clause required that property in the State be assessed at 100% of full value, instead of some lesser and unspecified percentage. *Id.* at 622, 295 S.E.2d at 709. Although the decision did not necessarily mean that property owners' taxes would go up, that was the popular fear.

[64] In addition to *Killen*, see Allegheny Pittsburgh Coal Co. v. Webster County, 488 U.S. 336, 338 (1989) (using only most recent sale price as basis for appraisal was not rationally related to creating an equal and uniform tax system because many properties were not sold for long periods of time and were grossly under appraised).

[65] *See* W. VA. CONST. art. VI, § 36. In addition to providing funds into general revenues for the support of senior citizens' programs, the lottery and its subsequent expansion into other forms of gaming, *see, e.g.*, W. VA. CODE §§ 29-22B-101, et seq. (2004) (authorizing and establishing video poker games), have supplied money for the "excess lottery fund," which, in turn, has been used to pay off bonds sold to finance substantial governmental programs. W. VA. CODE § 18-9D-6 (2004) (school construction and improvements); W. VA. CODE § 18C-7-7 (2004) (PROMISE scholarship fund); W. VA. CODE § 29-22-18a (2004) (economic development grants). The Supreme Court has upheld both the use of the gaming devices (State *ex rel.* City of Charleston v. W. Va. Econ. Develop. Auth., 214 W.Va. 277, 295, 588 S.E.2d 655, 673 (2003)), and the use of the excess lottery fund to pay off the bonds (State *ex rel.* W. Va. Citizens Action Group v. W. Va. Econ. Develop. Grant Comm., 213 W.Va. 255, 273-79, 580 S.E.2d 869, 887-93 (2003); State *ex rel.* School Bldg. Auth. v. Marockie, 198 W.Va. 424, 437-38, 481 S.E.2d 730, 743-44 (1996)).

[66] Most notably, these amendments included the Modern Investment Management Amendment in 1997, which amended Article X, § 6 to permit the Legislature to establish procedures and guidelines for "prudent investment" and eliminating the prior ban on investments in corporate stocks; the 2002 amendment that created Article X, § 11 allowing counties and cities to have excess levies for terms up to 5 years; and the 2002 enactment creating Article X, § 8a, which authorizes local governments to use Tax Increment Financing (issuing revenue bonds to attract investors and economic development with the bonds to be liquidated through the property taxes on the *increased* value of the developed property).

[67] *See* W. VA. CONST. art. VIII, § 16.

II. FUNDAMENTAL PRINCIPLES OF CONSTITUTIONAL LAW

There are several basic constitutional principles that bear directly on the ability to engage in local government reform in West Virginia. The first of those is that the Legislature's power does not depend upon express grants of power but is plenary. The only limits on it are those expressly stated in, or necessarily implied from, the United States and West Virginia Constitutions. As stated by the Supreme Court of Appeals in *Robertson v. Hatcher*:

> [The West Virginia] Constitution being a restriction of power rather than a grant of power as is the Federal Constitution, the Legislature may enact any measure which is not specifically prohibited by the State or Federal Constitution.
>
> This proposition has been succinctly stated by this Court. Quoting from *Harbert v. The County Court of Harrison County*, 129 W.Va. 54, 39 S.E.2d 177, the Court, in *Tanner v. Premier Photo Service, Inc.*, 147 W.Va. 37, 125 S.E.2d 609, said: "* * * The Legislature of this State, unlike the Congress of the United States under the Federal Constitution, does not depend for its authority upon the express grant of legislative power. The Federal Constitution is a grant of power; a State Constitution is a restriction of power. The Constitution of a State is examined to ascertain the restraints, if any, which the people have imposed upon the Legislature, not to determine the powers they have conferred. The Legislature of this State possesses the sole power to make laws and it is necessarily invested with all the sovereign power of the people within its sphere. *Booten v. Pinson*, 77 W.Va. 412, 89 S.E. 985."[68]

A corollary to the Legislature's plenary powers principle is that those powers should be liberally construed to permit maximum flexibility for the State to deal with unanticipated exigencies and circumstances.[69]

Second, with very few exceptions, local governments derive their powers from the Legislature, and except as stated in the Constitution and noted below, the Legislature has complete power over its local governments. This has been the rule in West Virginia with regards to cities since at least 1915 when

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[68] 148 W.Va. 239, 250-51, 135 S.E.2d 675, 682-683 (1964); *accord, e.g.*, Thorne v. Roush, 164 W.Va. 165, 168, 261 S.E.2d 72, 74 (1979) (the Legislature's "powers are limited only by express restriction or restrictions necessarily implied by a provision or provisions of our Constitution").

[69] *E.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407, 415-16 (1819).

Booten v. Pinson[70] held that "[m]unicipalities derive all their power as well as their existence from the legislature, and in the absence of any express constitutional reservations in their favor or express limitations upon the legislative control over them, they can exercise only such powers as are directly conferred by their charters."[71] Since that decision, the State has enacted home rule for cities in Article VI, § 39a of the West Virginia Constitution, but even that provision reserves to the Legislature the power to override by general laws any municipal enactment.[72] Counties do not have home rule, and as will be developed below, they are also totally beholden to the State for their existence. Likewise, local school districts in West Virginia are subject to the control of the State Board of Education, at least when that control is not wielded arbitrarily.[73]

Third, the United States Constitution imposes very few restrictions on the states regarding their relationships with their local governments. As stated by the Supreme Court long ago in its unchallenged decision in *Hunter v. City of Pittsburgh*[74]:

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, . . . constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. . . . The power is in the State

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[70] 77 W.Va. 412, 89 S.E. 985 (1915), *overruled on other grounds by*, Marra v. Zink, 163 W. Va. 400, 256 S.E.2d 581 (1979).

[71] *Id.* at 421, 89 S.E. at 989.

[72] A proviso in § 39a states that any municipal charter provision or ordinance shall be invalid "if inconsistent or in conflict with . . . the general laws of the State[.]" Municipal home rule is further discussed, *infra*, at notes 104- 136.

[73] *E.g.*, Bd. of Educ. of County of Kanawha v. W. Va. Bd. of Educ., 184 W.Va. 1, 5, 399 S.E.2d 31, 35 (1990); Leonhart v. Bd. of Educ., 114 W.Va. 9, 14, 170 S.E.2d 418, 420 (1933).

[74] 207 U.S. 161 (1907).

> and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.[75]

For federal constitutional purposes, then, local governments are creatures of the State and subject to its dictates. Article IV, § 4 of the United States Constitution does provide that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government," but the clause is not judicially enforceable.[76] Presumably, it requires that the states must provide for democratic elections at the state level, but it has never been thought to affect how a state arranges its local governments. A state is under no federal obligation to provide for elections at the local level, although if it does, the Fourteenth Amendment does require that it accord citizens the right to a vote of equal weight in elections of general purpose governments.[77] The only other restraints are that the State may not create or regulate local governments in ways that are invidiously discriminatory (*e.g.*, actions that have a racially prejudicial motive and effect)[78] or that violate local citizens' rights expressly or implicitly guaranteed to them by the federal constitution or statutes.[79] These requirements are easily satisfied and rarely present issues for reformers of local government.

Finally, the West Virginia Bill of Rights, Article III of the Constitution, imposes essentially the same limits[80] on the State as does the federal constitu-

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[75] *Id.* at 178-79.

[76] U.S. CONST. art. IV, § 4; Pac. States Tel. & Tel. Co. v. Or., 223 U.S. 118, 147-51 (1912); Luther v. Borden, 48 U.S. 1, 42-48 (1849).

[77] This is the one-person-one-vote limitation established by Reynolds v. Sims, 377 U.S. 533, 562-64 (1964), and extended to local governments in Hadley v. Junior Coll. Dist., 397 U.S. 50, 54-59 (1970), and Avery v. Midland County, 390 U.S. 474, 478-79 (1968). Some limited purpose governments may not be subject to the requirement. *See, e.g.*, Ball v. James, 451 U.S. 355, 368 (1981); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 725-28 (1973).

[78] This limitation is imposed by the Fourteenth Amendment's Equal Protection Clause; it strictly limits a State's ability to classify along the lines of race, national origin, sex, and (to a lesser extent) illegitimate birth status, and also holds that any classification must have some rational basis. The latter is extremely easy to satisfy, *see, e.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 168-80 (1980), and the "suspect classifications" test would hardly ever be used in pursuing local government reform. For examples of the rare occasions when the Equal Protection Clause has overturned a state's manipulation of its local governments, *see* Rogers v. Lodge, 458 U.S. 613, 627 (1982) (state's maintenance of at-large elections of county commissioners in order to negate blacks' voting rights violated equal protection); Gomillion v. Lightfoot, 364 U.S. 339, 346-48 (1960) (statute that created an "uncouth" 28-sided city and thereby gerrymandered almost all blacks out of city was invalid); *see also* cases cited in notes 164-65, *infra*.

[79] These fundamental rights make a short list. They include the implied rights of privacy and interstate travel, and the First Amendment freedoms of speech, press, religion, assembly, association, and the right to petition the government for redress of grievances. Obviously, these rights would rarely be implicated in structuring local governments.

[80] There are some differences between West Virginia's protection of individual rights and the federal constitution's protection of them, *see generally*, BASTRESS, *supra* note 11, at 44-112; John Patrick Hagen, *Policy Activism in the West Virginia Supreme Court of Appeals*, 89 W. VA. L. REV. 149 (1986); Thomas B. Miller, *The New Federalism in West Virginia*, 90 W. VA. L. REV. 51

tion, and as a consequence, would not significantly affect a restructuring of local government.

III. WEST VIRGINIA CONSTITUTIONAL PROVISIONS

The ensuing discussion considers *seriatim* potentially relevant provisions and, with a few exceptions does so, in order of their appearance in the Constitution.

Article II, § 1 – Section 1 defines the territory of the State by listing its counties, as they existed in 1872 and by more general descriptions.[81] It is clear for two reasons that the listing of the counties implies no requirement for their preservation or integrity. Most obviously, and as expanded on below,[82] Article IX, § 8 provides for the formation of new counties. Second, the 1863 West Virginia Constitution had an equivalent provision,[83] and four new counties were created under its reign,[84] which lead to the conclusion that the list of counties merely defined the State's territory as of 1872 and did not create any constitutional status for the listed counties.

Article VI, § 39 – Section 39 limits the Legislature's ability to enact "local" or "special" laws.[85] The latter "include laws that focus on individual

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(1987); Gene R. Nichol, *Dialectical Federalism: A Tribute to the West Virginia Supreme Court of Appeals*, 90 W. VA. L. REV. 91 (1987), but the differences are neither extensive nor particularly relevant to this article.

81 The full text of W. VA. CONST. art. II, § 1 states:

> **The State.** The territory of the following counties, formerly parts of the commonwealth of Virginia, shall constitute and form the State of West Virginia, viz:
>
> The counties of Barbour, Berkeley, Boone, Braxton, Brooke, Cabell, Calhoun, Clay, Doddridge, Fayette, Gilmer, Grant, Greenbrier, Hampshire, Hancock, Hardy, Harrison, Jackson, Jefferson, Kanawha, Lewis, Lincoln, Logan, Marion, Marshall, Mason, McDowell, Mercer, Mineral, Monongalia, Monroe, Morgan, Nicholas, Ohio, Pendleton, Pleasants, Pocahontas, Preston, Putnam, Raleigh, Randolph, Ritchie, Roane, Summers, Taylor, Tucker, Tyler, Upshur, Wayne, Webster, Wetzel, Wirt, Wood and Wyoming. The State of West Virginia includes the bed, bank and shores of the Ohio river, and so much of the Big Sandy river as was formerly included in the Commonwealth of Virginia; and all territorial rights and property in, and jurisdiction over, the same, heretofore reserved by, and vested in, the Commonwealth of Virginia, are vested in and shall hereafter be exercised by the State of West Virginia. And such parts of the said beds, banks and shores as lie opposite, and adjoining the several counties of this State, shall form parts of said several counties respectively.

