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## Localism and the West Virginia Constitution

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## LOCALISM AND THE WEST VIRGINIA CONSTITUTION

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*Robert M. Bastress, Jr.\**

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“Local governments [in West Virginia] are subject to the state constitution, which severely limits their autonomy, determines their institutional rules and organizational structures, and imposes strong fiscal restraints. Every aspect of local government activity is closely regulated by state government through constitutional or statutory requirements.”<sup>1</sup> That sentiment is widely shared among West Virginia’s local government officials, as well as academicians. There is good reason to perceive the State’s local governments as strictly constrained by state law. A widely cited 1981 study published by the United States Advisory Commission on Intergovernmental Relations ranked all fifty states on the degree of discretionary authority accorded to their local governments based on the flexibility permitted in four basic areas of local governance – structure, functions, finance, and personnel.<sup>2</sup> The study ranked West Virginia forty-ninth in the amount of discretion it accorded its local governments,<sup>3</sup> the state being

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<sup>1</sup> Kenneth A. Klase, *West Virginia*, in DALE KRANE, PLATON N. RIGOS, & MELVIN B. HILL, JR., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 445 (2001); accord RICHARD A. BRISBIN, JR., ROBERT JAY DILGER, ALLAN S. HAMMOCK, & CHRISTOPHER Z. MOONEY, WEST VIRGINIA POLITICS AND GOVERNMENT 142-61 (CQ Press 1996).

<sup>2</sup> JOSEPH F. ZIMMERMAN, U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, MEASURING LOCAL DISCRETIONARY AUTHORITY 6, 59 tbl.20 (1981) [hereinafter ACIR, MEASURING AUTHORITY].

<sup>3</sup> *Id.* at 59 tbl.20.

forty-sixth out of forty-nine in giving cities discretion and fortieth out of forty-eight regarding counties.<sup>4</sup> Not too much has changed since 1981 that would lend cause to think that West Virginia would fare much better today.<sup>5</sup> On the other hand, there are largely untapped possibilities that are easily available and that could change that reality.

In an article published in 2005, I argued that the West Virginia Constitution gives the Legislature much more flexibility to facilitate local government reforms than had previously been assumed by lawmakers.<sup>6</sup> After several years of trying, and following the yeoman efforts of key legislative and civic leaders, the 2006 Legislature enacted a comprehensive statute to enable local government reforms, most notably the consolidation of counties and the creation of city-county metro governments.<sup>7</sup> This Article ventures that our Constitution also provides for considerably more local government discretion than has been understood to be the case and that the Constitution includes several provisions that promote localism principles. By localism, I refer to the scope of local autonomy and control.<sup>8</sup> Part I summarizes why we should care about localism. Part II canvasses the most typical forms of state constitutional provisions in the United States that offer local governments some protection against state dominance. Part III then reviews West Virginia's variations on at least some of those devices, their legislative elaborations, and their judicial applications. Finally, Part IV focuses on a recent case that presents several different aspects of localism and an opportunity to solidify its significance in our constitutional scheme. Collectively, the Parts will identify steps that can easily be taken to enhance local autonomy in the State.

## I. THE VALUES OF LOCALISM

The debate over the allocation of decision-making between local governments and more distant sovereigns has persisted since the founding of our Republic. The controversy over the ratification of the United States Constitution primarily centered on the enhanced powers of the national government and the extent to which that enhancement would undermine the authority of state

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<sup>4</sup> *Id.* Hawaii was not included in the city rankings since it has only one city, *id.* at 52 tbl.14, and Connecticut and Rhode Island were not included in the county rankings because they do not have organized county governments. *Id.* at 54 tbl.15.

<sup>5</sup> *But see* W. VA. CODE § 8-1-5a, enacted by the West Virginia Legislature in 2007, which authorized a pilot program giving complete home rule to four cities in the State.

<sup>6</sup> Robert M. Bastress, Jr., *Constitutional Considerations for Local Government Reform in West Virginia*, 108 W. VA. L. REV. 125 (2005).

<sup>7</sup> 2006 ACTS OF THE W. VA. LEGISLATURE, Ch. 39; *see* W. VA. CODE §§ 7A-1-1, *et seq.*

<sup>8</sup> *See, e.g.*, Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990).

and local governments.<sup>9</sup> Such concerns provoked, for example, James Madison's famous argument in *The Federalist No. 10* that the size of the federal government would serve as a bulwark against factions becoming too powerful and imposing tyranny.

Americans have traditionally cherished local autonomy. Alexis de Tocqueville captured the sentiment in his observations on the American political system. Local governments, he said "are to freedom what primary schools are to science; they put it within reach of the people; they make them taste its peaceful employ and habituate them to making use of it. Without [local institutions] a nation can give itself a free government, but it does not have the spirit of freedom."<sup>10</sup> By leaving important decisions to local governments, a state promotes self-determination, the rationale and foundation of democracy. The smaller the governmental unit, the more input and influence an individual citizen can have on her government.<sup>11</sup> Then, too, the more discretion that local leaders have, the better they can address problems in a manner that is most suitable to the community's particular needs.<sup>12</sup> Local people know local conditions the best and can most effectively address them,<sup>13</sup> if they have sufficient regulatory tools and the resources to do so. The problems confronting the Eastern Panhandle are not those that plague the southern coal fields, and vice versa.

With enhanced local power also comes enhanced citizen participation in local government. Citizens participate in government when that participation can be meaningful. The smaller the governmental unit, the more likely a citizen's participation will be meaningful. And the more autonomy that unit has, the more likely the participation will prove to be useful.<sup>14</sup> Active citizen par-

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<sup>9</sup> See generally THE DEBATE ON THE CONSTITUTION (Bernard Bailyn ed., Library of America 1993) (compiling debates in the press, private correspondence, and state ratifying conventions).

<sup>10</sup> ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 57-58 (Harvey C. Mansfield & Delba Winthrop eds., trans., University of Chicago Press 2000).

<sup>11</sup> E.g., ROBERT A. DAHL & EDWARD R. TUFTS, SIZE AND DEMOCRACY 41 (1973).

<sup>12</sup> See, e.g., JANE MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 270-75 (1980); ROBERT WOOD, SUBURBIA: ITS PEOPLE AND THEIR POLITICS 266-67 (1958); Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 984-85 (1988).

<sup>13</sup> E.g., DE TOCQUEVILLE, *supra* note 10, at 77: "The township and the county are not constituted in the same manner everywhere; but one can say that the organization of the township and the county in the United States rests on the same idea everywhere: that each is the best judge of whatever relates only to himself, and is in the best position to provide for his particular needs."

<sup>14</sup> E.g., DE TOCQUEVILLE, *supra* note 10, at 63-64:

One must indeed be persuaded that men's affections are generally brought only to where there is force. . . . The inhabitant of New England is attached to his township not so much because he was born there as because he sees in that township a free and strong corporation that he is a part of and that is worth his trouble to seek to direct. . . . Now, remove force and independence from the township, and you always find only those under its administration and no citizens.

ticipation in government improves the public debate, promotes better decision-making, advances the lives of the participants, and makes for a better polity and a better democracy.

Local control allows communities to set their own priorities, which in turn promotes diversity and individual choice.<sup>15</sup> That is, if the citizens of each local government can determine the goods and services they want their government to provide – and to set the corresponding level of taxation – then the multiplicity of local units will be more likely to offer “consumers” choices in where they want to live. And as consumers make those choices by choosing to move to communities that match their personal priorities, communities become more efficient at offering just those goods and services that an increasing majority of their citizens prefer. When priorities are set by a distant and central authority, local choice, and hence diversity, are undermined.

Of course, not all governance is more effectively or equitably performed at the local level. The larger the governmental unit, the greater its capacity to redistribute income. That is because residential patterns concentrate both wealth and poverty in confined and separate locales, which makes it less likely that a small government can capture the wealth needed to support fully services for middle and lower income level citizens. The graduated income tax has given the federal government an enormous redistributive capability, which it uses to support not only cash transfer programs but also projects, programs, offices, military bases, etc., that provide economic support for local communities. The same principle applies as between state and local governments. In the past several decades, for example, a parade of school finance cases has demonstrated the importance of increased reliance on state funds to achieve equity and adequacy of public education.<sup>16</sup> The effect of these cases has consistently been to increase

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More recently, Gerald Frug has served as the most forceful and influential advocate for enhanced local autonomy as a means to increase citizen participation. According to Frug, that participation will promote citizens’ well-being and the quality of the local polity is Gerald Frug, *Empowering Cities in a Federal System*, 19 URB. LAW. 553 (1987); Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); see also STEPHEN L. ELKIN, CITY AND REGIME IN THE AMERICAN REPUBLIC 105-07, 146-83 (1987). One of our earliest champions of this civic republicanism was Thomas Jefferson.

<sup>15</sup> The classic articulation of this theory was set forth in Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

<sup>16</sup> The cases are legion, as courts in over half the states have ordered some form of reform. Robert M. Bastress, *The Impact of Litigation on Rural Students: From Free Textbooks to School Consolidation*, 82 NEB. L. REV. 9, 9-10 (2003). For a collection of the cases through 2003, see Anna Williams Shavers, *Rethinking the Equity vs. Adequacy Debate: Implications for Rural School Finance Reform Litigation*, 82 NEB. L. REV. 133, 138 n.18 (2003). For citations to some of the voluminous literature on the subject, see Bastress, *supra* note 6, at 10 n.1, 21 n.73. The litigation continues. *E.g.*, Londonderry Sch. Dist. SAU # 12 v. State, 907 A.2d 988 (N.H. 2006); *Missouri School Funding Trial Begins*, RURAL POLICY MATTERS (The Rural School & Community Trust, Arlington, Va.), Feb. 2007, at 3; *Alaska Trial Opens*, RURAL POLICY MATTERS (The Rural School & Community Trust, Arlington, Va.), Nov. 2006, at 3. West Virginia’s litigation included *State ex rel. Bds. of Educ. v. Chafin*, 180 W.Va. 219, 376 S.E.2d 113 (W. Va. 1988); Pauley v.

state support of public schools and decrease reliance on local property taxes. Zoning laws, a traditionally local concern, may also need state control if exclusionary municipal practices create substantial spill-over effects in other cities.<sup>17</sup> Environmental and transportation issues have cross-boundary implications and thus call for regional or statewide regulation. Finally, concerns about inner city decline and racial distributions may affect urban and suburban strategies regarding local control and fixing boundaries.<sup>18</sup>

These factors have much less impact in West Virginia than they do in more urbanized states. As for school finance, West Virginia already supports public education at a higher level than all but a handful of states.<sup>19</sup> The state has little, if any, exclusionary zoning. Nor does it have much in the way of extended suburbs juxtaposed one after another, a fact that diminishes the externalities created by zoning and related regulations. Similarly, the dearth of large cities means that West Virginia does not have to deal as much with the problems of declining cities surrounded by more prosperous suburbs.<sup>20</sup> And to the extent that certain problems call for regional solutions and intergovernmental cooperation, the Legislature can provide structures to meet those occasions – as it has already done for several subjects.<sup>21</sup>

In short, local autonomy should be the rule and ought not to be displaced in the absence of an overriding state or regional concern.

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Bailey, 174 W.Va. 167, 324 S.E.2d 128 (W. Va. 1984); and Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859 (W. Va. 1979).

<sup>17</sup> See, S. Burlington County N.A.A.C.P. v. Twp. of Mount Laurel, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975); Appeal of Kit-Mar Builders, Inc., 268 A.2d 765 (Pa. 1970); RICHARD F. BABCOCK & FRED P. BOSSELMAN, EXCLUSIONARY ZONING (1973); Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 39-58 (1990).

<sup>18</sup> See generally DAVID RUSK, CITIES WITHOUT SUBURBS (2nd ed. 1995).

<sup>19</sup> U.S. CENSUS BUREAU, PUBLIC EDUCATION FINANCES 2004 at 5 (issued March 2006), available at <http://ftp2.census.gov/govs/school/04f33pub.pdf>. In 2004, the State ranked 8<sup>th</sup> in percentage of education funded by state revenues, just .4% behind Nevada. *Id.* West Virginia's heavy reliance on state resources for education is a function of the school finance litigation, see *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859, the severe limitations imposed on local property taxes by the Tax Limitation Amendment of 1932, W. VA. CONST., art. X, § 1, and priorities set over time by governors and legislatures.

<sup>20</sup> To be sure, the Kanawha Valley and its two major cities have that look to some degree. It may well be that local autonomy for, say, Kanawha County might more effectively be vested in a city-county metro form of government. As noted above, the Legislature authorized that form in 2006. W. VA. CODE §§ 7A-1-1 to -4 (2006).

<sup>21</sup> See Bastress, *supra* note 6, at 165-66. Examples include authorizations for the creation of regional solid waste commissions, W. VA. CODE §§ 22C-4-1 to -27 (2005), and water and wastewater authorities. W. VA. CODE §§ 16-13D-1 to-21 (2006). Cities and counties may also enter in agreements with other local governments to address common concerns. W. VA. CODE §§ 7-1-3i, 8-12-2(a), 8-12-5(57) (2006).