W. VA. CONST. art. II, § 1.

82 *See* text at notes 137-141, *infra*.

83 W. VA. CONST. art. I, § 2 (1863).

84 *See infra* note 139 & accompanying text.

85 The section reads, in its entirety:

cases or that classify a narrow class of individuals, groups, or entities for special treatment. 'Local laws' limit their application to a specific locale within the State, rather than apply statewide. Thus, special laws classify by persons, places, or things, and local laws classify by places."[86] The notion is that general laws are preferred because they reduce the potential for favoritism and discrimination[87] and promote "uniformity and consistency in statutory enactments."[88] In

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> **Local Laws Not to Be Passed in Enumerated Cases.** The Legislature shall not pass local or special laws in any of the following enumerated cases; that is to say, for
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> Granting divorces;
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> Laying out, opening, altering and working roads or highways;
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> Vacating roads, town plats, streets, alleys and public grounds;
>
> Locating, or changing county seats;
>
> Regulating or changing county or district affairs;
>
> Providing for the sale of church property, or property held for charitable uses;
>
> Regulating the practice in courts of justice;
>
> Incorporating cities, towns or villages, or amending the charter of any city town or village, containing a population of less than two thousand;
>
> Summoning or impaneling grand or petit juries;
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> The opening or conducting of any election, or designating the place of voting;
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> The sale and mortgage of real estate belonging to minors, or other under disability;
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> Chartering, licensing, or establishing ferries or toll bridges;
>
> Remitting fines, penalties or forfeitures;
>
> Changing the law of descent;
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> Regulating the rate of interest;
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> Authorizing deeds to be made for land sold for taxes;
>
> Releasing taxes;
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> Releasing title to forfeited lands.
>
> The Legislature shall provide, by general laws, for the foregoing and all other cases for which provision can be so made; and in no case shall a special act be passed, where a general law would be proper, and can be made applicable to the case, nor in any other case in which the courts have jurisdiction, and are competent to give the relief asked for.

W. VA. CONST. art. VI, § 39.

[86] BASTRESS, *supra* note 11, at 165-66 (*citing* State *ex rel.* Appalachian Power Co. v. Gainer, 149 W.Va. 740, 757-58, 143 S.E.2d 351,363 (1965); Tweel v. West Virginia Racing Comm., 138 W.Va. 531, 546-47, 76 S.E.2d 874, 883 (1953)).

[87] Railway Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring):

> [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to

addition, the provision promotes efficiency, localism, and separation of power goals through its enumeration of eighteen subjects that the Legislature is completely prohibited from using special or local laws to regulate because the subject is too trivial to merit legislative time, or concerns only local matters, or relates to a matter that should be controlled by another branch.[89] As to all other subjects, the Legislature must use general laws whenever it "would be proper." The Court has loosely applied that latter requirement and has deferred to the Legislature's judgment that a general law was not feasible so long as that judgment was reasonable.[90] As such, the constraint has had a minimal impact on the Legislature's regulatory capability.

Five of the enumerated subjects concern local government matters, although only two are relevant to the present purpose.[91] The first of those prohibits statutes "[i]ncorporating cities, towns or villages, or amending the charter of any city, town or village, containing a population of less than two thousand[.]" The framers' reason for including this as a prohibited subject was undoubtedly

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> escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

88 *See, e.g.*, State *ex rel.* Taxpayers Protective Ass'n v. Hanks, 157 W.Va. 350, 352, 201 S.E.2d 304, 306 (1973); Brozka v. County Ct. of Brooke County, 111 W.Va. 191, 193, 160 S.E. 914, 915 (1931).

89 BASTRESS, *supra* note 11, at 166.

90 *Id.* at 166-67. The standard of review has not been completely toothless, however. Consider the following:

> A statute violates § 39 when it fails to operate uniformly on a class. Thus, the [S]upreme [C]ourt struck down a law that varied magistrates' pay by county of residence, grouping the counties according to population, but arbitrarily placing a handful of counties in a level with counties that were not of the same approximate size. *State ex rel. Longanacre v. Crabtree*[,177 W. Va. 132, 350 S.E.2d 760] (1986). Moreover, to satisfy section 39, a population classification must be 'natural, reasonable and appropriate to the purpose of the statute.' Accordingly, a legislative authorization to tax hotel occupancy that was limited to Class I cities (those with more than 50,000 people) violated section 39 because there was no reason not to extend the tax authority to smaller communities. *State ex rel. City of Charleston v. Bosely*[, 165 W.Va. 332, 340, 268 S.E.2d 590, 595] (1980) [(quoting Hanks, 157 W.Va. 350, Syl. Pt. 3, 201 S.E.2d 304 (1973))].

Id.

See also Hanks, 157 W. Va. at 358-59, 201 S.E.2d at 308-9 (statutory provision that allowed an exemption for counties over 100,000 from a requirement that counties maintain Saturday hours for their courthouse offices was arbitrary and bore no reasonable relationship to the Act's purposes and therefore violated § 39).

91 The other three subjects from W. VA. CONST. art. VI, § 39 are:

> Laying out, opening, altering and working roads or highways;
>
> Vacating roads, town plats, streets, alleys and public grounds;
>
> Locating, or changing county seats; . . .

based on the opinion that such matters were too trivial to warrant legislative treatment rather than for respect for localism. That conclusion follows from the fact that nowhere in the 1872 Constitution was there any limitation on the Legislature's ability to revamp municipal governments for particular towns and cities over two thousand, a power that the Legislature exercised with regularity until 1936, when the Home Rule Amendment forbade the practice.[92]

The other relevant provision in § 39 prohibits local laws "regulating or changing county or district affairs." The phrase has eluded clear definition from our court; there are few cases interpreting it – none recently decided – and those that have been rendered have produced some conflicting results. For example, in *State ex rel. Green v. Board of Education*,[93] the Legislature had enacted a law requiring the Braxton County Board of Education to compensate Green for injuries he had sustained while working for the Board. (Because of then-existing sovereign immunity, Green could not successfully sue the Board.) The Court agreed with the Legislature that the Board had a moral obligation to pay Green but nevertheless concluded that the act related to a district affair and thus was barred by § 39. The Court reasoned:

> [T]o the extent that the statute directs the Board of Education of Braxton County to reimburse realtor, the [L]egislature, in our opinion, is regulating the fiscal affairs of the board. If such regulation should be held valid in this case, the instant appropriation would be a stepping stone toward legislative direction of the fiscal affairs of boards of education and other governmental agencies of the State.[94]

In addition, the Court has found that a statute dealing with business hours in county courthouses is a regulation of county affairs.[95]

On the other hand, the Court in *Herold v. McQueen*, 71 W.Va. 43, 75 S.E. 313 (1912), confronted a statute that directed construction of a high school in Nicholas County, established a board of directors to oversee it, and imposed a tax on county residents to pay for it. The Court upheld the act, relying on the improbable reasoning that it was not a law "regulating or changing" a district affair; rather, it "only create[d]"something.[96] The Legislature had made the plan

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92 W. VA. CONST. art. VI, § 39a; *see* text *infra* at note 104. For examples of affirmations of the Legislature's power to restructure a city's affairs, *see generally*, Hood v. City of Wheeling, 85 W.Va. 578, 102 S.E. 259 (1920); Booten v. Pinson, 77 W. Va. 412, 89 S.E. 985 (1915).

93 133 W.Va. 750, 58 S.E.2d 279 (1950).

94 *Id.* at 755, 58 S.E.2d at 282; *see also* Broza v. County Court of Brooke County, 111 W.Va. 191, 195, 160 S.E. 914, 916 (1931) (statute amending Wellsburg's city charter to exempt its residents from obligation to pay county road tax was a special law regulating county affairs).

95 Hanks, 157 W. Va. at 358-59, 201 S.E.2d at 308-9.

96 71 W. Va. 43, 47, 75 S.E. 313, 315 (1912). The Court stated, in full, on this point:

contingent on approval of the county's voters, but that was not a crucial fact. We know this because the Court explicitly said so:

> The legislature could have established the high school without submitting the question to a vote of the people at all, and may have submitted it to a vote only for the reason that it thought it unwise to establish the school unless a majority of the voters of the whole county were in favor of it.[97]

In any event, a later case upheld a similar statute, directing construction of a high school in Upshur County, in which the law did not afford the taxpayers of the county the option to vote on the plan and the new taxes.[98] Another decision upheld a statute directing the Kanawha County Court and the Kanawha County Board of Education to provide $83,000 to help support the county library, even though the library was already in existence and the act did not therefore "create" it.[99] The Court noted *Herold*'s regulate/change - create distinction, but did not offer an explanation as to why the statute did not affect a "change" in the county's and district's fiscal affairs.

West Virginia law on the meaning of "regulating or changing county or district affairs"[100] is obviously muddled. Much of it must also be considered just plain wrong. It is untenable to conclude that a decision to build a particular school to serve a particular county or local population and to assess the citizens of that locality for the funds to construct the school does not pertain to "district affairs." Concluding otherwise defeats § 39's purpose of preserving by some

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> The act does not attempt to regulate or change the county and district affairs of Nicholas county. Such county and district affairs as the Legislature is inhibited from regulating or changing by a local or special act, are still carried on in that county under the general laws applicable alike to all the counties and districts of the state. The act only creates a county high school, and provides for its support by a tax to be levied on the taxpayers of the whole county. It does not work a change in, or operate as a regulation of, the general county and district affairs which already existed, but it is a creation of something in addition thereto. It makes no change in the plan provided by general law for the creation of district high schools; and, under the general law, any two or more districts of Nicholas county may still combine and establish district high schools.

Id.

97 *Id.* at 49-50, 75 S.E. at 316.

98 Casto v. Upshur County High Sch. Bd., 94 W.Va. 513, 517-18, 119 S.E. 470, 472 (1923).

99 Kanawha County Pub. Library v. County Ct., 143 W. Va. 385, 386, 391-405, 102 S.E.2d 712, 714, 716-24 (1958).

100 The term "affairs" is used, as well, in Article VI, § 39a to identify those things, "municipal affairs," over which cities have home rule powers. Both §§ 39 and 39a concern subjects that the Constitution directs should be addressed by the Legislature only through general laws and should otherwise be decided at the local level. Thus, the interpretation of "county or district affairs" in § 39 would also affect the meaning of "municipal affairs" in § 39a.

measure local decision-making on matters of strictly local concern and focusing the Legislature on matters of statewide import.

Other states commonly make distinctions about "local" affairs and issues in construing provisions analogous to § 39 and home rule laws. While their decisions have produced diverse results, they have at least identified what ought to be the relevant inquiries. Needless to say, they do not include determining whether the state law has changed a local condition or created a local condition. Rather, the criteria have concerned the impact of the particular subject,[101] whether uniform treatment of the subject is needed, the relative breadth of the subject, and whether it relates to administrative or procedural aspects of local government.[102] Applying those criteria, as well as common sense, allows the conclusion that the phrase, "district or county affairs," would apply to attempts by the Legislature to restructure a particular county government.

If this reasonable interpretation prevails, then one can safely conclude that § 39 would not permit the Legislature to, say, provide for the consolidation of Charleston and Kanawha County, but it would have nothing – at all – to say about a general statute authorizing cities and counties to consolidate if they choose to do so. Article IX, §§ 8 and 13 reinforce that interpretation.[103]

Section 39 deals only with special laws that interfere with county and school district governance. The next section, Article VI, § 39a, now imposes the same limitation on the Legislature regarding special laws and municipal affairs of cities with over two thousand residents.

Article VI, § 39a – In 1936, West Virginia voters ratified Article VI, § 39a[104] and home rule for municipalities. The section ended the legislative prac-

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[101] A decision whose impact would be primarily local would be more likely to be characterized as a local (or, in § 39's terms, county or district) affair. The decision about whether to build a school and to tax only locally to finance it would, for example, have an impact that is primarily local.

[102] MATTHEW BENDER'S ANTIEAU ON LOCAL GOVERNMENT LAW § 21.05[1] at 21-31 (2d ed. 1977); Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737 (1959); *see generally* ANTIEAU, *supra*, §§ 21.02 & 21.05[1]; OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW 105-127 (1982).

[103] *See* text *infra* at notes 137-165.

[104] The section reads, in its entirety:

> **Home Rule for Municipalities.** No local or special law shall hereafter be passed incorporating cities, towns or villages, or amending their charters. The Legislature shall provide by general laws for the incorporation and government of cities, towns and villages and shall classify such municipal corporations, upon the basis of population, into not less than two nor more than five classes. Such general laws shall restrict the powers of such cities, towns and villages to borrow money and contract debts, and shall limit the rate of taxes for municipal purposes, in accordance with section one, article ten of the Constitution of the State of West Virginia. Under such general laws, the electors of each municipal corporation, wherein the population exceeds two thousand, shall have power and authority to frame, adopt and amend the charter of such corporation, or to amend an existing charter thereof, and through its legally constituted authority, may pass all laws and ordinances relating to its munici-

tice of adopting and amending charters for cities exceeding two thousand in population and bestowed that authority on the cities themselves. In addition, the section directed the Legislature to regulate municipalities by general laws and to restrict municipal taxing and borrowing capabilities, thus limiting cities' revenue raising capacities to only that specifically authorized by the Legislature.[105] On the other hand, the amendment apparently reversed Dillon's Rule, which had been the common law default rule on municipal regulatory powers. The rule was named after John F. Dillon, a nineteenth century jurist and legal commentator. He first articulated the rule in an 1872 treatise on municipal corporations. The law, he said, was that such entities had no power except those expressly granted by the Legislature, those necessarily or fairly implied from the express grants, and those necessary to accomplish the city's objects and purposes – "not simply convenient, but indispensable."[106] The rule caught on in West Virginia not long after its articulation, and the State Supreme Court soon applied it to other local governments as well as cities.[107] As Professor Lorensen so aptly described it, "Dillon's Rule is more than just a rule; it is a thought-way, an attitude, and a mind-set that is pervasive and difficult to unseat."[108] Its endurance might have been attributable to its "blessing of simplicity and the lure of reserving to the judiciary the power to substitute its policy choices for those of locally elected officials."[109]

The key language in § 39a provides that a city "may pass all laws and ordinances relating to its municipal affairs" unless such law is "inconsistent or in conflict with" the Constitution or state statute or regulation. This language certainly seems to confer on cities a comprehensive home rule power – as indicated by the section's title – limited only by specific legislative countermands and the previously mentioned restriction on raising revenues. Despite the clarity of the directive, the Supreme Court of Appeals continued to assert Dillon's Rule and, in fact, cited § 39a in support of a narrow view of municipal power. In *Brackman's Inc. v. Huntington*,[110] just seven years after the section's ratification, the Court considered a challenge to an ordinance that precluded licensing of bars within three hundred feet of a church or school. The State had licensed

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> pal 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.

W. VA. CONST. art. VI, § 39a.

105 *See* note 135, *infra*.

106 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911).

107 *See generally* Willard D. Lorensen, *Rethinking the West Virginia Municipal Code of 1969*, 97 W. VA. L. REV. 653, 658-64 (1995).

108 *Id.* at 658.

109 *Id.* at 659.

110 126 W. Va. 21, 27 S.E.2d 71 (1943).

Brackman's to sell "non-intoxicating beer," but state law also authorized local governments to license such establishments. Although the statute and the ordinance were capable of co-existence without conflict, the Court struck down the city's geographical qualification. According to that Court:

> [M]unicipalities may only exercise powers not in conflict with general law, unless the power to do so is plainly and specifically granted. This principle has always prevailed, but is established beyond question by Section 39(a) of Article VI of our Constitution, known as the Municipal Home Rule Amendment[.][111]

One could question why, if the "principle ha[d] always prevailed," the Legislature and the voters felt it necessary to amend the Constitution to "establish" it and why they would use the language that local laws will be invalid only "if inconsistent or in conflict with" state law. Similarly, *State ex rel. Plymale v. City of Huntington* [112] invalidated a city charter provision that permitted citizens to submit to council an initiative ordinance by a petition signed by at least ten percent of registered voters. State law, however, gave effect to such petitions when they were signed by at least thirty percent of registered voters. Although the relevant statute did not prohibit a more liberal procedure, the Court nevertheless found the ordinance to be "in conflict" with the state law and refused to permit the local government to provide the enhanced rights to its citizens. The ultimate irony, though, came in *Toler v. City of Huntington*,[113] when the Court voided a notice of claim ordinance, which barred any tort action against the city unless the person injured by municipal negligence or wrongdoing gave the city notice of the claim within thirty days of the injury. The case distinguished two earlier decisions[114] sustaining notice of claim ordinances because those cities operated under legislative charters[115] that had authorized the ordinances while Huntington was a home rule city and no statute sanctioned notice of claim ordi-

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111 *Id.* at 24, 27 S.E.2d at 73.

112 147 W.Va. 728, 131 S.E.2d 160 (1963).

113 153 W.Va. 313, 168 S.E.2d 551 (1969).

114 Thomas v. City of South Charleston, 148 W.Va. 577, 136 S.E.2d 788 (1964), *overruled on other grounds by* O'Neil v. Parkersburg, 160 W. Va. 94, 237 S.E.2d 504 (1977); Thompson v. City of Charleston, 118 W. Va. 391, 191 S.E. 547 (1937), *overruled on other grounds by* O'Neil v. Parkersburg, 160 W. Va. 694, 237 S.E.2d 504 (1977).

115 Following the ratification of the Home Rule Amendment in 1936, the Legislature enacted a new chapter of the West Virginia Code, Chapter 8A, to implement the amendment. The State continued, however, to recognize city charters enacted by the Legislature prior to 1936, and those cities continued to operate under the old municipal code in Chapter 8. Only if a city opted to become a home rule city did it come within the Chapter 8A sphere. This duality created much confusion and remained in place until 1969, when the Legislature rewrote Chapter 8 to create a comprehensive and unified Municipal Code. *See* Lorensen, *supra* note 107, at 655-56.

nances for home rule cities.[116] Quoting a long line of Dillon Rule cases and authorities, the Court held:

> A municipal corporation is a creature of the State, and can only perform such functions of government as may have been conferred by the Constitution, or delegated to it by the law-making authority of the State. It has no inherent powers, and only such implied powers as are necessary to carry into effect those expressly granted.[117]

The Court reached that result despite the existence of West Virginia 8A-4-2, which provided:

> A city shall have the power to protect and promote the public safety, health, morals and welfare by the exercise of the powers granted by this article. The enumeration of powers and authority granted in this article shall not operate to exclude the exercise of other powers and authority fairly incidental thereto or reasonably implied and within the purposes of this chapter; and the provisions of this article shall be given full effect without regard to the common-law rule of strict construction.

What would appear to have been, in the section's last clause, an attempt to abolish Dillon's Rule simply failed.

A further irony to *Toler* is that it was decided the same day that the new Municipal Code of 1969 took effect, which eliminated the old "legislative charter" cities and made all cities home rule cities.[118] The Legislature took several steps in that Act to try, once again, to liberalize municipal powers and provide for meaningful home rule. First, it repeated in § 8-1-7 the directives that the enumeration of powers was not to deny reasonably implied and incidental powers and that the chapter was to be applied without regard to the common law rule of strict construction. Second, after the rejection of that rule, the Legislature added, "and particularly when the powers and authority are exercised by charter provisions" created under the provisions of the Act. Third, the Legislature inserted a provision, § 8-1-6, that set forth (among other things) "rules of construction" to be used in applying charter provisions alongside state law. The

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116 Toler, 153 W.Va. at 316, 168 S.E.2d at 553.

117 *Id.* at 318, 168 S.E.2d at 554. The oft-noted void of inherent municipal power would seem to have been filled by W. VA. CONST. art. VI, § 39a's grant to a city to "pass all laws and ordinances relating to its municipal affairs." Why that did not suffice to create an "inherent" power has never been addressed by the Court.

118 *Id.*

details of those rules are not needed for present purposes;[119] suffice it to say that the section limited invalidation of the charter provisions to instances where they were "inconsistent or in conflict with" state law and certain provisions in the Act were to be deemed to be general laws superseding charter provisions. The rules thus direct flexibility in both the creation and application of municipal laws and "an abundant respect for local autonomy."[120]

Fourth, the definitional section of the Act provided the Legislature's understanding of the meaning of "inconsistent or in conflict with," as that term is used in § 8-1-6 and, presumably, in Article VI, § 39a.[121] The phrase "shall mean that a charter or ordinance provision is repugnant to the constitution of this state or to general law because such provision (i) permits or authorizes that which the constitution or general law forbids or prohibits, or (ii) forbids or prohibits that which the constitution or general law permits or authorizes."[122] This called for a much narrower basis for finding conflict preemption than prior case law had prescribed.[123] Fifth, § 8-12-2(a) of the Act included among the municipal powers accorded cities, in addition to other powers granted to them by the Constitution and general laws, the plenary power and authority by charter provision not inconsistent or in conflict with [state law] to provide for the government, regulation and control of the city's municipal "affairs[.]" The subsection then lists eleven such "affairs" in very broad terms[124] and specifically states that the list does not exhaust the possibilities for municipal regulation. It is also significant that the section's introductory clause provides that the grant of power is "[i]n accordance with the provisions of the 'Municipal Home Rule Amendment' to the Constitution of this State[.]" Following the broad language of the first subsection, § 8-12-2 proceeds to list fifty-seven additional, more specific pow-

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[119] As Professor Lorensen put it, "Reading the section demands patience and commitment." Lorensen, *supra* note 107, at 665.

[120] *Id.*

[121] The Legislature's definition of a constitutional term would not likely be binding on the Supreme Court. *See, e.g.*, Bd. of Trustees v. Garrett, 531 U.S. 356, 363 (2001) (the Court, not the Congress, defines the substance of constitutional guarantees); City of Boerne v. Flores, 521 U.S. 507, 519-24 (1997) (same); State *ex rel.* W. Va. Citizens Action Group v. W. Va. Econ. Develop. Grant Comm., 213 W.Va. 255, 273-79, 580 S.E.2d 869, 887-93 (2003). That point is not significant in this context, however, because the Legislature most certainly has the power to direct by statute which municipal laws shall be valid so long as they are not "inconsistent or in conflict with" state law and to then define the meaning of that phrase as a matter of statutory law. That is what the Legislature has done. W. VA. CODE § 8-1-2(b)(9) (2003).

[122] W. VA. CODE § 8-1-2(b)(9) (2003).

[123] *See, e.g.*, Plymale v. City of Huntington, 147 W. Va. 728, 729-36, 131 S.E.2d 160, 161-65 (1963); Lorensen, *supra* note 107, at 668-77.

[124] The "affairs" include creating and discontinuing the city's business, incurring obligations, acquiring and managing property, "the furnishing of all public services," and "the adoption and enforcement of local police, sanitary and other similar regulations." W. Va. Code § 8-12-2a(1)(3)(5)(10) (2003). Consistent with § 39, however, subsection 8-12-2(a)(6) authorizes only such taxes and assessments "as have been or may be specifically authorized by the legislature." W. Va. Code § 8-12-2a(6) (2003).

ers. Finally, the Act's § 8-11-1(a)(1) sets forth that, to carry into effect the conferred municipal powers, a city's "governing body . . . has plenary power and authority to [make] and pass all needful ordinances, orders, bylaws, acts, resolutions, rules and regulations not contrary to the constitution and laws of this state[.]"