## II. LOCALISM IN THE UNITED STATES

A. *Local Governments as Creatures of the State*

The backdrop for defining state-local government relations has to be Dillon's Rule and the concept that local governments are creatures of the state and are beholden to the state for their powers. Dillon's Rule was fashioned by Judge John Dillon of the Iowa Supreme Court in an 1863 decision<sup>22</sup> and later memorialized in Dillon's leading treatise on the law of municipal corporations.<sup>23</sup> Cities, said Dillon "can exercise the following powers and no others: First those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation – not simply convenient but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation – against the existence of the power."<sup>24</sup> West Virginia was an early and consistent subscriber to this view.<sup>25</sup> The rule was applied, as well, to county governments and school boards.<sup>26</sup> Only a few courts espoused a contrary view and sought to establish some inherent power of local control.<sup>27</sup>

Courts fastened onto Dillon's Rule a rule of strict interpretation requiring that state grants of power to local governments be read narrowly.<sup>28</sup> This state-local relationship has been variously referred to as being "unitary"<sup>29</sup> or as the "creature of the state" and "creatures of the state."<sup>30</sup> West Virginia subscribed to the approach in 1915 with its decision in *Booten v. Pinson*:<sup>31</sup>

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<sup>22</sup> *Merriam v. Moody's Ex'rs*, 25 Iowa 163, 170 (1868).

<sup>23</sup> JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS §§ 237-39 (Little, Bown, and Co. 5th ed. 1911) (1890).

<sup>24</sup> *Merriam*, 25 Iowa at 170.

<sup>25</sup> The initial case was *Christie v. Malden*, 23 W.Va. 667 (1884). Later applications are collected in Willard D. Lorensen, *Rethinking the West Virginia Municipal Code of 1969*, 97 W. VA. L. REV. 653, 659, nn.18-19 (1995).

<sup>26</sup> *Id.* at 659; *see, e.g.*, *State ex rel. County Court of Cabell County v. Arthur*, 150 W.Va. 293, 145 S.E.2d 34 (1965).

<sup>27</sup> Most notable was Justice Thomas Cooley's opinion in *People v. Hurlburt*, 24 Mich. 44 (1871). For a time, Indiana, Texas, Kentucky, and even Iowa followed Cooley's lead. KRANE, *et al.*, *supra* note 1, at 10; *see also* *Booten v. Pinson*, 77 W.Va. 412, 89 S.E. 985 (1915) (Poffenbarger, J., dissenting). Dillon's Rule, however, ultimately prevailed throughout the country. KRANE, *et al.*, *supra*.

<sup>28</sup> *See generally, e.g.*, U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, LOCAL GOVERNMENT AUTONOMY 33-34 (1993) [hereinafter ACIR, LOCAL AUTONOMY]; Briffault, *supra* note 8, at 8; Lorensen, *supra* note 25, at 658-64.

<sup>29</sup> *E.g.*, Klase, *supra* note 1, at 445.

<sup>30</sup> *E.g.*, KRANE, *supra* note 1, at 4.

<sup>31</sup> 77 W.Va. 412, 89 S.E. 985.

Municipalities are but political subdivisions of the state, created by the Legislature for purposes of governmental convenience, deriving not only some, but all, of their powers from the Legislature. They are mere creatures of the Legislature, exercising certain delegated governmental functions which the Legislature may revoke at will.<sup>32</sup>

At about the same time, the United States Supreme Court decided that local governments enjoy no federal constitutional status.<sup>33</sup>

The creatures of the state approach had a distinct allure for judges: it gave them an enormous discretion to invalidate local laws with which they disagreed.<sup>34</sup> If, for example, judges apply express grants so narrowly and are so unwilling to find a power necessarily implied that a county commission is found to be without power to hire a secretary,<sup>35</sup> then courts are free to pick and choose among local enactments based upon their personal views of the law in question. Because the doctrine removed from a layer of government the ability to regulate a large number of subjects, it also had the effect of promoting individual autonomy and, hence, the *laissez faire* economic attitudes favored by courts in the late nineteenth and early twentieth centuries.

This backdrop of Dillon's Rule, strict interpretation, and judicial activism generated discord even in the nineteenth century. Since then, sustained discontent has set off successive waves of efforts to provide for some measure of local autonomy. Those developments, which have often found chilly judicial receptions, are canvassed in the ensuing section.

### B. *Strategies for Advancing Localism*

Localism proponents have succeeded in achieving enactments of five general state constitutional strategies to promote localism, with three of them rooted in the nineteenth century: (1) bans on certain special laws; (2) "ripper law" amendments; (3) *imperium in imperio* home rule; (4) legislative home rule; and (5) restrictions on unfunded mandates.

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<sup>32</sup> *Id.* at 416, 89 S.E. at 989.

<sup>33</sup> *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

<sup>34</sup> *See, e.g.*, ACIR, LOCAL AUTONOMY *supra* note 28, at 33; Richard Briffault, *Home Rule, Majority Rule, and Dillon's Rule*, 67 CHI.-KENT L. REV. 1011, 1022-1023 (1991); Lorensen, *supra* note 25, at 678.

<sup>35</sup> Those were the facts in *State ex rel. County Court of Cabell County v. Arthur*, *supra* note 26. One commentary has opined that many states' narrow interpretation of Dillon's Rule "means that a city cannot operate a peanut stand at the city zoo without first getting the state legislature to pass an enabling law, unless, perchance, the city's charter or some previously enacted law unmistakably covers the sale of peanuts." EDWARD C. BANFIELD & JAMES O. WILSON, *CITY POLITICS* 65 (1963). As developed below, much of the persistent legacy of Dillon's Rule is local governments' own limited reading of their powers even when their legislature has attempted to confer a generous home rule.



(1) *Local and Special Laws*. Even before the Civil War, Ohio and Indiana acted to prohibit the Legislature from enacting local or special legislation regarding certain subjects with the design of keeping the Legislature from meddling in local affairs and of keeping its attention focused on more important matters. The Legislature could, for example, enact general laws to address what municipal charters had to, or could not, include, but it could not enact a city charter for a particular city. The ban on special legislation was a common inclusion in mid-nineteenth century constitutions.<sup>36</sup>

(2) *Ripper Clauses*. As noted above, the decades following the Civil War saw a rapid acceptance by the states of local governments as mere creatures of the state, to be dealt with by the state as wisely or as capriciously or as viciously as it chose. Nowhere did a state legislature, with the full concurrence of the state's courts, push this further than in 1860's and 70's Pennsylvania, particularly at the expense of Philadelphia. Among other things, the state's General Assembly authorized street railway construction on a particular city street over the city's objection,<sup>37</sup> ordered the construction of an unwanted bridge and required the city to pay for it,<sup>38</sup> and divested Philadelphia of trusts under its control and reassigned control to an independent board.<sup>39</sup> The courts dutifully sustained each of these measures.<sup>40</sup>

The worst affront, however, arrived in 1870 with the passage of an act creating the Philadelphia Building Commission, which was a "self-perpetuating commission that could require the city council to provide an unlimited sum of money for the construction of public buildings."<sup>41</sup> Charges of corruption, extravagance, and mismanagement abounded, as did cries of protest.<sup>42</sup> A constitutional convention in 1872 therefore paid considerable attention to drafting provisions that would rein in legislative interferences with local business. Among them was the first "ripper clause," which provided:

The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money,

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<sup>36</sup> E.g., RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 224-46 (6th ed., 2004); OSBORNE M. REYNOLDS, JR., *HANDBOOK OF LOCAL GOVERNMENT LAW* 96-103 (2nd ed. 2001). See *infra*, notes 66-76 and accompanying text, for a discussion of West Virginia's provision on local and special legislation.

<sup>37</sup> *City of Philadelphia v. Lombard & S. St. Passenger Ry.*, 4 Brewst. (Pa. 1866).

<sup>38</sup> *City of Philadelphia v. Field*, 58 Pa. 320 (1868).

<sup>39</sup> *City of Philadelphia v. Fox*, 64 Pa. 169 (1870).

<sup>40</sup> See *supra* notes 37-39; see generally, Samuel Dickson, *The Development in Pennsylvania of Constitutional Restraints upon the Power and Procedure of the Legislature*, 35 AM. L. REG. & REV. 477 (1896); David O. Porter, *The Ripper Clause in State Constitutional Law: An Early Urban Experiment*, Part I, 1969 UTAH L. REV. 287, 306-11 (1969).

<sup>41</sup> Porter, *supra* note 40, at 307.

<sup>42</sup> *Id.*

property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever function whatever.

After the voters approved it in 1874, the clause became Article III, § 20 of the Pennsylvania Constitution.<sup>43</sup> California adopted a very similar ripper clause at its 1878-79 convention,<sup>44</sup> and five western states soon followed suit upon their admission into the Union.<sup>45</sup> New Jersey included a somewhat different version at its 1875 Constitution.<sup>46</sup> The clauses are sometimes referred to as bans on special commissions.<sup>47</sup>

(3) *Imperium in imperio* Home Rule. Most commentators identify the 1875 Missouri Constitution and the 1879 California Constitution as the initial enactments of local home rule, although the discussion below contends that West Virginia provided an earlier example. Missouri's version gave to the City of St. Louis the power to create its own charter. California extended it to cities generally, and over the two decades or so spanning the turn of the century, several other states followed suit.<sup>48</sup> The Progressive Movement provided particular impetus to the proliferation of home rule provisions. The goal of home rule was twofold: "to undo Dillon's Rule by giving localities broad lawmaking authority and to provide local governments freedom from state interference in areas of local concern."<sup>49</sup>

The home rule that initially developed conceived the local government as *imperium in imperio*, a government within a government.<sup>50</sup> As such the local government had two fonts of power. First, it could initiate actions regarding local or municipal affairs without the need for an express or necessarily implied

<sup>43</sup> Unfortunately for Philadelphia, the constitutional convention did not propose abolishing preexisting commissions. The Philadelphia Building Commission survived judicial challenge, *Perkins v. Slack*, 86 Pa. 270 (1878), and remained undiminished for another twenty years before the legislature finally limited its powers. Porter, *supra* note 40, at 307-08.

<sup>44</sup> CAL. CONST. art. 11, § 13.

<sup>45</sup> COLO. CONST. art. V, § 35; MONT. CONST., art. V, § 36; S.D. CONST. art. III, § 26; UTAH CONST. art. VI, § 29; WYO. CONST. art. III, § 37.

<sup>46</sup> N.J. CONST. art. IV, § 7, ¶ 9. On the development and application of ripper clauses, see generally Porter, *supra* note 40; David O. Porter, *The Ripper Clause in State Constitutional Law: An Early Urban Experiment*, Part II, 1969 UTAH L. REV. 450 (1969).

<sup>47</sup> See, e.g., BRIFFAULT & REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 238-44 (6th ed. 2004).

<sup>48</sup> ACIR, *LOCAL AUTONOMY*, *supra* note 28, at 41-42 (1993). The states then conferring charter drafting powers on local government included Washington (1889), Minnesota (1896), Colorado (1902), Virginia (1902), Oregon (1906), Oklahoma (1907), Michigan (1908), Arizona (1912), Ohio (1912), Nebraska (1912), and Texas (1912). ACIR, *MEASURING AUTHORITY*, *supra* note 2, at 11.

<sup>49</sup> Briffault, *supra* note 8, at 10.

<sup>50</sup> The United States Supreme Court coined the term in *St. Louis v. Western Union Tel. Co.*, 149 U.S. 465, 468 (1893), referring to the city of St. Louis.

grant from the State. That authority was intended to undo Dillon's Rule. Second, home rule provided the local government with protection from state preemption regarding local or municipal matters.<sup>51</sup> This created a "sphere of local immunity,"<sup>52</sup> which explains why *imperium* home rule is sometimes referred to as "immunity home rule."

The visions of local autonomy promoted by the home rule advocates of *imperium in imperio*, however, did not develop. The problem was that the courts "adopted a progressively constricted view of what is a purely local matter."<sup>53</sup> Hence, the number of subjects that local governments could address – without the Dillon's Rule's requirement for state authorization – became extremely limited. At the same time, courts were generous in according deference to legislative interference in matters arguably local.<sup>54</sup> These two developments rendered *imperium* home rule in most states an unfulfilled promise of local self-rule and fostered an alternative approach to meeting the promise.

(4) *Legislative Home Rule*. In 1953, the American Municipal Association, which evolved into the National League of Cities, proposed a model state constitutional provision that removed the immunity element of home rule but expanded the initiative. The proposal basically advocated allocating to local governments all delegable legislative powers subject to the legislature's power to deny them.<sup>55</sup> In 1968, the National Municipal League offered a version that would authorize a city to "exercise any legislative power . . . not denied . . . by general law."<sup>56</sup> This has been variously referred to as "NLC/NML home rule," "legislative home rule," "devolution of powers home rule," and "initiative home rule." Its principle difference from, and its advocates say its advantage over, *imperium* home rule, is that it makes the legislature, not the courts, the principal definer of local home rule. An additional advantage that has developed is that it allows the state the discretion to create devices to deal with the problems created by urban sprawl and exclusionary zoning, which *imperium* home rule could otherwise make difficult.<sup>57</sup> Rather than home rule turning on a court's definition of what is embraced within local or municipal matters, under legislative home rule a local government would look to see whether some statute precludes it from acting on a particular subject. Some judicial interpretation would still be

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<sup>51</sup> BRIFFAULT & REYNOLDS, *supra* note 36, at 281.