The net effect of these various provisions is unmistakably clear: the Legislature declared that Dillon's Rule is dead in West Virginia and that the State's cities enjoy a plenary, broad, and flexible home rule authority. At least one would think.

The Supreme Court of Appeals, however, showed some reluctance to reach those conclusions, at least initially. In the first application of the new Act, *Rogers v. City of South Charleston*[125] considered whether a municipal board's statutory grant of authority to "sell or convey" its real property included the ability to convey an option to buy some of its realty. The Court rejected the power; public corporations, it said, have only such power as are expressly accorded them by the Legislature or as "arise[s] by necessary implication from the express statutory grant." The opinion recognized the existence of § 8-1-7 but said it only "relaxes the common law rule of strict construction" and "does not lift all restrictions" on municipal power.[126] Similarly, both *Sharon v. City of Fairmont*[127] and *City of Fairmont v. Investors Syndicate of America, Inc.*[128] repeated as a syllabus point the Court's "familiar law regarding the limited powers of municipalities"[129]:

> A municipal corporation has only the powers granted to it by the legislature, and any such power it possesses must be expressly granted or necessarily or fairly implied or essential and indispensable. If any reasonable doubt exists as to whether a municipal corporation has a power, the power must be denied.[130]

That, of course, is the phoenix, Dillon's Rule.[131]

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125 163 W.Va. 285, 256 S.E.2d 557 (1979).

126 *Id.* at 290, 256 S.E.2d at 561.

127 175 W.Va. 479, 334 S.E.2d 616 (1985).

128 172 W.Va. 431, 307 S.E.2d 467 (1983).

129 Sharon, 175 W.Va. at 487, 334 S.E.2d at 624.

130 *Id.* at Syl. pt. 2; City of Fairmont, Syl. Pt. 1, 172 W. Va. 431, 307 S.E.2d 691, *quoting* State ex rel. Hutchinson, Syl. Pt. 2, 154 W.Va. 585, 176 S.E.2d 691 (1970).

131 One is reminded here of Justice Scalia's description of the "*Lemon* test"(from Lemon v. Kurtzman, 403 U.S. 602 (1971)) in cases under the First Amendment's Establishment Clause:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.

The Court's more recent encounter with the scope of municipal power demonstrated some respect for the Legislature's purpose and text in the 1969 Act. *McCallister v. Nelson*[132] presented a challenge to a provision in Huntington's city charter that gave the mayor a veto power over ordinances passed by city council. Although a state statute authorized the creation of a strong mayor form of government, it did not explicitly provide for a mayoral veto. Thus, the challengers contended that the charter exceeded the city's powers, citing the above quote from *Sharon*. *McCallister* is not a model of clarity. The opinion repeatedly cited with approval its prior decisions that strictly construed municipal powers, it quoted three times some statement of Dillon's Rule without disavowing it, and the Court included the *Sharon* syllabus point as its first syllabus point. On the other hand, the Court did point out that, in spite of its syllabus point, *Sharon* had held that a city could abate a nuisance pursuant to a statute that permitted cities to eliminate "hazards to public health and safety" (really, not a very surprising conclusion). *McCallister* also quoted §§ 8-1-7, 8-11-1, and 8-12-2, and based its second syllabus point on § 8-1-7. Thus, its second syllabus point relies on a statute that was clearly designed to overrule its first syllabus point.[133]

Perhaps the decision's conclusion provides the more important element to be derived from the case, or at least one can hope it is. After recounting the cases' and statutes' positions on the rule of strict construction – without acknowledging the incompatibility of those positions – the Court simply concluded that it "can find no state law or constitutional provision violated by the

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Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

While resurrecting the Rule and apparently ignoring § 8-1-7, the Court has also failed on occasion to pay heed to the "rules of construction" stated in § 8-1-6. *See* Hogan v. City of South Charleston, 164 W.Va. 136, 260 S.E2d 833 (1979); Lorensen, *supra* note 107, at 667-68.

[132] 186 W.Va. 131, 134, 411 S.E.2d 456, 459 (1991). That the "most recent encounter" was, as of this writing, 14 years ago and that § 8-1-7 has only been interpreted twice since enactment of the 1969 Act seems somewhat surprising. The infrequency of the Court's application of the statute, as well as the confusion in the Court's opinions when it has applied it, may have contributed to the caution that the State's cities have generally shown in exercising home rule authority.

[133] *Id.* at 135, 411 S.E.2d at 460. The Court also at one point quoted Perdue v. Ferguson, 177 W.Va. 44, 47, 350 S.E.2d 555, 559 (1986) for the proposition that, to prevail, "the challenger must overcome a presumption that legislative enactments are immune from judicial interference. A municipal council . . ., when acting or attempting to act in a legislative capacity, upon a subject within the scope of its powers, is entitled to the same immunity from judicial interference . . . as is the state legislature." *Perdue*, however, dealt with the validity of an injunction against a city council enacting an ordinance, not the review of an ordinance already enacted. There is no legislative "immunity" from judicial review, as the Court has often proved. There is, or ought to be, a "presumption" of validity that legislative enactments are generally accorded, out of judicial deference to a coordinate branch, but that presumption does not lead to an immunity. Furthermore, it makes no sense for this so-called immunity to be of any relevance if it only attaches to enactments that are "within the scope of [the city council's] powers" since that is the very question being asked.

veto provision. The omission of a specific provision allowing a veto in the statute or Constitution does not mean it is forever forbidden."[134] *That* is the inquiry on which §§ 8-1-7, 8-11-1, and 8-12-2 attempt to focus the courts. The question should be: is there some state law that expressly precludes this act – not is there some law that expressly authorizes it? The *McCallister* Court could also have made clear that structuring mayoral powers was within the city's "municipal affairs" and thus expressly authorized by both Article VI, § 39a and § 8-12-2. The Court, however, did not take advantage of the opportunity.

When construed as written and as ultimately applied in *McCallister*, the Home Rule Amendment and the Municipal Code of 1969 combine to provide cities with an enormous breadth of discretion and power (outside the revenue-raising context[135]) to structure and operate their governments. The Legislature has already provided cities with five different forms of municipal governments[136] and can, of course, create more varieties, including, for example, "metro" or city-county governments – so long as it does so generally.

Article IX, § 8 – This section provides that "no new county" may be "formed" that does not contain at least four hundred square miles and at least six thousand residents or that causes any existing county to fall under those minima. The section also requires the consent of a majority of the voters in the proposed county who vote on the question.[137] It and its predecessor provision in the 1863

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134 McCallister, 186 W. Va. at 135, 411 S.E.2d at 460.

135 The constraints on West Virginia cities' – and counties' – revenue-raising alternatives remain severe and need to be loosened. West Virginia is one of the few states in the country that does not allow either a local sales tax or a local income tax. The principle revenue streams for cities – the business and occupation tax, property taxes, and user fees – all have negative aspects to them. *See* L. Christopher Plein & David G. Williams, *Local Government Finance in West Virginia* 13 PUBLIC AFFAIRS RPTR. No. 3 (1996), *available at* www.polsci.wvu.edu/ipa/par/report_13_3.html; Mehmet Serkan Tosun, *Municipal Finance in West Virginia: Forging a Course for Fiscal Stability*, A West Virginia Public Finance Program Project Report (2003), *available at* http://www.bber.wvu.edu/public_finance/publications.htm; Kenneth A. Klase, *Meeting Fiscal Challenges in the 1990s: Local Government Fiscal Trends in West Virginia*, 11 PUBLIC AFFAIRS RPTR. No. 2 (1994), *available at* www.polsci.wvu.edu./ipa/par/report_11_2.html. West Virginia presently ranks 49th among the states in per capita local government revenues and local government tax revenues. STATE RANKINGS 2005: A STATISTICAL VIEW OF THE UNITED STATES (Kathleen O'Leary Morgan & Scott Morgan, eds., 16th ed. 2005).

The State also ranks very low in the support that it receives from state government. Tosun, *supra*, at 26 (W. Va. has the lowest share of state revenue among total municipal revenues of any state in the 13-state Appalachian region). Although Article X, § 6 of the West Virginia Constitution prohibits the State from lending its credit to local governments or assuming their debts, it would not (or should not) prevent the state from creating various kinds of programs, contracts, or grants that could ease the crunch on local governments.

136 W. VA. CODE § 8-3-2 (2003).

137 The section states, in its entirety:

> **Formation of New Counties.** No new county shall hereafter be formed in this State with an area of less than four hundred square miles; nor with a population of less than six thousand; nor shall any county, from which a new

Constitution[138] have been invoked five times: In 1866, Mineral County was sliced off Hampshire County and Grant off Hardy; the following year, Lincoln County was patched together from four different counties, as was Summers County in 1871; the last was the separation of Mingo County from Logan County in 1895.[139]

Undoubtedly, what the drafters had in mind was the formation of a county by taking territory away from, and thus reducing, pre-existing counties. That is what states and counties did in the eighteenth and nineteenth centuries. No doubt, too, some people have read the section to preclude the formation of counties by combining them, since commissions have twice proposed a constitutional amendment to authorize county consolidation and one of those proposals was actually voted on.[140] Nothing in § 8, however, requires that conclusion. When two counties combine, they form a new county. That is precisely and literally authorized in the language of § 8. In addition, the default rule of legislative power – that the Legislature may accomplish any end by any means unless prohibited by the Constitution – supports an interpretation of § 8 that is enabling rather than disabling. Thus, if the Legislature wants to consolidate counties, it may do so – so long as it satisfies the requirements of § 8: the resulting county must have more than six thousand people and four hundred square miles[141] and its formation must be approved by the voters in the new county.

> county, or part thereof shall be taken, be reduced in area below four hundred square miles, nor in population below six thousand. Nor shall a new county be formed without the consent of a majority of the voters residing within the boundaries of the proposed new county, and voting on the question.

W. VA. CONST. art. IX, § 8.

138 W. VA. CONST. art. VII, § 12 (1863). The 1863 version was nearly identical to § 8 except that the population minimum was 4,000 white residents.

139 E. LEE NORTH, THE 55 WEST VIRGINIAS: A GUIDE TO THE STATE'S COUNTIES 24, 46, 60, 62, 97 (2nd ed. 1998). The creation of Lincoln County was challenged as unconstitutional on the grounds that the county had less than the minima required for both population and square miles and that it left Cabell County with fewer than 400 square miles. An amended act adding more territory to Lincoln got it above the minima but most assuredly left Cabell too small, as it has only 282 square miles. *Id.* at 13. The Supreme Court of Appeals nevertheless rejected the challenge in Lusher v. Scites, 4 W.Va. 11 (1870), reasoning that the counties' populations and sizes were facts necessarily resolved by the Legislature prior to passing the relevant act and its findings were conclusive on the Court. *Id.* at 14-15. In a similar vein, the Court found the matter to be a political question, that is, an issue that is committed to the political branches and not reviewable by the courts. *Id.* at 17-21.

140 *See supra* notes 7, 29, 34-36 and accompanying text.

141 An interesting issue would be presented if the Legislature decided, and the voters agreed, on the consolidation of the three counties in the northern panhandle. The combined square mileage of Brooke (90), Hancock (85) and Ohio (106) Counties is 281. NORTH, *supra* note 139, at 11, 31 & 73. A literal reading of § 8 would, in that instance, preclude formation of the new county because it would have less than the 400 square mile minimum. A court could possibly conclude, however, that the elimination of three very small counties to create a newer and larger county was consistent with the purpose of the geographical minimum. A court could also follow the holding of *Lusher* and conclude that the determination of sufficient size and the formation of a new county

The procedure already in place in West Virginia Code § 1-3-1 for the "creation" of a new county would be well-suited for use in consolidating counties.

Article IX, §§ 1 and 12 – Any statutory reorganization at the county level would have to respect the constitutional, elective offices created by sections 1 and 12 in Article IX. Section 1 provides for election of a surveyor of lands, a prosecuting attorney, a sheriff, and one or two assessors,[142] while § 12 requires the position and election of a clerk of the county commission.[143] Each of these officers retains a degree of independence in meeting his or her constitutional and statutory duties.[144] The offices cannot be eliminated without a constitutional amendment.[145] Of course, any such county re-organization would need to provide for officers or employees to perform the functions of those now performed by the prosecuting attorney, sheriff, and county clerk.[146] The continued

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are strictly matters for the political branches and decline to review their decisions. *See supra* note 139.

[142] Section 1 states, in its entirety: "The voters of each county shall elect a surveyor of lands, a prosecuting attorney, a sheriff, and one and not more than two assessors, who shall hold their respective offices for the term of four years." W. VA. CONST. art. IX, § 1.

[143] Section 12 states, in its entirety:

> The voters of each county shall elect a clerk of the county commission, whose term of office shall be six years. His duties and compensation and the manner of his removal shall be prescribed by law. But the clerks of said commissions, now in office, shall remain therein for the term for which they have been elected, unless sooner removed therefrom, in the manner prescribed by law.

W. VA. CONST. art. IX, § 12

Article VIII, § 9 of the Constitution also requires the election in each county of a clerk of the circuit court, who is a cog in the judicial system. *See* Rutledge v. Workman, 175 W. Va. 375, 332 S.E.2d 831 (1985). The Legislature has implicitly authorized counties to combine the two clerkships, *see* W. VA. CODE § 7-7-4(d)(9) (2003), although at this time none of the counties has a joint clerk. *See* W. VA. ASSOC. OF COUNTIES, DIRECTORY OF COUNTY OFFICIALS (2005).

[144] State *ex rel.* Lambert v. Cortellessi, 182 W. Va. 142, 146, 386 S.E. 2d 640, 644 (1989); *cf.* Webster County Comm'n. v. Clayton, 206 W. Va. 107, 522 S.E.2d 201 (1999) (showing the limits of such officer's power).

[145] That is not the case for the offices referred to in Article IX, § 2, which is a constitutional relic. The first sentence of that section provides for the election in each magisterial district of one or more constables, a provision that was nullified by the 1974 Judicial Reorganization Amendment. W. VA. CONST. art. VIII, § 15 (abolishing the offices of justice of the peace and constable). The second sentence authorizes the assessor to appoint assistants, though such authority would be implicit even without § 2 and would certainly be within the Legislature's capacity to create. (It has done so in W. VA. CODE § 11-2-3 (2003)). The third sentence states: "Coroners, overseers of the poor and surveyors of roads, shall be appointed by the county [commission]." While some counties have coroners, most do not, and the other two mentioned offices no longer exist. *See* State *ex rel.* K.M. v. W. Va. Dep't of Health and Human Res., 212 W. Va. 783, 792, 575 S.E.2d 393, 402 (2002); BASTRESS, *supra* note 11, at 226-27.

[146] *See* Kenny v. County Ct. of Webster County, 124 W. Va. 519, 529-30, 21 S.E.2d 385, 390 (1942):

> We cannot have constitutional government in the counties without [commissions] for the control of their fiscal affairs; taxes must be collected, and therefore, we must have assessors and sheriffs; law and order must be preserved,

utility of electing and maintaining a surveyor of lands in each county could certainly be questioned.

Article IX, §§ 9-11 – These three sections create county commissions, specify the terms of office and qualifications of commissioners, and set forth their powers.[147] They provide for three member commissions with members

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> and crime suppressed, therefore, we must have courts, not only to try persons accused of crime, but settle disputes of a civil nature which arise between citizens, and such courts must have clerical assistance; juries must be summoned and paid; we must have officers to apprehend and prosecute alleged criminals; jails must be built and maintained, and prisoners fed; and elections must be held for the selection of officials, county, state and national. All these, and many others which might be mentioned, are the mandatory expenses necessary to the functioning of constitutionally required activities of county government[.]

Id.

On the other hand, many of the local government functions described by *Kenny* have in West Virginia been taken over by or are dominated by the State. The Regional Jail Authority has totally taken over from sheriffs the operation of jails, W. VA. CODE §§ 31-20-1 *et seq.* (2003); the state police provides much of our law enforcement, W. VA. CODE §§ 15-2-1, *et seq.* (2004); the assessment process is to a considerable extent state-administered, *see* W. VA. CONST. art. X, § 1b; Killen v. Logan County Comm., 213 W. Va. 602, 607, 295 S.E.2d 689, 694 (1982); and (as *Kenny* itself recognized) the provision of welfare has entirely shifted from county overseers of the poor to the state and national governments. *See* State *ex rel.* K.M., 212 W. Va. at 795-96, 575 S.E.2d at 405-06 (2002); *infra* notes 156-157 and accompanying text.

[147] The three provisions state:

> County Commissions
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> § 9. The office of county court or tribunal in lieu thereof heretofore created is hereby continued in all respects as heretofore constituted, but from and after the effective date of this amendment shall be designated as the county commission and whatever in this Constitution, the Code of West Virginia, acts of the legislature or elsewhere in law a reference is made to the county court of any county, such reference shall be read, construed and understood to mean the county commission.
>
> Except as otherwise provided in section eleven or thirteen of this article, there shall be in each county of the State a county commission, composed of three commissioners, and two of said commissioners shall be a quorum for the transaction of business. It shall hold four regular sessions in each year, and at such times as may be fixed and entered of record by the said commission. Provisions may be made by law for holding special sessions of said commissions.
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> Terms of Office of County Commissioners
>
> § 10. The commissioners shall be elected by the voters of the county, and hold their office for at term of six years, except that at the first meeting of said commissioners they shall designate by lot, or otherwise in such manner as they may determine, one of their number, who shall hold his office for a term of two years, one for four years, and one for six years, so that one shall be elected every two years; but no two of said commissioners shall be elected from the same magisterial district. If two or more persons residing in the same district shall receive the greater number of votes cast at any election, then only the one of such persons receiving the highest number shall be de-

serving staggered six-year terms and each coming from a different magisterial district. The enumeration of their powers in § 11 essentially leaves them with whatever the Legislature gives them. All of the conferred powers are qualified, in some fashion, by reference to what is prescribed by state law. Nevertheless, it is clear that the commissions are to function as their county's executive and legislative bodies, and the Legislature has placed on them a broad range of powers to superintend and administer the counties' affairs.[148] The Commissions' powers have been subjected to Dillon's Rule; thus, they may exercise only express powers and those necessarily implied for the execution of the express

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cared elected, and the person living in another district, who shall receive the next highest number of votes, shall be declared elected. Said commissioners shall annually elect one of their number as president. The commissioners of said commissions, now in office, shall remain therein for the term for which they have been elected, unless sooner removed therefrom, in the manner prescribed by law.

Powers of County Commissions

§ 11. The county commissions, through their clerks, shall have the custody of all deeds and other papers presented for record in their counties, and the same shall be preserved therein, or otherwise disposed of, as now is, or may be prescribed by law. They shall also, under such regulations as may be prescribed by law, have the superintendence and administration of the internal police and fiscal affairs of their counties, including the establishment and regulation of roads, ways, bridges, public landings, ferries and mills, with authority to lay and disburse the county levies: Provided, that no license for the sale of intoxicating liquors in any incorporated city, town or village, shall be granted without the consent of the municipal authorities thereof, first had and obtained. Until otherwise prescribed by law, they shall, in all cases of contest, be the judge of the election, qualification and returns of their own members, and of all county and district officers, subject to such regulations, by appeal or otherwise, as may be prescribed by law. Such commissions may exercise such other powers, and perform such other duties, not of a judicial nature, as may be prescribed by law. Such existing tribunals as have been heretofore established by the legislature to act as to police and fiscal matters in lieu of county commissions in certain counties shall remain and continue as now constituted in the counties in which they have been respectively established until otherwise provided by law, and they shall have and exercise the powers which the county commissions have under this article, and, until otherwise provided by law, such clerk as is mentioned in section twelve of this article shall exercise any powers and discharge any duties, heretofore conferred on, or required of, any such tribunal or the clerk of such tribunal respecting the recording and preservation of deeds and other papers presented for record and such other matters as are prescribed by law to be exercised and discharged by the clerk thereof.

W. VA. CONST. art. IX, §§ 9-11.

[148] Most of the powers and duties are set forth in W. VA. CODE §§ 7-1-1, *et seq.* (2003). As noted above, one of the defeated 1989 amendments sought to authorize the Legislature to confer home rule powers on counties. As also noted above, nothing in the constitution prevents the Legislature from bestowing those powers without a constitutional amendment.

powers.[149] Of course, the Legislature remains free to enhance commission powers or to confer a broad home rule power analogous to that bestowed on municipalities.[150]

Article IX, § 13 – This section authorizes counties to fashion "another tribunal for the transaction of business" assigned to county commissions.[151] The adoption of an alternative tribunal ultimately depends on its approval by the county's voters, but there are two methods by which the proposal can be initiated. A county commission may itself request the Legislature for an act to change the form of its county government and to submit the question to a referendum. Citizens of the county may also submit a petition, signed by at least ten percent of the county's registered voters, to the commission to direct it to make the request to the Legislature. Neither the commission nor the Legislature has discretion to deny the request, and the resulting legislation must propose a reform that reflects the citizens' original petition.[152]

Obviously, § 13 offers opportunity for local government reform. Its procedures are strictly bottom-up, however; the reform movement must come from either the county's citizens or governing body. That does not mean, however, that the state government could not facilitate reform. The Legislature could, for example, create a menu of different forms of government, much like it has done for cities in West Virginia Code § 8-3-2.[153] Alternatives could in-

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149 *E.g.*, State *ex rel.* County Ct. of Cabell County v. Arthur, Syl. Pt. 1, 150 W. Va. 293, 145 S.E.2d 34 (1965); Berkeley County Comm'n. v. Shiley, 170 W. Va. 684, 685, 295 S.E.2d 924, 926 (1982). On Dillon's Rule, *see supra* notes 106-117, 130-131 and accompanying text.

150 *See supra* notes 68, 70-71, 74-75 and accompanying text.

151 Section 13 reads, in its entirety:

> Reformation of County Commissions
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> The legislature shall, upon the application of any county, reform, alter or modify the county commission established by this article in such county, and in lieu thereof, with the assent of a majority of the voters of such county voting at an election, create another tribunal for the transaction of the business required to be performed by the county commission created by this article. Whenever a county commission shall receive a petition signed by ten percent of the registered voters of such county requesting the reformation, alteration or modification of such county commission, it shall be the mandatory duty of such county commission to request the legislature, at its next regular session thereafter, to enact an act reforming, altering or modifying such county commission and establishing in lieu thereof another tribunal for the transaction of the business required to be performed by such county commission, such act to take effect upon the assent of the voters of such county, as aforesaid. Whenever any such tribunal is established, all of the provisions of this article in relation to the county commission shall be applicable to the tribunal established in lieu of said commission. When such tribunal has been established, it shall continue to act in lieu of the county commission until otherwise provided by law.