<sup>52</sup> *Id.*, quoting GORDON L. CLARK, JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY 7 (1985).

<sup>53</sup> Michael Libonati, *Reconstructing Local Government*, 19 URB. LAW. 645, 646 (1987); accord CLARK, *supra* note 52, at 113.

<sup>54</sup> E.g., *City of New Orleans v. Bd. of Comm'rs of the Orleans Levee Dist.*, 640 So.2d 237, 242-43 (1994); Briffault, *supra* note 7, at 11 (Colum.).

<sup>55</sup> AMERICAN MUNICIPAL ASSOCIATION, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE, § 6 (1953).

<sup>56</sup> NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION § 8.02 (6th ed. 1968).

<sup>57</sup> David Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003).

needed to determine whether state preemptive legislation applies,<sup>58</sup> but the opportunity for judicial constriction of local power would be greatly reduced.<sup>59</sup>

There are, of course, various formulations of both *imperium* and legislative home rule, and some states blur the distinctions between the concepts and combine elements of both.<sup>60</sup> There is no questioning the general acceptance of

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<sup>58</sup> For that reason, no doubt, some versions of legislative home rule state that local government power to act on a matter exists unless the legislature has prohibited it. *E.g.*, ALASKA. CONST., art. 10, § 11; N.M. CONST., art. X, § 6 D.

<sup>59</sup> *But see* Bastress, *Constitutional Considerations*, *supra* note 6, at 144-51 (describing the West Virginia Supreme Court's persistent hostility to local powers under a legislative home rule provision); Lorensen, *supra* note 25 (same); *infra* notes 81-83 & accompanying text.

<sup>60</sup> *See* George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 20 STETSON L. REV. 845 (1991); Joseph F. Zimmerman, *State Dominance or Local Autonomy*, in DEIRDRE A. ZIMMERMAN & JOSEPH F. ZIMMERMAN, *THE POLITICS OF SUBNATIONAL GOVERNANCE* 51 (2nd ed. 1991). For example, Article VII, § 6 of the Illinois Constitution provides:

(a) Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.

(b) A home rule unit by referendum may elect not to be a home rule unit. . . .

(f) A home rule unit shall have the power subject to approval by referendum to adopt, alter or repeal a form of government provided by law, . . .

(g) The General Assembly by a law approved by the vote of three-fifths of the members elected to each house may deny or limit the power to tax and any other power or function of a home rule unit not exercised or performed by the State other than a power or function specified in subsection (l) of this section.

(h) The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a taxing power or a power or function specified in subsection (l) of this Section.

(i) Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive. . . .

(l) The General Assembly may not deny or limit the power of home rule units (1) to make local improvements by special assessment and to exercise this power jointly with other counties and municipalities, and other classes of units of local government having that power on the effective date of this Constitution unless that power is subsequently denied by law to any such other units of local government or (2) to levy or impose additional taxes upon areas within their boundaries in the manner provided by law for the provision of special services to those areas and for the payment of debt incurred in order to provide those special services.

(m) Powers and functions of home rule units shall be construed liberally.

Subsection (a) appears to confer a generous *imperium* home rule: the local government may "exercise any power . . . pertaining to its government and affairs," and that includes the entirety of the

some form of home rule, however. The counts vary, but it is safe to say that nearly all states have some form of municipal home rule and that about three-fourths of the states extend some home rule to counties.<sup>61</sup> At the same time, Dillon's Rule remains the backdrop for local government law in a large majority of the states,<sup>62</sup> and the courts persist as a problem in many states. As one set of commentators have observed, "the actions of state legislatures have often been negated by state courts that have been reluctant to drop the catechism of Dillon's Rule. Crabbed judicial interpretations have continued to construe local government power."<sup>63</sup>

(5) *Restrictions on Unfunded mandates.* An increasingly common feature of modern government has been for one level of government to require a lower level of government to provide services or implement programs without furnishing the lower government the funds to do so. For example, the State could require municipal governments to maintain a building inspection system. To comply with the law, a city would undoubtedly have to expend funds to (at least) hire an inspector and establish an office. Such top down requirements are called unfunded mandates. While often necessary, they do tend to blur the line between governmental spending and governmental accountability. When the State mandates the local program without corresponding financial support, then local officials must raise the additional revenue or cut services – and bear the political consequences while state officials take credit for the new program. Beginning in the late 1960s, states began to require that any bill introduced in the legislature imposing new costs on local governments must be accompanied

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entirety of the police power. On the other hand, subsections (g), (h), and (I) seem to take away the local immunity and install legislative home rule. Omitted provisions limit local governments' powers to incur debt, enact criminal laws, and impose particular taxes. Meanwhile, subsections (b) and (f), by separately providing for local self-determination regarding the form of government, appear to install *imperium* home rule in that particular context. For an example of the Illinois's Supreme Court's struggle to deal with the meaning of this most curious provision, see *People ex rel. Bernardi v. Highland Park*, 520 N.E.2d 316 (Ill.1988), and *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266 (Ill.1984); see also BRIFFAULT & REYNOLDS, *supra* note 36 at 291.

<sup>61</sup> For the number of states with some kind of municipal home rule, see ACIR, LOCAL AUTONOMY, *supra*, note 28 at iii (48 states); KRANE, *et al.*, *supra* note 1, at 14 (45 states, citing Mead, *infra*), 471 & 476-77 (46 states); Barron, *supra* note 57 (48 states); Timothy D. Mead, *Federalism and State Law: Legal Factors Constraining and Facilitating Local Initiatives*, in HANDBOOK OF LOCAL GOVERNMENT ADMINISTRATION 31-45 (John J. Gargan, ed. 1997) (45 states have home rule, 26 having legislative home rule, 19 with *imperium* home rule). For the number of states with some kind of home rule for counties, see ACIR, LOCAL AUTONOMY, *supra*, note 28, at iii (37 states); KRANE, *et al.*, *supra*, note 1, at 13 (37 states), 471 & 477-78 (36 states); Barron, *supra*, note 57, at 2260, n.7 (37 states, citing KRANE, *et al.*). The chart appearing in KRANE, *et al.*, at 477-78 lists West Virginia as not having any home rule for counties. As explained below, West Virginia should have been listed (in Krane's terms) as having structural home rule for counties. See *infra* notes 113-127 and accompanying text.

<sup>62</sup> Barron, *supra* note 57, at 2260, n.7; Mead, *supra* note 61, at 31-45.

<sup>63</sup> KRANE, *supra* note 1, at 13.

by a fiscal note identifying those costs.<sup>64</sup> Fiscal note requirements did not technically restrict imposition of new unfunded mandates, but they at least promoted more accountability and awareness. Later, several states adopted measures – mostly citizen-initiated – requiring the state government to reimburse local governments for the cost of implementing new mandates. By the mid-1990s, seventeen states had a reimbursement requirement.<sup>65</sup>

### III. LOCALISM IN WEST VIRGINIA

West Virginia has several constitutional provisions that offer a measure of local autonomy. Each has been underused and underenforced. They include two provisions banning local laws on certain subjects, legislative home rule for municipalities, and *imperium* home rule regarding the structure of county government.

#### A. *Local and Special Laws*

Article VI, § 39 of the West Virginia Constitution prohibits the Legislature from enacting local or special legislation regarding eighteen specified subjects and in all cases where a general law could be as effective.<sup>66</sup> The general

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<sup>64</sup> Robert M.M. Shaffer, Comment, *Unfunded State Mandates and Local Governments* 64 U. CIN. L. REV. 1057, 1065 (1996).

<sup>65</sup> BRIFFAULT & REYNOLDS, *supra* note 36, at 259-60. The West Virginia Legislature in 2005 provided local governments with some relief from unfunded mandates by the enactment of Local Government Flexibility Act, W. VA. CODE § 7-23-1, which provides a mechanism for counties, cities, and school districts to apply for waivers from state requirements and regulations.

<sup>66</sup> The section reads, in its entirety:

The legislature shall not pass local or special laws in any of the following enumerated cases; that is to say, for

Granting divorces;

Laying out, opening, altering and working roads or highways;

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;

The opening or conducting of any election, or designating the place of voting;

The sale and mortgage of real estate belonging to minors, or other under disability;

Chartering, licensing, or establishing ferries or toll bridges;

proscription has served as a sort of minimal rationality equal protection requirement: the State may restrict legislation – *i.e.*, enact laws identifying “special” groups, persons, entities, or locales – “so long as its identification of a class for receipt of a benefit or burden is not arbitrary or unreasonable.”<sup>67</sup> The section reflects the general sentiment that special laws invite cronyism, favoritism, and undue service to special interests. Some of the enumerated bans rest on separation of powers concerns, keeping the legislature out of matters best left to the courts or the executive,<sup>68</sup> and on efficiency considerations, that some matters are too trivial to justify the attention of a state legislature.<sup>69</sup> Several of the prohibited subjects, however, manifest a view that they involve matters that should be decided at the local rather than the state level. These include vacating roads, town plats, streets, alleys, and public grounds; locating or changing county seats; incorporating municipalities under two thousand; establishing ferries or toll bridges; and, most importantly, “regulating or changing county or district affairs.” The latter language thus removes from the Legislature’s power to address through targeted laws those matters that *imperium* home rule reserves entirely to local control. The question becomes important, then, as to what are “county or [school] district affairs.” I have previously explained that the West Virginia cases, none of which have been decided in the past thirty-three years and most of which are much older,<sup>70</sup> have not developed any coherent definition

Remitting fines, penalties or forfeitures;  
 Changing the law of descent;  
 Regulating the rate of interest;  
 Authorizing deeds to be made for land sold for taxes;  
 Releasing taxes;  
 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.

<sup>67</sup> ROBERT M. BASTRESS, *THE WEST VIRGINIA CONSTITUTION: A REFERENCE GUIDE* 167 (1995).

<sup>68</sup> Those subjects would include granting divorces, regulating the practice in courts of justice, summoning or impaneling grand or petit juries, the sale and mortgage of real estate belonging to minors, or other under disability, remitting fines, penalties or forfeitures, changing the law of descent, authorizing deeds to be made for land sold for taxes, and releasing title to forfeited lands.

<sup>69</sup> That could be said about most of the listed subjects. They involve issues that the Legislature may appropriately address through general laws but should not be wasting its time looking at specific circumstances.

<sup>70</sup> The cases include *State ex rel. Taxpayers Protective Ass’n*, 157 W. Va. 350, 201 S.E.2d 304 (1973) (setting courthouse hours is a county affair); *Kanawha County Pub. Library v. County Ct.*, 143 W. Va. 385, 102 S.E.2d 712 (1958) (state could require county and school district to finance a public library); *State ex rel. Green v. Bd. of Educ.*, 133 W. Va. 750, 58 S.E.2d 279 (1950) (state could not validly enact a law requiring a Braxton County school board to compensate a person for injuries sustained on district property); *Broza v. Brooke County Court*, 111 W. Va. 191, 160 S.E. 914 (1931) (statute amending city charter to exempt residents from a county road tax was an

of “county or district affairs” and that they are hopelessly muddled and to some extent just plain wrong.<sup>71</sup> The definition takes on additional meaning because a 1936 amendment, which added § 39a to Article VI, authorizes cities to enact any ordinances, not inconsistent with state law, relating to its “municipal affairs.”<sup>72</sup> Presumably, that would get the same interpretation as “county or district affairs.”

West Virginia has not been alone in struggling with the meaning of such terms. Although state-to-state variations exist, Professor Michael Libonati has provided a useful synthesis:

The constitutions of 16 states [citing, among the 16, West Virginia] contain terms [in their home rule provisions] like “municipal affairs,” “municipal matters,” and “powers of local self-government,” which would appear to convey discretion over the structure and methods of operation of local government. This hypothesis is apparently confirmed in the case law of California, wherein matters concerning local elections, procedures for enacting and enforcing ordinances, forms of government . . . , and the establishment and operation of local administrative bodies fall within the ambit of municipal affairs.<sup>73</sup>

Criteria that courts have used to identify local matters include “the impact of the particular subject [*i.e.*, whether its impact is primarily local or whether it creates extensive externalities], whether uniform treatment of the

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unlawful regulation of county affairs); *Casto v. Upshur County High Sch. Bd.*, 94 W. Va. 513, 119 S.E. 470 (1923) (statute requiring a county school board to construct a high school and imposing a tax to pay for it was not a regulation of district affairs); *Herold v. McQueen*, 71 W. Va. 43, 75 S.E. 313 (1912) (same).