W. VA. CONST. art. IX, § 13.

152 Taylor County Comm'n. v. Spencer, 169 W. Va. 37, 43-49, 285 S.E.2d 656, 660-63 (1981).

153 The Supreme Court made the same suggestion in *Spencer*. *Id.* at 44, 285 S.E.2d at 660.

clude a metro (or joint city-county) government and variations on the municipal forms in § 8-3-2. Hampshire County citizens, for example, have recently petitioned for a vote on a proposed reform that would create a county government very similar to that described in Plan IV, the "Manager Plan," with tribunal members being elected by their respective voting districts and then hiring a county administrator to handle the county's day-to-day business. Members' pay would be limited to $250 for each tribunal meeting attended.[154]

A significant issue arises in applying § 13 as to whether there are any limits on or requirements regarding the form of the altered government. Section 13 itself places none, except that the new government must be "another tribunal." The word, "tribunal," at first seems an odd choice because its most typical usage is as a court of justice or as a place of judgment or decision.[155] When § 13's original antecedent was drafted, however, the county commission was called the county court, and it exercised considerable judicial powers. That antecedent, Article VIII, § 34 of the Constitution adopted in 1872, became Article VIII, § 29 following an 1880 amendment, which took away almost all of the county courts' judicial power. The current version was adopted in the Judicial Reorganization Amendment of 1974, which renamed the county courts as county commissions, moved the provisions relating to them from Article VIII (the Judicial Article) to Article IX (the County Organization Article), and took away almost all of their judicial powers.[156] That Amendment also took the old Article VIII, § 29 and made it the current Article IX, § 13, adding to it the procedure for the reform to be initiated by citizen petition. Through each version of the provision, the language of "another tribunal" remained, even though the judicial functions of county courts/commissions had been eliminated. The current Article IX, § 11, which was also part of the 1974 Amendment, provides for the continuation of "such existing tribunals as have been heretofore established by the Legislature to act as to police and fiscal matters in lieu of county commissions."[157] It thus seems clear that the term, "another tribunal," simply refers

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[154] H.D. 4396, 77th Leg., Reg. Sess. (W. Va. 2004); S. 727, 77th Leg., Reg. Sess. (W. Va. 2004); H.D. 3291, 77th Leg., Reg. Sess. (W. Va. 2005).

[155] OXFORD ENGLISH DICTIONARY (2nd ed. 1989, unabridged), http://dictionary.oed.com/cgi/entry/50257514?single=1&query_type=word&queryword=tribunal&first=1&max_to_show=10; RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2019 (2nd ed. 1987, unabridged).

[156] After the 1880 Amendment, the only judicial powers retained by the county courts related to probate and the appointment and oversight of personal representatives, guardians, committees, and similar issues. With the 1974 amendment, Article IX, § 11 now expressly prohibits the Legislature from assigning commission duties "of a judicial nature." Article VIII, § 6 authorized the Legislature to confer jurisdiction over probate and personal representatives, etc., on the circuit courts, "but until such time as the legislature provides otherwise, jurisdiction in such matters shall remain in the county commissions or tribunals existing in lieu thereof or the officers of such county commission or tribunals." The Legislature has not taken that action, so those judicial duties remain with the commissions/tribunals. *See generally* BASTRESS, *supra* note 11, at 234-35.

[157] *See also* W. VA. CONST. art. VIII, § 6, discussed *supra* note 156.

to an executive/legislative body that performs the duties of a county commission but has a different form than that described in Article IX, § 10 and does not impose any inherent limitations on that body's form.

The purpose of § 13 is obviously to maximize the democratic power of the people and to put into action the mandate of its philosophical counterpart, Article III, § 3, which confers on "a majority of the community "an indubitable, inalienable, and indefeasible right to reform, alter or abolish [its government] in such manner as shall be judged most conducive to the public weal."[158] Given those aims, the section should be interpreted to provide the people with the maximum amount of flexibility and discretion in shaping the form of their altered government, *i.e.*, to let the people have their way.

That leads to the remaining question, then, whether the Constitution elsewhere places limits on the form of the alternative tribunal. Certainly, basic due process and equal protection constraints would apply; a county could not, for example, create a body that was elected by a procedure that arbitrarily excluded a particular group or that violated one-person-one-vote principles. Other provisions of the Bill of Rights would also control.[159] Another possible limitation, however, might be found in Article IX, § 10. That section says that the "commissioners shall be elected by the voters of the county." That language would likely require that a "tribunal in lieu of a commission" should be elected. It would be odd, indeed, if § 13's design to maximize democracy resulted in a diminution of democratic rights, even if consented to. The Supreme Court of Appeals has ruled that there are certain fundamental rights that the majority cannot waive for the minority.[160] It also concluded in *Dunham v. Morton*[161] that the language in § 10's predecessor provision (that county court members "shall be elected") precluded the Legislature from authorizing the governor to choose a winner in a tied election for county judge; only the people could elect commission members.

A democratically elected tribunal, however, should be the only requirement imposed by § 10. A possible additional limitation has been inferred by a 1963 Attorney General Opinion and has become an issue in the previously referred to petition from Hampshire County citizens. That petition proposes that each tribunal member be elected by the voters within his or her own district

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[158] Indeed, the Supreme Court ventured in *Spencer* that § 3 by itself gave county residents the right to alter their form of government. *Spencer*, 169 W. Va. at 44, 285 S.E.2d at 661.

[159] *E.g.*, W. VA. CONST. art. III, §§ 7 (freedom of speech) and 11 (political tests condemned) would not permit the altered government to condition membership in the tribunal on taking a political oath.

[160] Woodruff v. Bd. of Trustees, 173 W. Va. 604, 610-11, 319 S.E.2d 372, 378-79 (1984) (Article III, § 1's statement that individuals "cannot, by any compact, deprive or divest their posterity" of certain fundamental rights would not permit public employees' union to waive its members' free speech rights); *see also* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("fundamental rights may not be submitted to vote").

[161] 115 W. Va. 310, 313, 175 S.E. 787, 788 (1934).

rather than by the voters countywide, as occurs with county commissions. When the Attorney General was asked whether a district-based election of an alternative form of government was constitutional, his reply was that the language, "the [commissioners] shall be elected by the voters of the county," required countywide voting of even tribunals in lieu of commissions.[162] He also relied on two cases, neither of which was particularly pertinent. One, the just mentioned *Dunham v. Morton*, simply said that the people, not the governor, must break a tie in an election for commissioner. The case tells us nothing about who "the people" must be. The second case, *McKee v. Hedrick*,[163] found unconstitutional a statute that divided Ohio County into residential districts for the election of commissioners. The residential districts differed from the county's magisterial districts and thus made it possible for more than one person to be elected from one magisterial district. That put the law in conflict with § 10's requirement that no more than one commissioner may reside in any one magisterial district. Regardless of whether that decision was correct (the Court could have said the second district resident elected was disqualified without nullifying the statute), it says nothing, and provides no guidance, about countywide versus district elections of tribunals.

In resolving this issue, the first question is whether § 10 has any impact, at all, on the form of a § 13 tribunal. I posited above that the requirement that a commission be elected should carry over to § 13, not so much because of the language of § 10, but because of the purposes of § 13. A requirement, though, that the commission or tribunal members be elected "by the voters of the county" does not necessarily mean that *each* of the members must be elected by *all* of the county's voters. Obviously, § 10 has been interpreted to prescribe countywide voting for traditional commissions, but the rest of the section includes language (especially the district residency requirement) that makes that interpretation illogical. Nothing in the text of the Constitution, however, suggests that that limitation must be carried over to § 13 tribunals. In the absence of a textual command, the default rule should be to facilitate flexibility and the wishes of the people. Most importantly, there is no principle of democracy that requires either countywide or district voting; each has its advantages, and the choice should depend on local priorities. Countywide voting makes for perfect equality in the weight of each vote (everyone's vote counts exactly the same) and every voter gets a say on each of the tribunal's members. On the other hand, district specific voting allows each community to select its own representative to be its advocate, prevents population-dense areas from dominating the voting on the tribunal, enhances voter familiarity with the candidates, and maximizes the opportunity for racial, ethnic, religious, and political minorities

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162 50 BIENNIAL REP. & OFF. OPS. OF THE A.G. OF W. VA. 202, 204 (1963).

163 McKee v. Hedrick, 146 W. Va. 777, 123 S.E.2d 227 (1961).

to elect one of their own.[164] Of course, the districts would have to be sufficiently equal in population to satisfy federal and state one-person-one-vote standards.[165] Such compliance would also offset to some extent one of the advantages of at-large voting.

In brief, § 13 offers significant potential for local government reform, particularly if it is given a broad interpretation to facilitate flexibility and diversity in structuring county government.

Article X, § 6 – The finance article (Article X) contains a few provisions that must be kept in mind in pursuing local government reform. One is § 6, which bars the State from lending its credit or assuming the liabilities of its local governments.[166] This would not, however, preclude the State from directing its revenues to local government for the creation, maintenance, or operation of particular programs.[167] In addition, the Court has construed § 6 and its sister section, § 4 (limiting state borrowing),[168] to permit the issuance of state or local government bonds where the bonds are to be repaid by third parties, by the funded projects, or by some dedicated fund outside general revenues.[169] Voters

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[164] *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 616-17 (1982); City of Mobile v. Bolden, 446 U.S. 55, 66 (1980), *superseded by statute on other grounds by*, Voting Rights Act § 2, *as recognized in*, Latino Political Action Comm. v. Boston, 784 F.2d 409 (1986).

[165] *See generally* Abate v. Mundt, 403 U.S. 182 (1971); Hadley v. Junior Coll. Dist., 397 U.S. 50 (1970); State *ex rel.* Smith v. Gore, 150 W. Va. 71, 143 S.E.2d 791 (1965). If a state or local apportionment deviates less than 10% from perfect equality, it is sufficient to satisfy equal protection standards. Percentages larger than that must be justified, and a 17% deviation approaches the maximum that can be permitted. *E.g.*, Brown v. Thompson, 462 U.S. 835, 842 (1983); Mahan v. Howell, 410 U.S. 315 (1973); White v. Regester, 412 U.S. 755 (1973); Deem v. Manchin, 188 F. Supp. 2d 651 (N.D.W.V. 2002) (3-judge court).

[166] Section 6 states, in its entirety:

> The credit of the State shall not be granted to, or in aid of any county, city, township, corporation or person; nor shall the State ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person. The investment of state or public funds shall be subject to procedures and guidelines heretofore or hereafter established by the Legislature for the prudent investment of such funds.

W. VA. CONST. art. X, § 6.

[167] *See* State *ex rel.* W. Va. Citizens Action Group v. W. Va. Econ. Dev. Grant Comm'n., 213 W. Va. 255, 580 S.E.2d 869 (2003).

[168] Section 4 provides:

> No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years.

W. VA. CONST. art X, § 4.

[169] *See, e.g.*, Winkler v. Sch. Bldg. Auth., 189 W. Va. 748, 756-57, 434 S.E.2d 420, 428-29 (1993); State *ex rel.* Marockie v. Wagoner, 190 W. Va. 467, 472, 438 S.E.2d 810, 815 (1993), *overruled on other grounds by* State *ex rel.* W. Va. Reg'l Jail & Corr. Facility Auth. v. W. Va.

can also approve a local government bond sales, up to five percent of the value of taxable property within the jurisdiction.[170] In other words, to the extent that governmental reforms hinge on financing, the Constitution precludes some options, but it is not a bar.

Article X, § 9 – Section 9[171] of Article X requires municipal taxes to be "uniform, with respect to persons and property" within the city. This provision does not present any particular legal difficulty, but it may have some political impact for efforts to create city-county governments. Some metropolitan governments, most notably Nashville, have assuaged rural residents through the creation of lower tax zones.[172] That situation currently prevails in West Virginia because Article X, § 1 prescribes a lower cap for taxes on nonresidential property outside municipalities than for taxes on such property within cities. Any efforts at creating city-county governments in the State would have to resolve the tension between sections 1 and 9 of Article X.

A tax satisfies § 9's uniformity when it taxes persons at an equal rate or taxes all property within each of the classes created by Article X, § 1 in the same proportion to its value and at an equal rate.[173] The section does not apply to license and privilege taxes, user fees, special assessments, and the like.[174]

Article X, § 10 and Article XII, §§ 3, 6, and 10 – Any effort to restructure local government must consider the potential impact on the local school system. Article XII, the education article, imposes in its first section a duty on the Legislature to provide "for a thorough and efficient system of free schools," and our Supreme Court has construed that provision (along with Article XII, § 5's requirement that the Legislature provide for the support of free schools) to create a fundamental right for every West Virginia child to receive a free, quality education.[175] Section 2 of the Article creates the State Board of Education and assigns it the responsibility for "the general supervision of the free schools of the State" and for electing a State Superintendent of Schools, who shall serve at the Board's "will and pleasure" and "be the chief school officer of the State" with such powers and duties as the Legislature and Board shall

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Inv. Mgmt. Bd., 203 W. Va. 413, 508 S.E.2d 130 (1998); *see generally* BASTRESS, *supra* note 11, at 250-55.

170 W. VA. CONST. art. X, § 8.

171 Section 9 reads, in its entirety: "Municipal Taxes to be Uniform. The legislature may, by law, authorize the corporate authorities of cities, towns and villages, for corporate purposes, to assess and collect taxes; but such taxes shall be uniform, with respect to persons and property within the jurisdiction of the authority imposing the same." W. VA. CONST. art X., § 9.

172 DAVID RUSK, CITIES WITHOUT SUBURBS 96 (2nd ed. 1995).

173 Killen v. Logan County Comm'n., 170 W. Va. 602, 295 S.E.2d 689 (1982); Article V, § 39a states that the Legislature "shall limit the rate of taxes for municipal purposes, in accordance with" Article X, § 1. *Id.*

174 *See generally* BASTRESS, *supra* note 11, at 259-60.

175 *E.g.*, Pauley v. Kelly, 162 W. Va. 672, 674, 255 S.E.2d 859, 861 (1979); Randolph County Bd. of Educ. v. Adams, 196 W. Va. 9, 14, 467 S.E.2d 150, 154 (1995).

give him. Section 6[176] addresses school districts, but provides only that those districts in existence at the time of ratification should continue until changed by the Legislature and that school boards shall be elected in nonpartisan elections and subject to magisterial district residency restrictions. Section 3[177] adds that the Legislature "*may* provide for county superintendents and such other officers as may be necessary" to implement Article XII (emphasis added). The only other relevant provision in Article XII is § 10,[178] which states that no "independent" school district[179] or organization may be created without the consent of a majority of voters in the district, or in each of the districts, from which the new district is created.

Article XII thus imposes very few restrictions on the structure of local education administration and leaves most of the configuring to Legislative discretion.

The Legislature has responded in various ways. West Virginia Code § 18-1-1 defines a "district" for purposes of the Code's chapter on public education as a "county school district" and a "board" as a "county board of education."[180] Section 18-1-3 provides, "A school district shall include all the territory in one county."[181] This "county unit" approach to districting was established in 1933, when the Legislature revamped local education structure by abolishing the pre-existing school districts – of which there were 398, including 54 independent districts – and their governing boards and replacing them with the 55 county districts governed by five-member boards, no more than two members of which could come from the same magisterial district.[182] Citizens

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176 Section 6 provides:

> The school districts into which any county is now divided shall continue until changed pursuant to act of the Legislature: Provided, That the school board of any district shall be elected by the voters of the respective district without reference to political party affiliation. No more than two of the members of such board may be residents of the same magisterial district within any school district.

W. VA. CONST. art. XII, § 6.

177 Section 3 provides: "The legislature may provide for county superintendents and such other officers as may be necessary to carry out the objects of this article and define their duties, powers and compensation." W. VA. CONST. art. XII. § 3.

178 Section 10 provides: "No independent free school district, organization shall hereafter be created, except with the consent of the school district or districts out of which the same is to be created, expressed by a majority of the voters voting on the question." W. VA. CONST. art. XII, § 10.

179 An "independent school district," according to the Supreme Court, is one that is carved out of a county or magisterial school district. *See generally* Leonhart v. Bd. of Educ., 114 W. Va. 9, 14, 170 S.E. 418, 420 (1933); Herold v. McQueen, 71 W. Va. 43, 50, 75 S.E. 313, 316 (1912).

180 W. VA. CODE § 18-1-1 (2003).

181 W. VA. CODE § 18-1-3 (2003).

182 *See generally* CHARLES H. AMBLER, A HISTORY OF EDUCATION IN WEST VIRGINIA 610 (1951). The fairly revolutionary move to county districts sought to advance both efficiency and equality goals and was no doubt facilitated politically by the fiscal crises created by the depression

and taxpayers in the Charleston city independent school district challenged the new law on the theory that it violated Article XII, § 10. They argued that, because § 10 required consent of the voters to *create* an independent district, then it followed that the section also required voter approval to *eliminate* an independent district. The West Virginia Supreme Court, however, rejected that argument, restricted the section to its literal meaning, and sustained the Legislature's decision to require the switch to the county unit without submitting the question to local voter approval.[183]

Since 1933, the State has to a limited extent constitutionalized the notion of county-wide school districts. First, the 1986 amendment to § 6 imposing magisterial district residency restrictions on school board members seems to assume a county board. It would be odd, indeed, to return to magisterial district or independent school districts and maintain a requirement that no more than two members of the school board "may be residents of the same magisterial district." Second, the Fair Educational Opportunities Amendment of 1982, which amended Article X, § 10,[184] lowered the level of voter approval needed to contract indebtedness and issue bonds from sixty percent to a simple majority. In doing so, however, the amendment stated, in relevant part:

> . . . [A] *county board of education* may contract indebtedness and issue bonds for public school purposes as provided by law, if, when submitted to a vote of *the people of the county*, in the manner provided by law, the question of contracting indebtedness and issuing bonds is approved by a majority of the votes cast for and against the same.[185]

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and by the contemporaneous enactment of the Tax Limitation Amendment, which limited the ability of local governments to raise revenues through property taxes. Efficiency was indeed promoted; in the first year of the county unit law, the districts employed 940 fewer teachers and saved $4.56 million. Because there had been some rather significant disparities within counties, especially in those counties with independent districts (which tended to be wealthier than the magisterial districts), the switch to county units and uniform taxation across the county also promoted the equality goal. *Id.* at 610.

183 Leonhart, 114 W. Va. at 16-17, 170 S.E. at 421.

184 The 1982 Amendment, which is now § 10's third paragraph, states as follows:

> Notwithstanding the provisions of section eight of this article relating to a vote of the people or any other provisions of this Constitution, a county board of education may contract indebtedness and issue bonds for public school purposes as provided by law, if, when submitted to a vote of the people of the county, in the manner provided by law, the question of contracting indebtedness and issuing bonds is approved by a majority of the votes cast for and against the same.

W. VA. CONST. art X, § 10.

185 W. VA. CONST. art. X, § 10. (emphasis added).

If this provision is read literally, it would authorize only county boards to issue bonds, and votes to authorize the issuance of bonds must be held on a county by county basis. If so read, a school district that was something more, or less, than a county could not use § 10 but would have to rely on the pre-existing authority in Article X, § 8 for a "school district" to issue bonds. That section is more restrictive in several respects, most notably in its requirement that bonds must be approved by a three-fifths supermajority rather than by a simple majority. Hence, if the State wanted to consolidate or rearrange school districts into something other than county school districts, then § 10 should be amended to provide in its final paragraph that a "[*district*] board of education may contract indebtedness and issue bonds" if approved by a majority in a vote of the "people of the [*district*]." With that accomplished, a legislative decision to restructure school districts could proceed unimpeded by any constitutional restraint, other than the general requirements for equality and rationality.

Consolidation of school districts does, however, create policy issues that are different from consolidation of counties and other local governments. A major rationale behind such efforts would be to achieve some economies of scale, eliminate duplication of some services, and reduce administrative costs. In school consolidations, at least, the evidence has not revealed cost savings,[186] while there is strong evidence now that smaller districts and smaller schools substantially reduce the powerful negative effects that low socio-economic

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[186] *See* Robert M. Bastress, *The Impact of Litigation on Rural Students: From Free Textbooks to School Consolidation*, 82 NEB. L. REV. 9, 45-47 (2003); Kathleen Cotton, *New Small Learning Communities: Findings from Recent Literature*, NW. REG'L EDUC. LAB. (2002) (available from the Nat'l Ass'n of Secondary Sch. Principals); James S. Streifel, et al., *The Financial Effects of Consolidation*, 7 J. RESEARCH RURAL EDUC. 13 (No. 2, 1991) (stating that "there is no reason to expect financial savings or increased revenues as a result of consolidation"); Eric Eyre & Scott Finn, *Educational Agency Grows While Enrollment Shrinks*, CHARLESTON GAZETTE, Oct. 6, 2002, *available at* http://www.wvgazette.com/section/Series/Closing+Costs/200210089; BARBARA KENT LAWRENCE, et al., DOLLARS & SENSE: THE COST EFFECTIVENESS OF SMALL SCHOOLS 11-13 (2002), http://www.ruraledu.org/docs/dollars.pdf 11..

status has on student achievement.[187] And West Virginia is already one of the few states to maintain county-wide school districts.[188]

IV. ADDITIONAL CONSIDERATIONS

A few additional points are relevant to structuring local government. First, the Legislature has almost unlimited discretion in creating or authorizing regional or statewide entities to perform governmental functions. Indeed, such restructuring has already occurred in a wide variety of contexts in West Virginia and elsewhere. Law enforcement, for example, was once entirely local, but has since 1919 been in the partial domain of the state police.[189] The Regional Jail Authority has almost completely taken over the operation of jails, which just fifteen years ago were entirely the domain of county sheriffs.[190] Welfare, once the responsibility of counties and their overseers of the poor, has since the depression been taken over by the federal and state governments,[191] although delivery of services often occurs through local agencies. Regional Education Ser-

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[187] *See* Bastress, *supra* note 186, at 38-41; CRAIG B. HOWLEY, THE MATTHEW PRINCIPLE: A WEST VIRGINIA REPLICATION? 20 , http://www.eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/23/df/3d.pdf; Craig B. Howley, *Compounding Disadvantage: The Effects of School and District Size on Student Achievement in West Virginia*, 12 J. RESEARCH RURAL EDUC. 25 (1996); Bradley J. McMillen, *School Size, Achievement, and Achievement Gaps*, 18 (2004), *available at* http://epaa.asu.edu/epaa/v12n58/ 18; Robert Bickel & Craig Howley, *The Influence of Scale on School Performance: A Multi-Level Extension of the Matthew Principle* 8 EDUC. POLICY ANALYSIS ARCHIVES 2 (2001), *available at* http://epaa.asu.edu/epaa/v8n22/; JERRY D. JOHNSON, et al., SIZE, EXCELLENCE, AND EQUITY IN ARKANSAS SCHOOLS: A MATTHEW REPLICATION 33 (2002), http://www.eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/0d/a5/3a.pdf ; *Maine's Small Schools Cut Poverty's Power over Student Achievement*, 1 (Feb. 2005) *available at* http://www.ruraledu.org/rpm/rpm702a.htm; RURAL SCHOOL AND COMMUNITY TRUST, SMALL SOUTHERN SCHOOLS BEATING THE ODDS IN POOR RURAL COMMUNITIES 5 (2004), http://www.ruraledu.org/docs/beatingodds/SGAreport.pdf 5.