<sup>71</sup> Bastress, *supra* note 6, at 141-44. The clearly wrong cases are those three in which the Legislature ordered a particular county to finance a particular public project. *See* note 70, *supra*. Part of the result in *Kanawha County Public Library* was effectively set aside by the Supreme Court of Appeals in 2006 when it held that the state board of education’s failure to adjust the county board of education’s school aid formula to compensate it for the funds diverted to support the county library violated equal protection principles. *Board of Education of Kanawha County v. West Virginia Board of Education*, 639 S.E.2d 893 (2006). The Court referred to its holding in *Kanawha County Public Library* that the diversion did not violate under Article VI, § 39 challenge to the diversion, *id.* at 897 n.3, but did not revisit the holding or otherwise elaborate. *See* Robert M. Bastress, Jr., *Supreme Court Finds Funding Formula Void As Applied to Counties Required to Support Libraries*, 27 THE LEGISLATURE No. 11 (Feb. 16, 2007), available at: [http://www.wvsba.org/publications/The\\_Legislature/newsletter/02-16-2007.html#commentary1](http://www.wvsba.org/publications/The_Legislature/newsletter/02-16-2007.html#commentary1).

<sup>72</sup> *See* notes 72-112 and accompanying text, *infra*.

<sup>73</sup> ACIR, LOCAL AUTONOMY, *supra* note 28, at 12. *See also* KRANE, *et al.*, *supra* note 1, at 12; REYNOLDS, *infra* note 74 at 112-19; Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737 (1959).



subject is needed, the relative breadth of the subject, and whether it relates to administrative or procedural aspects of local government.”<sup>74</sup>

Professor Libonati’s synthesis and those criteria lead to the conclusion that the Legislature should not have the capability to control, by special legislation, the fiscal affairs of a local government. The ripper clauses and their history also convey that basic understanding. Unfunded mandates through general legislation, while a growing problem for local governments,<sup>75</sup> are at least subject to political checks, since their burdens are shared statewide. If, however, a Legislature could dictate local revenue decisions of a particular city, the political shield is removed and the affected government’s autonomy would be sorely rent. As noted above,<sup>76</sup> West Virginia’s cases on this specific point are mixed.

### B. *Municipal Home Rule*

In 1929, West Virginia Governor William Conley appointed a Constitutional Review Commission to study the State’s constitution and recommend any needed changes. The Commission filed its report on December 1, 1930, less than a month after the voters had rejected four of the Commission’s proposals.<sup>77</sup> Several others were later submitted to the voters, but the rest were ignored.<sup>78</sup> Only one proposal achieved ratification. In 1936, the people adopted Article VI, § 39a, the Municipal Home Rule Amendment.<sup>79</sup> It was badly needed. Prior to

<sup>74</sup> Bastress, *supra* note 6, at 144, citing 1 ANTIEAU, LOCAL GOVERNMENT LAW § 21.05[1] at 21-31 (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 105-27 (2001).

<sup>75</sup> *See, e.g.*, ACIR, LOCAL AUTONOMY, *supra* note 28, at v (unfunded mandates can “impose a serious restraint on the ability of [local] governments to exercise even a modicum of autonomy) and 1 (“home rule is jeopardized if the state legislature is free to impose unfunded mandates on local governments”).

<sup>76</sup> Among the cases cited in note 70, *supra*. *Kanawha County Public Library, Casto*, and *Herold* upheld legislatively mandated local expenditures while *State ex rel. Green* and *Broza* invalidated them.

<sup>77</sup> W. VA. BLUE BOOK (Darrell E. Holmes, ed., vol. 84, 2002); Letter from Gov. William G. Conley to the W. Va. Legislature (Jan. 28, 1931), in 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.

<sup>78</sup> *See* Bastress, *supra* note 6, at 129-30.

<sup>79</sup> The section reads, in its entirety:

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.

that time, the Legislature enacted and amended charters for individual cities and incorporated cities through special laws. Section 39a ended that cumbersome and problematic practice by requiring the Legislature to use general laws for incorporating municipalities. In addition, cities with more than 2,000 in population may create and amend their own charters and “may pass all laws and ordinances relating to its municipal affairs.” Obviously, the scope of this home rule grant depends upon how generously the Supreme Court treats the term, “municipal affairs.” A proviso in the section makes clear that the home rule conferred is legislative home rule: any municipal charter or law “shall be invalid and void if inconsistent or in conflict with . . . the general laws of the State[.]”<sup>80</sup>

Alas, but the seventy years passage since the adoption of the Home Rule Amendment has not witnessed the development of significant municipal autonomy, largely because of the continued judicial crankiness in construing city governments’ powers. My 2005 article canvassed the Court’s decisions addressing municipal powers and statutory developments since 1936,<sup>81</sup> and there is no need to repeat that review here. Present purposes are served by noting several points from that period.

*First*, the State Supreme Court’s reaction to § 39a has been, essentially, to ignore its existence, except to the extent that it allows cities over two thousand to enact their own charters.<sup>82</sup> The Court continued to vigorously apply Dillon’s Rule and to insist that cities have no inherent powers and only such implied powers as are necessary to give effect to express powers.<sup>83</sup>

*Second*, the Legislature in 1969 rewrote the municipal code and quite clearly attempted to confer on cities a substantial degree of local autonomy, subject to legislative override through general laws. The 1969 Act provided that the powers conferred on cities by the code “shall not operate to exclude the ex-

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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 municipal affairs: Provided, That any such charter or amendment thereto, and any such law or ordinance so adopted, shall be invalid and void if inconsistent or in conflict with this constitution or the general laws of the state then in effect, or thereafter, from time to time enacted.

W. VA. CONST. art. VI, § 39a (1937).

<sup>80</sup> The section is legislative home rule in the sense that the legislature can overrule – through general laws – any local enactment. On the other hand, limiting the home rule power to “matters relating to [a city’s] municipal affairs” could impose an *imperium* type restriction on the power depending upon the interpretation given to “municipal affairs.” Because the section does not confer an *imperium* immunity, however, it cannot be *imperium in imperio*.

<sup>81</sup> Bastress, *supra* note 6, at 145-51.

<sup>82</sup> See *Wiseman v. Calvert*, 134 W. Va. 303, 59 S.E.2d 445 (1950) (statute authorizing county courts to incorporate cities with more than 2,000 population violated the charter provision of § 39a).

<sup>83</sup> *E.g.*, *Toler v. City of Huntington*, 153 W. Va. 313, 168 S.E.2d 551 (1969); *State ex rel. Plymale v. City of Huntington*, 147 W. Va. 728, 131 S.E.2d 160 (1963).

ercise of other powers and authority fairly incidental thereto or reasonably implied” and “shall be given full effect without regard to the common law rule of strict construction . . . .”<sup>84</sup> The Act also listed “rules of construction” regarding just when laws are “inconsistent or in conflict with” state law.<sup>85</sup> The rules “direct flexibility in both the creation and application of municipal laws and ‘an abundant respect for local autonomy.’”<sup>86</sup> The major municipal powers provision in the Act accorded what would seem to be a very generous grant of local initiative. Section 8-12-2(a) gives cities the “plenary power and authority” to provide by charter or ordinance “for the government, regulation and control of the city’s municipal affairs.” Significantly, the provision goes on to define “municipal affairs” as “including, but not limited to” eleven categories, ten of which are broadly written and copious in their conferral of all of the usual run of municipal powers.<sup>87</sup> The one exception among the enumerated powers is subsection

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<sup>84</sup> W. VA. CODE § 8-1-7. The provision states, in relevant part:

Construction of powers and authority granted. The enumeration of powers and authority granted in this chapter 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 *or in accordance with the provisions of the Municipal Home Rule Amendment to the constitution of this state, the powers and authority granted by such Constitution, other provisions of this code and any existing charter.* The provisions of this chapter shall be given full effect without regard to the common-law rule of strict construction, and particularly when the powers and authority are exercised by charter provisions framed and adopted or adopted by revision of a charter as a whole or adopted by charter amendment under the provisions of this chapter.

The italicized language was added by a 2007 Amendment. S.B. 747.

<sup>85</sup> W. VA. CODE §§ 8-1-2(b)(9)-§ 8-1-6.

<sup>86</sup> Bastress, *supra* note 6, at 148 (quoting Lorensen, *supra* note 25, at 665).

<sup>87</sup> W. VA. CODE § 8-12-2(a). This subsection states, in its entirety:

In accordance with the provisions of the "Municipal Home Rule Amendment" to the Constitution of this State, and in addition to the powers and authority granted by (i) such Constitution, (ii) other provisions of this chapter, (iii) other general law, and (iv) any existing charter, any city shall have plenary power and authority by charter provision not inconsistent or in conflict with such Constitution, other provisions of this chapter or other general law, or by ordinance not inconsistent or in conflict with such constitution, other provisions of this chapter, other general law or any existing charter, to provide for the government, regulation and control of the city's municipal affairs, including, but not limited to, the following:

- (1) The creation or discontinuance of departments of the city's government and the prescription, modification or repeal of their powers and duties;
- (2) The transaction of the city's business;
- (3) The incurring of the city's obligations;

six, which restricts the cities' power to tax and impose special assessments to those that "have been or may be specifically authorized by the legislature."<sup>88</sup> In addition 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[.]" Finally, included among a long list of otherwise specific powers in § 8-12-5 is the conferral on cities of the power "(44) To protect and promote the public morals, safety, health, welfare and good order." That is the classic rendition of the State's police power, which enables the State Legislature to regulate *anything* not otherwise forbidden by the Constitution.<sup>89</sup> Thus, a reasonable reading of this provision is that municipalities can regulate anything that the Legislature can, unless the Legislature has preempted or limited the power.

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(4) The presentation, ascertainment, disposition and discharge of claims against the city;

(5) The acquisition, care, management and use of the city's streets, avenues, roads, alleys, ways and property;

(6) The levy, assessment, collection and administration of such taxes and such special assessments for benefits conferred, as have been or may be specifically authorized by the legislature;

(7) The operation and maintenance of passenger transportation services and facilities, if authorized by the public service commission, and if so authorized, such transportation system may be operated without the corporate limits of such city, but may not be operated within the corporate limits of another municipality without the consent of the governing body thereof;

(8) The furnishing of all local public services;

(9) The government, protection, order, conduct, safety and health of persons or property therein;

(10) The adoption and enforcement of local police, sanitary and other similar regulations; and

(11) The imposition and enforcement of penalties for the violation of any of the provisions of its charter or of any of its ordinances.

W. VA. CODE § 8-12-2(a).

<sup>88</sup> Municipals' fiscal authority is discussed *infra* at notes 102-06 and accompanying text.

<sup>89</sup> *E.g.*, Robertson v. Hatcher, 148 W. Va. 239, 250-51, 135 S.E.2d 675, 683-84 (1964). *Accord, e.g.*, Thorne v. Roush, 164 W. Va. 165, 167-68, 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"). *See* Bastress, *supra* note 6, at 136.

Really, these provisions should equate into a wide-ranging grant of legislative home rule. To date, however, that has not been realized.

*Third*, the 1969 Act continued the legislative practice of providing a menu of governmental structures for cities to adopt in their charters.<sup>90</sup> There are presently five alternatives: mayor-council (council elects a weak mayor and runs city), strong-mayor (mayor is popularly elected and exercises meaningful executive power to council's legislative power), commission (five-member commission elected at-large with each commission holding responsibility for a specific subject of city affairs), manager (council exercises legislative power and appoints city manager to administer city functions), and manager-mayor (mayor elected at large as member of, and presiding officer for, council, who appoints manager to administer city functions). Whether these forms provide cities with sufficient flexibility and whether the Legislature should vest the entirety of structural home rule in the cities have been questions raised in some circles.<sup>91</sup>

The Legislature in 2006 added a new chapter to the Code that offers the potential for major changes in the forms of local government. The Consolidated Local Government Act<sup>92</sup> provides new procedures for the consolidation of local governments, including cities,<sup>93</sup> counties,<sup>94</sup> and cities with counties to form metro governments.<sup>95</sup> Each such consolidation shall use the same procedure for initiating and conducting the process.<sup>96</sup> A charter review committee is created to study the feasibility, scope, costs, and benefits of consolidation and, if it decides to proceed, to draft a proposed charter for citizens within the affected areas to vote on. The only constraint on the form of government to be created is that it must include a governing body with an odd number of not less than five members.<sup>97</sup> Beyond that, apparently, consolidated governments (including cities) can select whatever form of government they want.

*Fourth*, the Supreme Court has continued to recite Dillon's Rule and has yet to recognize a clearly stated vision for municipal home rule in West Virginia. The Court's initial response to the 1969 Municipal Code was to persist in construing [municipal] power narrowly and to ignore the broad grants in §§ 8-12-2 and 8-11-1. The Act, the Court said, only "relaxes the common law rule of

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<sup>90</sup> W. VA. CODE § 8-3-2. Of the State's 231 municipalities, 209 use the mayor-council plan. 165 of the latter are Class IV towns or villages, whose charters are matters of general statute, and they are required to use the mayor-council plan. See BRISBIN, *et al.*, *supra* note 1, at 156-57; Klase, *supra* note 1, at 446. (One Class IV town, Ronceverte, uses the commission plan, and is the only West Virginia municipality to do so. BRISBIN, *supra* note 1, at 158.) Class IV towns are those with a population of 2,000 or less. W. VA. CODE § 8-1-3.

<sup>91</sup> See, e.g., Klase, *supra* note 1, at 446, 451.