[188] Maryland and Nevada also have county districts with one extra each for Baltimore and Carson City, respectively; Louisiana has 66 districts and 64 parishes. U.S. CENSUS, STATE & COUNTY QUICK FACTS, *available at* http://quickfacts.census.gov/qfd/index.html. Hawaii has one statewide school district. NAT'L CTR. FOR EDUC. STATISTICS, OVERVIEW OF ELEMENTARY AND SECONDARY SCHOOL DISTRICTS: 2001-02, Table A-5 (2003), *available at* http://nces.ed.gov/pubs2003/overview03/table_A5_1.asp

The West Virginia Legislature has regionalized some educational functions through the creation of and reliance on Regional Educational Service Agencies, W. VA. CODE § 18-2-26 (2003), and through the authorization of inter-county construction and maintenance of schools. W. VA. CODE § 18-5-11 (2003).

[189] W. VA. CODE §§ 15-2-1, *et seq.* (2004).

[190] W. VA. CODE §§ 31-20-1, *et seq.* (2003).

[191] *See, e.g.*, 42 U.S.C. §§ 401, *et seq.* (2000) (Federal Old-Age, Survivors and Disability Insurance Benefits); 42 U.S.C. §§ 601, *et seq.* (2000) (Grants to States for Aid and Services to Needy Families with Children and for Child-Welfare Services); W. VA. CODE §§ 9-9-1, *et seq.* (2003) (WV Works Act); *see generally* State *ex rel.* K.M. v. W. Va. Dept. of Health & Hum. Res., 212 W. Va. 783, 575 S.E.2d 393 (2002); WILLIAM R. BROCK, WELFARE, DEMOCRACY, AND THE NEW DEAL (1988).

vice Agencies – which (among other things) provide technical assistance, staff development, and technological support to local school systems – have been part of the State's educational system since 1972.[192] And the Legislature has authorized the creation of multi-county commissions to regulate a variety of environmental issues, which do not respect political boundaries. These include regional solid waste commissions[193] and water and wastewater authorities.[194] Regional libraries have also been sanctioned.[195] Finally, the Legislature can authorize cities and counties to enter into cooperative arrangements with other governmental units to address shared problems in a more efficient and effective manner.[196]

Another alternative readily available to the Legislature to facilitate effective local governance, without (perhaps) as much political resistance as, say, county or city-county consolidation, is the use of laws that make annexation easy for municipalities. For the same reasons that make metropolitan governments effective, cities with borders extended to absorb suburbs promote a variety of interests. The bigger the governmental unit, the more easily it can equitably tax and redistribute wealth. Easy annexation also helps to avoid the phenomenon, now common throughout West Virginia, of large retailers and malls establishing businesses just outside city limits, enabling them to draw on a city's population base for its business but avoiding both municipal property taxes and business and occupation taxes, as well as other assessments. Larger cities, in particular, provide a variety of cultural, recreational, and economic benefits that nearby nonresidents can take advantage of but do not share equally with municipal inhabitants in supporting them. Through their zoning and other regulatory powers, cities with expansive borders have an easier time reining in uncontrolled development, which has become a significant issue in growth areas, and can better defend against elitist zoning practices. For communities with sizeable minority populations, laws permitting easy annexation – or municipal "elasticity" – also help to promote residential integration and to discourage white flight.[197]

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192 W. VA. CODE § 18-2-26 (2003).

193 W. VA. CODE §§ 22C-4-1, *et seq.* (2005).

194 W. VA. CODE §§ 16-13D-1, *et seq.* (2001).

195 W. VA. CODE §§ 10-1-3 - 3a (2003).

196 This has already been expressly done for counties, W. VA. CODE § 7-1-3i (2003) (county commissions may cooperate with other governmental units to carry out any lawful purpose), and both cities and counties have express authorization to contract with governmental subdivisions across state lines for fire protection and emergency medical services. *Id.* (counties); W. VA. CODE § 8-12-5(57) (2003) (cities). Presumably, cities can enter into intergovernmental agreements as a means for forwarding any of their enumerated powers. *See supra* notes 124-136 and accompanying text.

197 All of the points made in this paragraph, and the use of the term "elasticity" to refer to a city's annexation capability, are made and supported in RUSK, *supra* note 172. *See also* Richard Briffault, *The Local Government Boundary in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996); *but see* Edward A. Zelinsky, *Book Review: Metropolitanism, Progressivism, and Race*, 98

Accommodating annexation means providing simple procedures for doing so, avoiding difficult substantive prerequisites or criteria, and permitting the municipal governments to annex without the consent of the voters or property owners in the appended territory.[198] West Virginia presently provides three methods for municipal annexation.[199] The first, annexation by election, is initiated only by a petition signed by five percent or more of a city's residence and must be approved by a majority voting in both the city and the added territory.[200] The second method provides for annexation without an election, but that procedure can only be initiated by a petition endorsed by a majority of the voters and a majority of the freeholders in the proposed annexation territory.[201] The city's determination regarding the sufficiency of the petition is reviewable by the courts.[202] The final alternative addresses "annexation by minor boundary adjustment,"[203] a term which the Code does not define. This process does not require a petition or an election; instead, the city must petition the county commission for permission to annex the desired territory and include in its petition various pieces of information about the territory and about the impact of the annexation. If the petition meets the threshold requirements, then the commission must hold a special public hearing on the proposal. Thereafter, the commission must render a decision, taking into account an array of specified criteria, including "whether affected parties of the territory to be annexed oppose or support the proposed annexation" and "whether the proposed annexation is in the best interest of the county as a whole."[204]

COLUM. L. REV. 665 (1998); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). Tiebout's work is the seminal argument for the modern public choice advocates, arguing that smaller local governments enhance individual choice, citizen participation, and diversity. The works cited here, as well as a wealth of literature, reflect an ongoing debate on the sizing of local government.

198 *See* RUSK, *supra* note 172, at 20-22.

199 W. VA. CODE § 8-6-1, *et seq.* (2003).

200 W. VA. CODE § 8-6-2 (2003).

201 W. VA. CODE § 8-6-4 (2003). Subsection (f) of the provision states, "If all of the eligible petitioners are qualified voters, only a voters' petition is required." According to subsection (b), the term "qualified voter" includes "firms and corporations in the additional territory."

202 W. VA. CODE § 8-6-4(c).

203 W. VA. CODE § 8-6-5 (2003).

204 W. VA. CODE § 8-6-5(f) (2003). The subsection reads, in its entirety:

> In making its final decision on an application for annexation by minor boundary adjustment, the county commission shall, at a minimum, consider the following factors:
>
> (1) Whether the territory proposed for annexation is contiguous to the corporate limits of the municipality. For purposes of this section, "contiguous" means that at the time the application for annexation is submitted, the territory proposed for annexation either abuts directly on the municipal boundary or is separated from the municipal boundary by an unincorporated street or highway, or street or highway right-of-way, a creek or river, or the right-of-way of

None of those procedures provides an easy mechanism to facilitate municipal elasticity. Of course, a state may conclude that there are important countervailing interests, which could include ensuring that the city can meet infrastructure and service needs[205] and preserving extant farmland,[206] and would ac-

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a railroad or other public service corporation, or lands owned by the state or the federal government;

(2) Whether the proposed annexation is limited solely to a division of highways right-of-way or whether the division of highways holds title to the property in fee;

(3) Whether affected parties of the territory to be annexed oppose or support the proposed annexation. For purposes of this section, "affected parties" means freeholders, firms, corporations and qualified voters in the territory proposed for annexation and in the municipality and a freeholder whose property abuts a street or highway, as defined in section thirty-five [§ 17C-1-35], article one, chapter seventeen-c of this code, when: (i) The street or highway is being annexed to provide emergency services; or (ii) the annexation includes one or more freeholders at the end of the street or highway proposed for annexation;

(4) Whether the proposed annexation consists of a street or highway as defined in section thirty-five [§ 17C-1-35], article one, chapter seventeen-c of this code and one or more freeholders;

(5) Whether the proposed annexation consists of a street or highway as defined in section thirty-five [§ 17C-1-35], article one, chapter seventeen-c of this code which does not include a freeholder but which is necessary for the provision of emergency services in the territory being annexed;

(6) Whether another municipality has made application to annex the same or substantially the same territory; and

(7) Whether the proposed annexation is in the best interest of the county as a whole.

W. VA. CODE § 8-6-5(f) (2003).

[205] *See, e.g.*, four of the required subjects that a city must address in petitioning a commission for an annexation without election:

(3) A statement setting forth the municipality's plan for providing the additional territory with all applicable public services such as police and fire protection, solid waste collection, public water and sewer services and street maintenance services, including to what extent the public services are or will be provided by a private solid waste collection service or a public service district;

(4) A statement of the impact of the annexation on any private solid waste collection service or public service district currently doing business in the territory proposed for annexation in the event the municipality should choose not to utilize the current service providers;

(5) A statement of the impact of the annexation on fire protection and fire insurance rates in the territory proposed for annexation;

(6) A statement of how the proposed annexation will affect the municipality's finances and services[.]

W. VA. CODE § 8-6-5(c) (2003).

cordingly want to provide safeguards to protect those interests. A good argument can be made, however, that West Virginia has created obstacles to annexation that are far greater than necessary to protect legitimate concerns about municipal over-extension.

V. CONCLUSION

There are constitutional limits on the Legislature's ability to implement local government reform. Most notably, the Legislature cannot impose reforms on particular counties and cities, at least not without a constitutional amendment. County reforms must originate in the county,[207] and any attempt to adjust city and county affairs must be accomplished by general laws.[208] Nevertheless, the Legislature has considerable discretion and flexibility in creating possibilities for reform and in devising incentives to do so. As it has already done with cities, the State can bestow home rule on counties and can provide them with a selection of governing models. Home rule on the city or county level, however, will require judicial cooperation; courts must end their miserly interpretation of local governments' powers. The Legislature can also create regional bodies to address problems that cut across political boundaries.

Moving toward consolidated governments and cooperative arrangements provides greater opportunities to share resources, achieve efficiencies, and promote equity. Any such effort, however, should include mechanisms to preserve the advantages of small government: local self-determination, diversity, governmental responsiveness to constituent concerns, citizen participation, and sense of community. Such mechanisms include residency requirements for election to city or county governing councils,[209] neighborhood associations or boards to organize community events and to air and promote citizen concerns,[210] and municipal outreach programs.

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206 *See, e.g.*, W. VA. CODE § 8-6-1(b) (2003): "Any farmlands or operations as described in [W. Va. Code § 19-19-1, *et seq.*] which may be annexed into a municipality shall be protected in the continuation of agricultural use after being annexed."

207 W. VA. CONST. art. IX, § 13; *see supra* notes 151-165 and accompanying text.

208 W. VA. CONST. art. VI, §§ 39-39a.

209 The Constitution, in Article IX, § 10, already requires that county commissioners live in diverse districts, and Article XII, § 6 imposes a similar requirement for school boards. Many West Virginia cities also have precinct or district residency requirements for election to their governing bodies. Such limits could, but should not, present issues about undue limitations on the right of candidacy as established in a line of West Virginia Supreme Court cases. *E.g.*, Marra v. Zink, 163 W. Va. 400, 256 S.E.2d 581 (1979); Sturm v. Henderson, 176 W. Va. 319, 342 S.E.2d 287 (1986), *superseded by constitutional amendment*, W. Va. Const. art. XII, § 6, *as recognized in*, Adkins v. Smith, 186 W. Va. 481, 408 S.E.2d 60 (1991); State *ex rel.* Billings v. City of Point Pleasant, 194 W. Va. 301, 160 S.E.2d 436 (1995).

210 *See* RUSK, *supra* note 172, at 135-36.

There are few constitutional barriers to local government reform or to city/county home rule in West Virginia. The issues really lie in political will and judicial cooperation.