<sup>92</sup> W. VA. CODE §§ 7A-1-1, *et seq.*

<sup>93</sup> W. VA. CODE §§ 7A-5-1, *et seq.*

<sup>94</sup> W. VA. CODE §§ 7A-6-1, *et seq.*

<sup>95</sup> W. VA. CODE §§ 7A-7-1, *et seq.*

<sup>96</sup> W. VA. CODE §§ 7A-3-1, *et seq.*

<sup>97</sup> W. VA. CODE §§ 7A-4-1(b)(6).

strict construction” and “does not lift all restrictions on municipal power.”<sup>98</sup> The Court proceeded to construe the city’s power in an extremely narrow fashion.<sup>99</sup> On the other hand, in the Court’s only two cases in the past twenty-three years to consider the subject, while citing Dillon’s Rule, the actual holdings have been consistent with a more flexible view of municipal powers.<sup>100</sup> In its last case, the thoroughly muddled *McCallister v. Nelson*,<sup>101</sup> the Court finally gave some emphasis to §§ 8-1-7, 8-11-1, and 8-12-2.

*Fifth*, constitutional and statutory restrictions severely restrict local autonomy regarding fiscal matters. As previously noted, Article VI, § 39a requires the Legislature to enact laws to restrict municipal powers to borrow money and impose taxes. In addition, Article X has several provisions that confine fiscal discretion, most notably § 1’s extreme limitations on property tax levels<sup>102</sup> and constraints on borrowing in §§ 4, 6, and 8.<sup>103</sup> As a consequence, the ACIR study on local autonomy listed West Virginia as one of four states to be ranked as according its local governments the least amount of discretionary au-

<sup>98</sup> *Rogers v. City of S. Charleston*, 163 W. Va. 285, 291, 256 S.E.2d 557, 561 (1979).

<sup>99</sup> *Id.* (city’s power to “sell or convey” real property does not include the ability to convey an option to buy). *See also* *City of Fairmont v. Investors Syndicate of Am., Inc.*, 172 W. Va. 431, 307 S.E.2d 691 (1983) (power of city to redeem its bonds before maturity does not enable it to delegate that option to bond purchaser).

<sup>100</sup> *McCallister v. Nelson*, 186 W. Va. 131, 411 S.E.2d 456 (1991); *Sharon Steel Corp. v. City of Fairmont*, 175 W. Va. 479, 334 S.E.2d 616 (1985).

<sup>101</sup> 186 W. Va. 131, 411 S.E.2d 456. *See* *Bastress*, *supra* note 6, at 150-51. In addition to creating syllabus points that simultaneously purported to rely on Dillon’s Rule and on § 8-1-7, which was designed to overrule Dillon’s Rule, the Court also missed an excellent opportunity to give some content to the meaning of “municipal affairs” in Article VI, § 39a and in § 8-12-2. Instead, the Court curiously held that a city charter provision giving the mayor a veto over council ordinances “is reasonably implied and fairly incidental to the granted or enumerated powers within W. Va. Code § 8-1-7.” *McCallister*, 186 W. Va. at 136, 411 S.E.2d at 461. That section, however, does not itself bestow any powers; it merely provides a rule of construction. *See* note 84, *supra*.

<sup>102</sup> Pursuant to the Tax Limitation Amendment of 1932, property taxes are capped at \$.50 on \$100 of personal property value, \$1 on \$100 of agricultural and residential property value, \$1.50 on \$100 of the value of real property outside of cities, and \$2 on \$100 value of other property inside cities. Excess levies approved by the voters can increase the local property tax up to 100% of those amounts for up to 5 years. W. VA. CONST. art. X, § 10. The effects of that amendment have not only forced cities and counties to search for alternative sources of revenues, but also – ultimately – to shift the lion’s share of the responsibility for funding public schools to the State. West Virginia ranks among the highest states in the country in percentage of education revenues that are provided by the State. BRISBIN, *et al.*, *supra* note 1, at 152-53. For a breakdown of how property tax revenues are divided among the county, school district, any cities, and the state, see Klase, *supra* note 1, at 449.

<sup>103</sup> Section 4 has been interpreted to preclude public borrowing unless it has been approved by the voters, subject to several exceptions for revenue bonds and related arrangements. *See* *BASTRESS*, *supra* note 67, at 250-53. Section 6 restricts government from lending public funds to private entities, *id.* at 254-55, and § 8 limits total indebtedness that local governments can incur within one county to 5% of the value of its taxable property, subject to mandated procedures and some exceptions. *Id.* at 260-61.

thority on finances.<sup>104</sup> While the constitutional limitations on property taxation and debt accumulation have some progressive effects,<sup>105</sup> the most unnecessarily restrictive aspects of municipal fiscal authority come from the requirement that cities can only levy taxes and assessments specifically authorized by law and the fact that the Legislature has been so reluctant to confer revenue-raising alternatives on cities.<sup>106</sup>

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<sup>104</sup> ACIR, MEASURING AUTHORITY, *supra* note 2, at 56. *Accord* Klase, *supra* note 1 at 448 (“West Virginia state government places relatively severe restrictions on the fiscal autonomy of local governments.”). Klase also opined:

By almost any standard, the revenues of West Virginia’s local governments are insufficient to support adequate levels of public services. Furthermore, they are inadequate to meet citizen demands for additional local spending, particularly for public education.

*Id.* at 449.

<sup>105</sup> As noted above, note 102, the Property Tax Limitation Amendment has had the salutary effect in shifting most of the burden for funding schools from local governments to the State, which can more equitably provide for school financing. Debt limitations can affect intergenerational equities by constraining one generation’s ability to spend money and assigning the bill to the next generation through bond sales. *See* Winkler v. State School Building Authority, 189 W. Va. 748, 434 S.E.2d 420 (1993) (Neely, Jr., concurring).

<sup>106</sup> The 2007 Legislature authorized a pilot project that would give four cities home rule that would include full discretion regarding revenues. S.B. 747 created W. VA. CODE 8-1-5a and amended 8-1-7. The project will run until July, 2013. In 1986, the State did authorize cities to take over the business and occupation (“B and O”) tax, but that tax is capped by statute. Despite the cap, by 1991, B and O taxes constituted forty-two percent of municipal revenues in the state. Klase, *supra* note 1, at 449. The next largest source is through fees, which West Virginia cities have imposed on everything from garbage collection to fire and flood protection. *See* City of Huntington v. Bacon, 196 W. Va. 457, 473 S.E.2d 743 (1996).

The 2005 article included the following footnote on local government finance in West Virginia:

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*, PUBLIC AFFAIRS RPTR., Summer 1996, at 2, available at [http://www.polsci.wvu.edu/ipa/par/report\\_13\\_3.html](http://www.polsci.wvu.edu/ipa/par/report_13_3.html);

Mehmet Serkan Tosun, *Municipal Finance in West Virginia: Forging a Course for Fiscal Stability*, West Virginia Public Finance Program Project Report (2003), [http://www.be.wvu.edu/bber/pub\\_pdfs/bber\\_2003\\_08.pdf](http://www.be.wvu.edu/bber/pub_pdfs/bber_2003_08.pdf) (last visited Mar. 25, 2007); Kenneth A. Klase, *Meeting Fiscal Challenges in the 1990s: Local Government Fiscal Trends in West Virginia*, PUBLIC AFFAIRS RPTR., Spring 1994, at 2, available at [http://www.polsci.wvu.edu/ipa/par/report\\_11\\_2.html](http://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 2007: A STATISTICAL VIEW OF THE 50 UNITED STATES (Kathleen O’Leary Morgan & Scott Morgan, eds. 18th ed. 2007) (utilizing data from 2004).

*Sixth*, there is undoubtedly a widespread perception that West Virginia's cities lack meaningful home rule, that perception is shared by the cities themselves, and it leads them to avoid exercising powers that a reasonable reading of § 8-12-1, *et seq.*, would give them.<sup>107</sup> Thus, despite § 39a's apparent grant of an expansive functional home rule, "in a practical sense municipal functional autonomy [in West Virginia] is anything but broad."<sup>108</sup> The prevailing perception derives from a combination of the Supreme Court's repeated recitations of Dillon's Rules and its insistence that cities have no power save what the State expressly gives them or what is necessarily implied from the express powers, from the restrictive statutes according fiscal authority, and – perhaps a reaction to the first reason – from the continued legislative practice of specifically spelling out municipal powers.<sup>109</sup> That is, the detailed enumeration of powers apparently creates for some readers an inference that if a particular authority is not listed, the city does not have the authority. There are a lot of specific grants. Section 8-12-5 alone includes fifty-eight allocations (although one is subsection 44's conferral of the police power), and it is followed by fourteen more sections creating power on specific subjects.<sup>110</sup> None of them is needed to enable the cities to address the subjects; they would all be encompassed within the general grants identified above.<sup>111</sup>

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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. W. VA. CONST. art. X, § 6.

Bastress, *supra* note 6, at 151 n.135.

<sup>107</sup> *E.g.*, Gary Gray, *Morgantown States Case for Home Rule: City Officials Tout System's Freedom from W. Va. Control*, MORGANTOWN DOMINION POST, July 9, 2006, at 1-A. The article reports on city leaders' frustration with their limited powers. It begins:

The situation between the state of West Virginia and its cities is somewhat like that of a parent and children. Morgantown's ability to pass local laws pertaining to local issues remains on a short legislative leash. And the city, like a child, has limited autonomy under the state's "roof."

The article goes on to discuss the harsh restrictions imposed by Dillon's Rule on the city's ability to meet its needs.

<sup>108</sup> Klase, *supra* note 1, at 451.

<sup>109</sup> That the perception of limited power pervades municipal governments in the State is supported by the dearth of cases on the issue in the past 25 years; cities have not been pushing the envelope for local power.

<sup>110</sup> W. VA. CODE §§ 8-12-5 to -18.

<sup>111</sup> Admittedly, some of the provisions were likely enacted to achieve purposes other than merely bestowing municipal authority. They may have been intended to define the manner in which the Legislature wants the powers to be exercised or limited. *E.g.*, W. VA. CODE § 8-12-17 (sale or lease of municipal public utility); W. VA. CODE § 8-12-18 (sale, lease or disposition of



Any inference that these specific listings somehow limit the general grants must be roundly rejected. In the first place, the Legislature nowhere intimates that such an inference is warranted. Second, the inference is inconsistent with the language in § 8-12-2(a) that specifically says the meaning of “municipal affairs” is “not limited to” the items enumerated in that section. Moreover, the Legislature specifically states in § 8-12-5 that the powers conferred in that section are “in addition to the powers and authority granted by” the Constitution, the Municipal Code, other general law, or any charter, to the extent not in conflict with state law.

Given the breadth of the power grants and these amplifications, the only question with regards to municipal power in West Virginia (outside the fiscal context) ought to be: “Has the Constitution or the Legislature anywhere denied cities the authority to enact this ordinance?”<sup>112</sup>

To achieve the promise of home rule set forth in § 39a will require a not-so-difficult coming together of three layers of government. First, the legislative process – the Legislature with the assent of the Governor – must create progressive and flexible alternatives to permit cities to achieve financial stability, provide basic services, and promote growth; greater discretion in raising revenues locally is critical. Second, the courts must junk Dillon’s Rule and follow what the law says in §§ 8-1-6, 8-1-7, 8-11-1, 8-12-2, and 8-12-5(44). Under those provisions, the default rule is that local governments have the power unless the Constitution or the Legislature has denied it to them or limited its operation. Third, the municipalities must shed their caution and use the broad authority conferred on them by the above sections.

### C. County Home Rule

Article IX, § 13 of the West Virginia Constitution provides:

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

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other municipal property). Another provision may have been thought necessary to override certain city charter provisions or old case law. W. VA. CODE § 8-12-11 (authorizing lease agreements of equipment or materials with option to cancel or renew). Section 8-12-19 probably is needed to enable cities; it gives them the authority to extend their powers extraterritorially for up to one mile when necessary to give effect to a city ordinance. W. VA. CODE § 8-12-19. Without statutory support, cities would probably not be able to do that.

<sup>112</sup> See *McCallister v. Nelson*, 186 W.Va. 131, 135, 411 S.E.2d 456, 460 (1991) (the Court could not find any state law or constitutional provision violated by the challenged provision and therefore sustained it); *Bastress*, *supra* note 6, at 150-51.

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.

This provision creates an *imperium* structural home rule for counties.<sup>113</sup> The counties are free to act without legislative authorization or directive, and their decision is immune from legislative override.<sup>114</sup> The immunity, however, relates only to the structure of the county's government.

The origins of the section differ from those that led to the *imperium* provisions that sprang up in other states not long after West Virginia's 1872 adoption of § 13's antecedent. There was no analogous provision in the State's first Constitution that came into existence upon statehood in 1863. The framers of that instrument had rejected the old Virginia county court system, in which the counties were run by "justices" who held executive, legislative, and judicial powers. The system concentrated power in the justices and invited cronyism and various forms of mischief.<sup>115</sup> In its place, the framers implemented the New England township system, which divided counties into townships that conducted their own business and elected supervisors to serve on the county board of su-

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<sup>113</sup> "Structural home rule" was one of the four categories of home rule developed in ACIR, MEASURING AUTHORITY, *supra* note 2. The other three were functional, finance, and personnel. See also KRANE, *et al.*, *supra* note 1. Neither in their article discussing West Virginia nor in their table listing the states regarding home rule for counties do KRANE, *et al.*, recognize § 13 or any home rule for the State's counties.

<sup>114</sup> As discussed below in Part IV, at least some legislators do not believe the county's action is free from legislative control.

<sup>115</sup> E.g., BASTRESS, *supra* note 67, at 11; 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 787 (1974); Bastress, *supra* note 6, at 127-28. Jefferson referred to the county courts of his day as "the most afflicting of tyrannies." HOWARD, *supra* at 787 (quoting Letter to John Taylor (July 21, 1816), in 10 WRITINGS OF THOMAS JEFFERSON 53 (Ford ed.). Speaking at the Constitutional Convention in 1861, Delegate Peter Van Winkle stated "that the county courts are damned and have been for twenty or thirty years. . . . There are many objections against them as judicial bodies but I think there are far more as administrative bodies[.]" 1 DEBATES AND PROCEEDINGS OF THE FIRSTS CONSTITUTIONAL CONVENTION OF WEST VIRGINIA 756 (1939). See also note 120, *infra*.

pervisors and justices to serve as judicial officers.<sup>116</sup> The 1863 Constitution became a prime target of the ex-Confederates and Democrats when they gained power after an extremely bitter Reconstruction period.<sup>117</sup> The delegates at the Democrat-dominated constitutional convention of 1872 aimed to cleanse the State's constitution of anything that hinted of Yankee and to restore as much of the Old Dominion as could be accomplished. Elimination of the New England township system and restoration of the Virginia county courts were priorities.<sup>118</sup>

According to the research of historian John Stealey,<sup>119</sup> the convention assigned the subject of county governmental reform to the Committee on Judiciary, which was chaired by Charles James Faulkner of Martinsburg. Faulkner knew that the prevailing sentiment among the delegates was to return to the Virginia county court system, but he also knew that a substantial number of counties would prefer a different form of government and that some delegates were vehemently opposed to the county courts.<sup>120</sup> Borrowing from a provision in the 1850 Kentucky Constitution, Faulkner proposed authorizing the Legislature to

<sup>116</sup> W. VA. CONST. of 1863, art. VII. See Bastress, *supra* note 6, at 128.

<sup>117</sup> See also *State ex rel. Rist v. Underwood*, 206 W.Va. 258, 267, 524 S.E.2d 179, 189 (1999). See generally BASTRESS, *supra* note 67 at 19, 72-73; Milton Gerofsky, *Reconstruction in West Virginia, Part I*, 6 W. VA. HISTORY 308 (1945); Milton Gerofsky, *Reconstruction in West Virginia, Part II*, 7 W. VA. HISTORY 6 (1945).

<sup>118</sup> In addition to local government reorganization, the convention inserted several natural law, high-sounding provisions from the Bill of Rights into the new Bill of Rights, now article III, §§ 1 - 3, and brought back *viva voce* voting as a right. W. VA. CONST. art. IV, § 2. The ex-Confederates' experiences as a disenfranchised and discriminated-against lot during Reconstruction also occasioned the inclusion of several new or revised sections. See W. VA. CONST. art I, § 3 (a plea of necessity does not justify departure from the Constitution); W. VA. CONST. art III, § 4 (writ of habeas corpus shall not be suspended – even in cases of rebellion or invasion); W. VA. CONST. art III, § 11 (prohibition of political tests or oaths as a condition for the enjoyment of any civil or political right); W. VA. CONST. art III, § 12 (military subordinate to civil power); W. VA. CONST. art VI, § 43 (ban on board or court of voter registration). See also W. VA. CONST. art I, § 2 (it is the “high and solemn duty of the several departments” of state government to guard against federal encroachment of states’ rights).

<sup>119</sup> John E. Stealey, III, *Quiet Revolution in Hampshire County: Who Says County Government Has to Be a Three-Member Throwback to Virginia's Old County Court System?*, CHARLESTON GAZETTE-MAIL, Mar. 26, 2006, at C1.

<sup>120</sup> For example, Stealey quotes John Marshall Hagan of Monongalia County (and the author of the *Sketch of the Erection and Formation of the State of West Virginia*, 1 W. Va. 5 (1866)) as referring to the county courts as “a bundle of antiquated conceits” and “a relic of barbarism.” Stealey, *supra* note 119 at C4. Stealey further reports:

Over every county court room, [Hagan] suggested a sign be erected with a warning, “the Inferno, He who enters here leaves hope behind.” Every county court had an officious, mean lawyer who by his continual presence and by petty helpfulness to ignorant justices controlled the body. The man had a knack for scenting other people's affairs and prying into them.

Stealey, *supra* note 119 at C4.

create optional forms of governments in individual counties. In committee, delegates from Brooke and Jackson County moved to amend Faulkner's proposal to place the power for initiating the process of adopting an alternative county government in the county governing body rather than the Legislature. The committee adopted the amendment, and the convention ultimately did as well.<sup>121</sup> It emerged as Article VIII,<sup>122</sup> § 34 and provided:

The legislature shall upon the application of any county, reform, modify, or alter the county court established by this Constitution, in such county, and in lieu thereof, with the assent of a majority of the voters of said county, voting at any election held for that purpose, create another court, or other tribunals, as well for judicial as for police and fiscal purposes, either separate, or combined which shall conform to the wishes of the county making the application, but with the same powers and jurisdiction herein conferred upon the county court, and with compensation to be made from the county treasury.

If two or more adjoining counties shall prefer to unite in the election of a judge to hold a county court, in their respective counties, they shall, with the assent of a majority of the voters of each of said counties be authorized, for all the purposes of judicial organization, to do so in the manner, and upon the terms above set forth: *Provided*, that the courts so created shall, in their provisions, be made to conform to the policy of the State, as prescribed in this Constitution.

An 1880 amendment eliminated almost all of the county courts' judicial functions and converted § 34 into Article VIII, § 29. That version of the section eliminated what had been the second paragraph and rewrote the first paragraph to reflect that the court no longer exercised significant judicial power. The revised section read:

The legislature shall, upon the application of any county, reform, alter, or modify, the county court 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

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<sup>121</sup> *Id.*

<sup>122</sup> The provision and the sections regarding the county courts were originally in Article VIII, the judicial article, because the county courts performed considerable judicial functions. Most of those were taken away in an 1880 amendment, but now § 13 and the county courts provisions remained in Article VII until the 1974 Judicial Reorganization Amendment moved them all to Article IX, the local government article.

be performed by the county court created by this article; and in such case, all the provisions of this article in relation to the county court shall be applicable to the tribunal established in lieu of said court. And when such tribunal has been established it shall continue to act in lieu of the county court until otherwise provided by law.

The Judicial Reorganization Amendment of 1974 rewrote the judicial article and in the process renamed county courts as county commissions and moved the local government provisions out of Article VIII and into their present home in Article IX, thereby creating the current Article IX, § 13. The principle change in the provision was the inclusion of a new, alternative procedure for initiating a reform of county government. Since 1974, the people themselves, rather than just the the county commission, have been able to seek a new form of county government by circulating a petition and submitting it to the commission.<sup>123</sup> Section 13 then requires the commission to forward the request to the Legislature to enact at its next regular session an act establishing the alternative government, to take effect upon the assent of the county's voters.

Section 13 and its predecessors have been invoked to initiate reform on at least sixteen occasions.<sup>124</sup> In the first attempt to use the new citizen-initiated procedure after the 1974 amendment, a dispute over its meaning led to the only Supreme Court opinion to date to interpret the section. In *Taylor County Commission v. Spencer*,<sup>125</sup> a group of Taylor County residents garnered enough signatures on a petition to meet the ten percent mark, and upon its submission, the county commission forwarded it to the Legislature with the request for enabling legislation. The petition sought to alter the three-member commission elected at-large into a six-member commission elected at-large with each member residing in a different one of the county's six magisterial districts. The 1978 Legislature responded with an enabling act that authorized a vote on and, if it were positive, the establishment of an alternative tribunal in Taylor County to consist of six members, each to be elected by the voters of his magisterial district.<sup>126</sup> That is how the question was submitted to the Taylor County voters at the 1980 primary, and they approved the proposal. When the ballots were printed for the

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<sup>123</sup> Because the first sentence of § 13 is the same (except to substitute "commission" for "county court") as in the old Article § 29, and because the old section obviously authorized county courts to request the Legislature to set an election to alter its form of government, then the addition of the second sentence in § 13 *added* an alternative method for initiating reforms. That is, it did not replace the pre-existing procedure.

<sup>124</sup> Summary Judgment Memorandum of Senate President Earl Ray Tomlin and House Speaker Robert Kiss, *The Committee to Reform Hampshire County v. Kiss*, Kanawha Circuit Court, Civ. Action No. 05-C-1910, at 11.

<sup>125</sup> 169 W. Va. 37, 285 S.E.2d 656 (1981).

<sup>126</sup> 1978 ACTS OF THE W. VA. LEGIS. 806-07; *Taylor County Comm'n*, 169 W. Va. at 38-42, 285 S.E.2d at 657-59.

general election the ensuing fall, the candidates for commissioner appeared on the ballots only in their magisterial district. The citizens who organized the original petition then sought a writ of mandamus to have the candidates placed on all ballots in the county. The circuit court granted the writ, and the Supreme Court affirmed. In deciding the case, the Court saw the issue as whether the Legislature acted unconstitutionally by submitting to the Taylor County voters a form of government different from that set forth in the citizens' petition that initiated the reform process.

The Court held that § 13's language, "the Legislature *shall*, upon the application of any county reform, alter or modify the county commission . . . with the assent of the voters," means exactly what it says:

Article 9, section 13 clearly anticipates that when the Legislature responds by the enactment process to a communication from a county commission that ten percent of the voters of the county have requested by petition an alternative form of county government, it has an obligation to see that the act upon which the people of the county will vote embodies the substance, spirit and intent of the petition. The use of the word "shall" connotes a mandatory duty on the part of the Legislature. Its role in the reformation process is to expedite, within constitutional parameters, the will of the citizens of the county by producing enabling legislation which reflects the stated preference of the petitioning voters and provides the other voters of the county an opportunity to approve or to reject that alternative to the existing form of government. In effect, the Legislature is obliged by the constitution to vindicate the desires and designs of the voters of the county. This it is constitutionally required to do and beyond this it cannot act.<sup>127</sup>

As demonstrated below, *Spencer* was clearly correct. Oddly enough, the issue it decided is back in court, along with some other issues of importance to the constitutional law of local governance.

#### IV. THE HAMPSHIRE COUNTY LITIGATION

##### A. *Background*

In March, 2003, a group of citizens in Hampshire County, West Virginia, circulated a petition to create an alternative county government and secured more signatures than the required minimum of ten percent. The petition called for a tribunal that would include one member from each of the county's

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<sup>127</sup> *Taylor County Comm'n*, 169 W.Va. at 44-45, 285 S.E.2d at 661. See also, e.g., *Perry v. Miller*, 166 W. Va. 138, 139, 272 S.E.2d 678, 679 (1980) ("'shall' means 'shall'").

voting districts with each member elected by the voters in his or her district.<sup>128</sup> Rather than receive a salary, tribunal members would be paid \$250 for each meeting they attended. The plan also called for the employment of a county administrator to execute the day-to-day business of the county. Upon receipt of the petition and signatures, the Hampshire County Commission requested the Legislature to enact the enabling legislation. Bills were submitted during the 2004 and 2005 legislative sessions,<sup>129</sup> but none was enacted into law.

The failure of any of the bills to pass initially could be attributed, at least in part, to a concern that some legislators had about the constitutionality of creating an alternative tribunal that is not elected county-wide. For that reason, the 2005 House Bill included a provision directing the Attorney General to bring a declaratory judgment action to obtain a judgment on the proposal's constitutionality before Hampshire County was to be subjected to the expense of an election. Apparently, the constitutional misgivings had been provoked by a 1963 Attorney General Opinion that had concluded that the then-existing Grant

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<sup>128</sup> The petition stated, in its entirety:

Petition for a Hampshire County Tribunal

We, the undersigned voters of Hampshire County, West Virginia, petition the West Virginia Legislature to cause to happen the creation of a Tribunal to replace the current Hampshire County Commission.

Tribunal Membership

The Tribunal shall be made up of one member from each Hampshire County voting district; only the registered voters in their respective district elect their member.

Term of Office

The term of each member shall be for a period of six years. Members' terms shall be staggered. Initially, the members first elected shall be required to draw lots to determine which two members shall serve 2-year terms, which three shall serve 4-year terms, which three shall serve 6-year terms.

Compensation

Each member shall be compensated \$250.00 per Tribunal meeting attended and be reimbursed for expenses incurred while performing official duties as sanctioned by the Tribunal. No other benefits shall be awarded members.

Effective Date of Authority

The Tribunal, when elected and seated, shall replace the present Hampshire County Commission, whose terms of office shall expire immediately.

County Administrator

Following a national search, a county administrator shall be hired by the Tribunal to carry out the day-to-day business of the county as prescribed by the Tribunal. Said county administrator shall be an employee of and answerable to the Tribunal.

<sup>129</sup> H.D. 3291, 76th Leg., Reg. Sess. (W.Va. 2005); S. 727, 75th Leg., Reg. Sess. (W.Va. 2004); H.D. 4396, 75th Leg., Reg. Sess. (W.Va. 2004). Subsequent legislative action, or inaction, or inaction, is described, *infra*, at notes 131-132.

County Court was unconstitutional because the county did not elect its members on an at-large basis.<sup>130</sup>

Frustrated with the Legislature's failure to act and eager to establish that their proposed tribunal would be constitutional, the Hampshire County citizens who had drafted and circulated the petition filed suit in Kanawha Circuit Court against the Speaker of the House and the President of the Senate.<sup>131</sup> The lawsuit sought a declaratory judgment affirming the proposal's validity and reaffirming the Legislature's mandatory duty to enact the enabling legislation for Hampshire County in the form prescribed by the citizens' petition.

Because of the lack of any factual dispute, the plaintiffs moved for a judgment on the pleadings. In responding to that motion, the legislative leaders cross-moved for judgment on the pleadings but declined to take a position on the constitutionality of the voting arrangement for the proposed reform county commission. They conceded that the Legislature had, on numerous occasions, submitted to a county's voters under Article IX, § 13 a proposed alternative tribunal whose members were to be chosen by district-specific, as opposed to county-wide, elections. The legislators nevertheless resisted plaintiffs' motion, contending that the Legislature was not bound to do anything by that provision. After hearing argument on the cross-motions, the circuit court directed the parties to fashion certified questions to submit to the Supreme Court of Appeals. After the parties complied, the court answered the questions in favor of the Hampshire County citizens and entered an order certifying the questions to the Supreme Court. The questions, and the circuit court's responses to them, were:

1. Would the reform of a county commission, undertaken pursuant to Article IX, § 13 of the West Virginia Constitution, violate any provision of the Constitution if it provided for commission members to be elected only by the voters within their respective voting districts rather than by at-large county elections?

Circuit Court Answer: No.

2. When a county commission submits to the Legislature, pursuant to Article IX, § 13 of the West Virginia Constitution, a request to submit to the voters of its county a constitutionally valid reform of county government as proposed by a petition signed by ten percent or more of the voters in that county, does the Legislature have a duty to provide for that referendum and, if the voters assent, for the creation of the alternative form of government?

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<sup>130</sup> 50 BIENNIAL REP. & OFF. OPS. OF THE A.G. OF W. VA. 202 (1963). The opinion is discussed in the text, *infra*, at notes 163-164.

<sup>131</sup> The author of this article represents the plaintiffs in that action.



Circuit Court Answer: Yes.

3. When a county commission submits to the Legislature, pursuant to Article IX, § 13 of the West Virginia Constitution, a request to submit to the voters of its county a constitutionally valid reform of county government as proposed by a petition signed by ten percent or more of the voters in that county, does the Legislature have the discretion to reject the proposal or to alter its substance?

Circuit Court Answer: No.

4. Whatever duty that Article IX, § 13 of the West Virginia Constitution imposes on the Legislature to enact legislation to provide for a referendum on a proposed reform of county government and, if assented to by the voters, for the creation of the alternative tribunal, does that duty extend beyond the Legislature to whom the request or petition has been submitted?

Circuit Court Answer: Yes.

In April, 2006, the plaintiffs filed a petition with the Supreme Court urging it to answer the certified questions and to provide the same responses as the circuit did. The Court rejected the petition, and the parties returned to circuit court and reargued the case. On April 4, 2007, just before this Article went to press, the Kanawha Circuit Court reaffirmed its earlier rulings.

Meanwhile, bills to put the Hampshire County referendum in motion were introduced during both the 2006 and 2007 legislative sessions. The 2006 bill<sup>132</sup> went nowhere. The 2007 bill<sup>133</sup> passed but then died in the Senate without a vote. The same fate (passed by the House and ignored by the Senate) befell a bill filed late in the session in response to an effort by the Berkeley County Commission to have a referendum on altering its form.

#### *B. Legislative Discretion*

Certified Questions 2 and 3 form the core of the Hampshire County litigation and are really the flip sides of the same coin.<sup>134</sup> Question 2 asks whether the Legislature has a mandatory duty to comply with a properly presented request from a county commission for a § 13 referendum, and Question 3 poses whether the Legislature may alter or reject such a request. For that reason, and

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<sup>132</sup> H.B. 3291.

<sup>133</sup> H.D. 3036, 78th Leg., Reg. Sess. (W.Va. 2007).

<sup>134</sup> They also take on added importance because there are now two counties who have attempted to invoke § 13 but have been thwarted by legislative dereliction.

because answering those two questions lays the foundation for resolving Questions 1 and 4, Part B of this section addresses 2 and 3 first. Part C then discusses Question 1 and Part D considers Question 4.

As explained above, the history of § 13 reveals a desire to provide individual counties the freedom to decide on their own form of government, one different from that set forth in the Constitution. The Court in *Taylor County Commission* accurately described the section's essence as the desire to place the form of county government "in the hands of those most directly affected by it: the people of the county."<sup>135</sup>

As the Court in *Taylor County Comm'n* also noted, § 13 implements foundational principles of our Constitution.<sup>136</sup> Article III, § 3 provides that, "when any government shall be found inadequate or contrary to [constitutional] purposes, a majority of the community has an indubitable, inalienable, and indefeasible right to reform, alter or abolish it in such manner as shall be judged most conducive to the public weal." In addition, Article II, § 2 guarantees that "[t]he powers of government reside in all the citizens of the State, and can be rightfully exercised only in accordance with their will and appointment." Just as significant is Article III, § 2. It proclaims: "All power is vested in, and consequently derived from, the people. Magistrates are their trustees and servants, and at all times amenable to them." Article III, § 16 adds that citizens have the right to instruct their representatives. Taken as a whole, these provisions establish a constitutional mantra that the people are the rulers and that government officials, including legislators, must do the people's bidding. Section 13 is a specific implementation of that principle, conferring on the people in each county the right to determine their county's form of government.

The defendants' primary arguments relied upon the inherent powers of the Legislature to exercise discretion in law-making and to set policy for the State and on the language of § 13. According to the legislators, legislative power cannot be restrained except as expressly stated in the Constitution and § 13, they argue, is not that. They contended that the concluding language in the section, which provides that the reformed tribunal "shall continue to act in lieu of the county commission until otherwise provided by law," recognizes that the Legislature can change the tribunal at any time. A power to alter at any time implies a power not to authorize the referendum in the first place or to put to vote some arrangement different from that specified in the initiating petition. (Obviously, defendants urge that *Taylor County Comm'n v. Spencer* should be overruled.) The plaintiffs responded by maintaining that the implied power does not necessarily follow and that "until otherwise provided by law" in this instance means in the manner provided by § 13 – that is, by petition and a vote of the people in the affected county. That was the procedure followed in 1988, when Preston County petitioned for a reform of its alternative tribunal, an eight-

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<sup>135</sup> *Taylor County Comm'n*, 169 W.Va. at 43-44, 285 S.E.2d at 660.

<sup>136</sup> *Id.* at 44, 285 S.E.2d at 661.

member commission, back to a three-member commission elected at-large. The Legislature in that case submitted the question to the voters of the county,<sup>137</sup> who ultimately assented. The defendants' reading of § 13's concluding sentence, giving the Legislature the authority to reshape a constitutionally altered form of government, would completely nullify the whole point of § 13, that is, to allow the local citizenry to decide on the shape of their government.<sup>138</sup>

Most importantly, the Legislature could not alter a country's government without its voters' assent because Article VI, § 39 prohibits the Legislature from enacting any local laws regarding "county or district affairs." The form of the county commission is surely a "county affair" and thus can be addressed by the legislature only through general laws. Any enactment specific to a particular county's tribunal and not authorized by the § 13 procedures would run afoul of Article VI, § 39.<sup>139</sup>

The defendants also emphasized a change that was made to § 13's antecedent when the 1880 Amendment revised and moved it in Article VIII from § 34 to § 29. The original 1872 version stated the Legislature, upon application from a county and upon the assent of its voters, shall reform its county court (now commission) in a manner "which shall conform to the wishes of the county making the application."<sup>140</sup> The 1880 amendment<sup>141</sup> removed that language, thus indicating, said the defendants, an intent to make the county's request nonbinding on the Legislature. That is one interpretation. Another is that the language was deemed to be redundant or unnecessary because the directive that "the Legislature shall" pass a reformed government combined with the point of the section in conferring local control over the form of local government were sufficiently clear that no reasonable person would conclude that the Legislature could alter or reject the county's proposal.

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<sup>137</sup> 1988 ACTS OF THE W. VA. LEGISLATURE 959, Chap. 137.

<sup>138</sup> Chief Justice John Marshall made the same point in his landmark opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 426 (1819):

[T]he constitution and the laws made in pursuance thereof are supreme . . . From this, . . . other propositions are deduced as corollaries[.] . . . These are, 1st. that a power to create implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

The Hampshire County citizens' power to create is clearly incompatible with the Legislature's asserted power to destroy, and § 13 makes the citizens' power supreme.

<sup>139</sup> The defendants' responded by noting the disarray in the West Virginia cases interpreting § 39's language, "county or district affairs." See *supra* note 171 and accompanying text.

<sup>140</sup> See the text following note 122, *supra*, for the original text.

<sup>141</sup> The 1880 amendment appears in the text following note 122, *supra*.

Article IX, § 13, read literally, and faithfully applied to implement its fundamental purposes in promoting democratic self-determination, imposes on the Legislature a mandatory duty to place before the voters of Hampshire County the plaintiffs' proposed reform of that county's government.

### C. *District Specific Election of Commissioners*

Article IX, § 13 “vests in the voters of the county the power to choose an alternative tribunal to suit their particular needs” and thus specifically implements the “indefeasible right” conferred on the majority of a community by Article III, § 3 “to reform, alter or abolish” their government.<sup>142</sup>

These provisions do not constrain the voters' discretion in shaping the form of their alternative tribunals.<sup>143</sup> Rather, they confer in capacious language the discretion to fashion whatever form of government the majority finds “most conducive.” Section 13, steeped in promoting democratic rights, presumably could not be used to create an unelected tribunal.<sup>144</sup> Beyond that, however, there is no language in either Article IX, § 13 or Article III, § 3 to support restricting the manner in which the reform tribunal is elected. Nor is there a good reason for doing so. On the other hand, there are good reasons for adhering to a literal reading of those provisions and permitting the voters to form whatever democratic government they want.

The Legislature may enact any measure not prohibited by the federal or state constitutions.<sup>145</sup> The § 13 grant of power conferred on citizens should carry the same presumption that the Legislature has when it acts: if the action is not expressly prohibited, then it is valid. Because there is no express or implied

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<sup>142</sup> Taylor County Comm'n v. Spencer, 169 W.Va. at 43-44, 285 S.E.2d at 660-61 (citing Art. III, § 3 for the proposition that “counties are free to modify their local government in any way that comports with the mandates of the constitution . . .”).

<sup>143</sup> Use of the word “tribunal” is explained by § 13's history. As noted in Part III-C, § 13's roots extend to Article VIII, § 34 in the 1872 Constitution, which created “county courts” that exercised considerable judicial powers. The 1880 amendment took away almost all of the county courts' judicial power, but continued to use the terms, “county court” and “tribunal.” The Judicial Reorganization Amendment of 1974 renamed the county courts as county commissions, but it kept the term “tribunal” in § 13. 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.” See also W. VA. CONST. Art. VIII, § 6. It thus seems clear, first, that the Constitution's use of the term “tribunal” refers to an executive/legislative body that performs the duties of a county commission but has a different form than that prescribed by Article IX, § 10, and second, that usage of the term does not imply any inherent limitations on that body's form. See generally BASTRESS, *supra* note 67, at 236-37; Bastress, *supra* note 6, at 156-60.

<sup>144</sup> Cf. Dunham v. Morton, 115 W.Va. 310, 175 S.E. 787 (1934) (statute authorizing governor to break any tie votes in elections of county court judges – now county commissioners – was unconstitutional because only a county's voters could elect county court).

<sup>145</sup> E.g., Thorne v. Roush, 164 W.Va. 165, 167, 261 S.E.2d 72, 74 (1979); Robertson v. Hatcher, 148 W.Va. 239, 250-51, 135 S.E.2d 675, 683 (1964).

restraint on the arrangement of a county's constituencies for the election of alternative tribunals, the citizens have the power to arrange the voting on any basis that satisfies the equal apportionment requirements of Article II, § 4, the federal Equal Protection Clause, and other basic limitations that constrain all exercises of power.<sup>146</sup> Constitutional grants of power should be liberally construed to permit maximum flexibility for the State and its citizens to deal with exigencies and circumstances as they arise.<sup>147</sup>

In terms of democratic values between countywide and district-specific voting, each system has its advantages. 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,<sup>148</sup> enhances voter familiarity with the candidates, facilitates delivery of constituent services,<sup>149</sup> and maximizes the opportunity for racial, ethnic, religious, and political minorities to elect one of their own.<sup>150</sup> As noted, the districts would have to be sufficiently equal in population to satisfy federal and state one-person-one-vote standards. Compliance with those standards would essentially offset one of the advantages of at-large voting.

The Court in *Taylor County Commission v. Spencer* recognized that deference is owed to the citizens' judgment on how to shape their government to ensure that that "ultimate determination" in fact rests in "the people of the county."<sup>151</sup> According to that Court, § 13 functions like "a limited grant of the

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<sup>146</sup> Such limits include, for example, the Due Process Clauses and the prohibitions against political and religious discrimination contained in Article III, §§ 7, 10, and 11 of the West Virginia Constitution and the First and Fourteenth Amendments to the United States Constitution.

<sup>147</sup> *E.g.*, *McCulloch v. Maryland*, 17 U.S. 316, 407, 415-16 (1819). Chief Justice Marshall eloquently explained in *McCulloch* that the nature of a constitution "requires, that only its great outlines should be marked, its important objects be deduced from the nature of the objects themselves . . . . [W]e must never forget that it is a *constitution* we are expounding." *Id.* (emphasis in original). Moreover, "a constitution [is] intended to endure for ages to come, and, consequently to be adapted to the various *crises* of human affairs . . . . It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur." *Id.* at 416-17 (emphases in original).

<sup>148</sup> Residency requirements, which are currently imposed on county commissions by Article IX, § 10, help to ensure some degree of geographical diversity, but it remains a fact that a county's populous area(s) can control who gets elected and effectively nullify the preferences of voters in outlying districts. With district elections, however, the populous areas elect only their own representatives, leaving the rural areas to choose their own as well.

<sup>149</sup> A member elected only by the voters in her home district is more likely to be more responsive to the inquiries and concerns of her home district's residents, who would constitute one hundred percent of those electing her, than members who are elected countywide and whose home district residents contribute only a fraction of the vote electing them. The size of the fraction would be inversely proportional to the size of the commission or tribunal.

<sup>150</sup> *See, e.g.*, *Rogers v. Lodge*, 458 U.S. 613 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

<sup>151</sup> 169 W.Va. 37, 43, 285 S.E.2d 656, 660 (1981).

right of initiative, by which the power is reserved to the people to propose laws and to enact or reject them at the polls, either independent of or with only the indirect participation of the Legislature . . . . The right of the people to enact and to approve or disapprove legislation under such a grant of authority is absolute and cannot be abridged directly or indirectly by the Legislature.”<sup>152</sup> Consequently, that Court held that the Legislature had no authority to enact an enabling statute calling for a referendum in a county on a form of government that was different from that which had been proposed by the voters in their petition.<sup>153</sup> Ironically, in that case the Legislature altered the proposed tribunal to provide for district-specific elections, rather than the countywide elections with district residency requirements for which the voters had petitioned.

It is instructive, too, that the practice of district-specific election of the members of an alternative tribunal has a long tradition in this State and dates back to at least 1887, not long after § 13 was originally created and then repositioned in 1880 as § 29 of Article VIII.<sup>154</sup> Chapter 10 of the 1887 Acts of the Legislature provided for a vote on the reformation of the Preston County Court to create a tribunal consisting of eight members, each of whom would be elected separately by the voters in each of the county’s eight magisterial districts.<sup>155</sup> That contemporaneous interpretation, by both the Legislature and the citizens of Preston County, of a newly drafted constitutional provision is persuasive evidence that § 13 should not be read so restrictively as to bind the citizens to, in effect, one form of government with only the ability to tinker with the number of seats on the tribunal. In addition, the Legislature has, on numerous other occasions, put to a county’s voters requests for alternative tribunals with members elected only by the voters of their individual districts.<sup>156</sup>

This history of the use of district-elected tribunal members is not surprising given the origins of § 13. As explained above in Part III.C, § 13’s first antecedent was proposed at the 1872 Convention because some counties wanted to retain the then-existing township system of county governance. Under that system, each county was divided into three to ten townships<sup>157</sup> and each township elected a supervisor.<sup>158</sup> The supervisors then formed a Board of Supervi-

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<sup>152</sup> *Id.* at 45 and 661. The Court thus recognized § 13 as an *imperium* home rule provision, although it did not use that specific term.

<sup>153</sup> *See supra* Part III.C.

<sup>154</sup> *See id.*

<sup>155</sup> *See Taylor County Comm’n.*, 169 W. Va. at 47, n.2, 285 S.E.2d 662, n.2.

<sup>156</sup> Those enactments included the following: 1883 W. Va. Acts 73; 1895 W. Va. Acts 220; 1913 W. Va. Acts 213; 1913 W. Va. Acts 217; 1915 W. Va. Acts 502; 1925 W. Va. Acts 459; 1927 W. Va. Acts 325; 1978 W. Va. Acts 806.

<sup>157</sup> W.VA. CONST. of 1863, Art. VII, § 1. (The 1863 Constitution is reproduced in 3 DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION OF WEST VIRGINIA (1939). The relevant sections appear at 874-75 of the volume.)

<sup>158</sup> W. VA. CONST. of 1863 at Art. VII, § 2.

sors,<sup>159</sup> which exercised “the superintendence and administration of the internal affairs and fiscal concerns of their county.”<sup>160</sup> Hence the alternative form of government contemplated by the framers of the original § 13 used district-based elections of county government.

The West Virginia Constitution’s provision bestowing an analogous power to “reform, alter or abolish” municipal governments has also been applied to permit district and ward election of candidates. Article VI, § 39a conferred home rule powers on the State’s cities and authorized them to draft their own charters pursuant to general laws laid down by the Legislature. Responding to that section, the Legislature has created a menu of five different forms of government from which cities can choose in creating their charters. W. Va. Code § 8-3-2.<sup>161</sup> In four of the five forms, cities have the ability to choose between electing council members citywide or by districts or wards. The Court in *Spencer* suggested that the Legislature could enact a similar provision to facilitate county reform under Article IX, § 13.<sup>162</sup> As noted above, the 2006 Legislature also authorized city-county metro governments.<sup>163</sup>

Against this array of reasons calling for a literal and citizen-friendly interpretation of § 13 stands one “authority.” The 1963 Attorney General Opinion referred to above addressed the question whether the district-based election of Grant County’s alternative tribunal was constitutional and concluded that it was not.<sup>164</sup> The opinion pointed to the language in Article IX, § 10 that provides that county commissions “shall be elected by the voters of the county” and concluded that it required countywide voting of even tribunals-in-lieu-of-commissions. The reasoning of that Opinion and its conclusion do not withstand analysis. Section 13 does say, as the Attorney General emphasized, that “all of the provisions of this article [Article IX] in relation to the county commission shall be applicable to the tribunal established in lieu of said commission.” To read that clause to say that § 10’s form of government for the county commission limits the forms that § 13 tribunals can take would be an effective repeal of the latter. It cannot be, if § 13 is to have *any* effect, that the above language from § 13 means that citizens can “reform, alter or modify county commission” as they please except that they have to cast it in the form provided by the other “provisions of this article.” To make sense of that qualification,

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<sup>159</sup> *Id.* at Art. VII, § 3.

<sup>160</sup> *Id.* at Art. VII, § 4.

<sup>161</sup> One of the forms of municipal government authorized by the Legislature is essentially the same as the governmental form proposed by the plaintiffs in this case. W. Va. Code § 8-3-2 (Plan IV – “*Manager Plan*”).

<sup>162</sup> 169 W. Va. at 44, 285 S.E.2d at 660.

<sup>163</sup> *See supra* notes 92-97 and accompanying text.

<sup>164</sup> 50 BIENNIAL REP. & OFF. OPS. OF THE A.G. OF W. VA. 202, 205 (1963). Although the opinion described the question as whether the Grant County Commission could be changed so that each member was elected only by his district, Grant County had already been using that system for 35 years. *See supra* note 130.

and to avoid gutting § 13, it must be read to say that the provisions of the article prescribing the duties, powers, terms, etc., of the commission apply as well to the alternative tribunals. As stated above, we can assume that § 13 tribunals should be elected, but that conclusion derives from the section's purposes and our traditions, not some directive on the form of § 10's county commissions.

In addition, even if the § 10 language does apply to alternative tribunals, there is no reason to conclude that "shall be elected by the voters of the county" would necessarily mean that *each* of the members must be elected by *all* of the county's voters.<sup>165</sup> Obviously, West Virginia counties have historically elected commissioners on a countywide basis, but just as obviously, Preston County had district-based tribunal elections for over one hundred years, going back to 1887. Grant County's alternative form of government also used district-elected commissioners from 1913 to 1921 and from 1927 until after the Attorney General's Opinion ventured that the plan was unconstitutional.<sup>166</sup> More importantly, tribunals that are elected in district-specific elections are "elected by the voters of the county" just as surely as are commissions elected by a countywide vote. Certainly, our Legislature is "elected by the voters of the [State]" even though none of our legislators is elected by a statewide constituency.

The Attorney General also relied on two cases, neither of which was particularly pertinent. One, *Dunham v. Morton*,<sup>167</sup> simply said that the people, not the governor, must break a tie in an election for commissioner. The case does not enlighten us about who "the people" must be. The second case, *McKee v. Hedrick*,<sup>168</sup> 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.<sup>169</sup> 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 light of the long, reasonable use of district-elected commissions, the plain language of § 13's grant to voters to "reform, alter, or modify" their county government, and § 3's conferral on the majority in any community of "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," reading into the Constitution unstated and unwarranted limitations on those

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<sup>165</sup> Nothing on the face of § 10, for example, would preclude the Legislature from providing for district-specific elections of county commissioners.

<sup>166</sup> 1927 W. Va. Acts 325; 1967 W. Va. Acts 1254.

<sup>167</sup> 115 W. Va. 310, 175 S.E. 787 (1934).

<sup>168</sup> 146 W. Va. 777, 123 S.E.2d 227 (1961).

<sup>169</sup> *McKee*, 146 W. Va. at 784, 123 S.E.2d at 231.



rights offends the most basic notions of self-determination, democracy, and the Lockean premises upon which those provisions are grounded.

#### D. *Continuing Legislative Duty*

The remaining issue in the Hampshire County litigation concerned the legislators' assertion that, whatever duty the Legislature had under § 13, that duty died at the end of the two year legislative term during which a county submits a request for an election on county government reform. There is no case law bearing directing on this question. The only case cited to the circuit court to support the legislators' proposition was *Heck's v. Winters*, which held that the Legislature can exercise its powers only within the sixty days allotted to it by Article VI, § 22 or within an extended or special session established in compliance with the procedures in Article VI and VII.<sup>170</sup> The Supreme Court has, however, imposed continuing constitutional duties on the Legislature that have extended past the existence of a single Legislature.<sup>171</sup>

Practical factors work against the contention that a Legislature's failure to comply with a constitutional duty acts as a suspension of the duty. Both the submission of a petition for reform to a county commission, and the commission's request to the legislature that the petition be submitted to the county's voters are events wholly unrelated to any legislative schedule. Thus, if the commission's request happens to reach the Legislature late in the session of that Legislature's second year, the request and the legislative duty to act would expire almost immediately. Moreover, requiring citizens to undertake the substantial and costly effort of re-circulating a petition in order to try, once again, to get the Legislature to comply with its § 13 duty imposes a senseless and demoralizing burden on those citizens. Section 13 quite clearly confers on a county's voters the prerogative of voting on their form of government.

### V. CONCLUSION

Despite perceptions to the contrary, local autonomy can have a future in West Virginia, even under our current constitutional system. Cities already

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<sup>170</sup> 147 W. Va. 876-77, 132 S.E.2d 383-84 (1963); W. VA. CONST. Art. VI, §§ 19 & 51 & Art. VII, § 7.

<sup>171</sup> See, e.g., *Crain v. Bordenkircher*, 180 W.Va. 246, 250, 376 S.E.2d 140, 144 (1988) (adding Senate President, for and on behalf of the Senate, and Speaker of the House, for and on behalf of the House of Delegates, as parties to litigation challenging constitutionality of conditions at Moundsville State Prison and ordering the construction of a new prison), *modified by Crain v. Bordenkircher*, 191 W. Va. 583, 447 S.E.2d 275 (1994), *supplemented by Crain v. Bordenkircher*, 192 W. Va. 416, 452 S.E.2d 732 (1994), *and by Crain v. Bordenkircher*, 193 W. Va. 362, 456 S.E.2d 206 (1995); *Pauley v. Kelly*, 162 W.Va. 672, 718, 255 S.E.2d 859, 883 (1979) (directing Senate President and Speaker of the House be joined as defendants and ordering overhaul of State's educational system), *supplemented by Pauley v. Bailey*, 174 W.Va. 167, 324 S.E.2d 128 (1984).

have a meaningful and substantial grant of home rule powers to initiate all manner of programs and regulations except in the fiscal realm. To realize the potential of that grant, all that is needed is for cities to flex their power, for the courts to allow them to do it (as statutes provide), and for the Legislature to accord cities the financial flexibility to allow them to use their powers in an effective manner. Counties also have an important home rule component: Article IX, § 13 empowers each county to structure its elected governing body as its citizens desire. For the promise of § 13 to be realized, however, the Legislature must meet its duty to enact the enabling legislation. The Legislature could facilitate county governance by conferring on county commissions the flexibility of home rule and an expanded ability to raise revenues locally. The State can retain the ability to preempt local laws in matters that have significant external impacts while maximizing local self-determination and affording local governments broad discretion to address the varied problems facing them.

