

July 1990

The Battle for the Environmental Provisions in Montana's 1972 Constitution

C. Louise Cross

Guest Speaker; Chairperson for the Committee on Natural Resources and Agriculture, 1972 Constitutional Convention

Follow this and additional works at: <https://scholarworks.umt.edu/mlr>



Part of the [Law Commons](#)

Let us know how access to this document benefits you.

Recommended Citation

C. Louise Cross, *The Battle for the Environmental Provisions in Montana's 1972 Constitution*, 51 Mont. L. Rev. (1990).

Available at: <https://scholarworks.umt.edu/mlr/vol51/iss2/13>

This Article is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review by an authorized editor of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

THE BATTLE FOR THE ENVIRONMENTAL PROVISIONS IN MONTANA'S 1972 CONSTITUTION

C. Louise Cross*

If birds and beasts abound no more,
And fish grow scarce on every shore,
What chance have you and I, my friend,
To meet a better, gladder end?

Anonymous

All beings—birds, beasts, fish, and humans—are connected.¹ And the health of the earth and of human beings ultimately depends on protecting the earth and its creatures. Awareness of this connection between all organisms prompted the drafting of Montana's environmental-protection provisions, which place a preeminent priority on the environment.

The Montana Constitution's recognition of the preeminence of the environment is unique. It begins with a preamble protective of the environment, and then states in its declaration of rights that "the right to a clean and healthful environment"² has priority over

* Chairperson, Committee on Natural Resources and Agriculture, 1972 Constitutional Convention. Currently, Ms. Cross is curator of the Frontier Gateway Museum in Glendive. She also is a local historian, specializing in Glendive and Dawson County. This article is based on a speech the author gave as part of the Environmental Panel at the *Constitutional Symposium '89*, November 16, 1989, additional research by the Montana Law Review editors, and notes the author made at the end of the 1972 convention. See *Thoughts from a Committee Chairman*, record series 22, folio 4-1, Montana State Archives, Helena, Montana.

1. Part of the belief of the environmental movement that all organisms are connected evolved from noted conservationist John Muir's view that all organisms—"animals, the rocks, the flowers, [and] the micro-organisms" are "bound fast by a thousand invisible cords." *Everything Is Bound Fast By a Thousand Invisible Cords: The Future of the Conservation Community in the American West: Keynote Address at the Montana Wilderness Association by Charles Wilkinson*, WILD MONTANA, Mar. 1988, at 4 [hereinafter Wilkinson]. Muir felt so strongly the interconnectedness of all beings that he "had trouble with the idea of human beings living off the earth." *Id.* Interestingly, "Muir never lived off the land during his extended journeys into the wilderness. He did not hunt or fish or gather—he either carried bread or went hungry. He was profoundly spiritual and saw divine life in all of nature." *Id.*

Muir helped build respect for the environment through "his own genius, eyes, and feet, sojourning throughout the wild lands of the West, gathering data with the benefit of little formal education." *Id.* "[A]n amazing physical specimen," he "routinely hiked 20-40 miles per day." *Id.* "From the ground up, he effectively created a new way of looking at the science of nature." *Id.* Muir's highly evolved views—seeing the spiritual connection between all beings—were so ahead of his time that they "make many people of the 1980's uncomfortable." *Id.*

2. MONT. CONST. art. II, § 3.

even freedoms of religion,³ assembly,⁴ and speech.⁵ Then, demonstrating its full commitment to environmental protection, Montana's constitution devotes a full article—article IX—to the environment. However, I am here to tell you that these constitutional environmental protections did not come easily. Not only were “most of the proposals . . . debated at length by the Committee on Natural Resources and Agriculture, and developed into committee proposals for consideration by all convention delegates,”⁶ but as one newspaper reporter said, “The environmental proposal[s] w[ere] drafted after weeks of haggling over wording.”⁷

As chairperson of the Committee on Natural Resources and Agriculture, I would like to share a view from the trenches as to how the environmental provisions of Montana's constitution were drafted. From the vantage of nineteen years and my memory of what happened in the committee, I seriously question whether if any other person had been chairperson, a separate article on the environment and natural resources would now exist. My commitment to the preservation of land, water, and air gave me the necessary tenacity to bring these provisions to fruition.

I. THE ENVIRONMENT AS A PUBLIC TRUST

Part of the battle over the environmental provisions included whether to include a public-trust provision. Public trust was then and still is an emerging idea that basically states that Montana's “total environment would be considered a ‘trust’ under the stewardship of the state . . . to be managed for the benefit of the public.”⁸ Classic public-trust doctrine had been applied to “shorelands and waterways, but controls over air and water pollution derive in part from the idea that air and water belong to the people and can't be ruined.”⁹ The public-trust provision proposed at the Convention was to “go beyond air and water” and to provide “standards for the use of the environment, including land,” that would have ensured these resources “continued quality.”¹⁰

Each committee chairperson had been asked to submit a guest editorial prior to the convening of the Convention. This is part of

3. MONT. CONST. art. II, § 6.

4. MONT. CONST. art. II, § 6.

5. MONT. CONST. art. II, § 7.

6. Schmidt and Thompson, *The Montana Constitution and the Right to a Clean and Healthful Environment*, *supra* this volume.

7. Helena Independent Record, Feb. 29, 1972, at 9, col. 1.

8. Helena Independent Record, Feb. 16, 1972, at 18, col. 2.

9. *Id.*

10. *Id.*

what I wrote on January 13, 1972, regarding environmental protection:

Since [we humans] first laid eyes upon the treasure of this earth, there has been some conflict between what [we] wanted to take from it, and what [we] should leave for generations yet to come. However it has not been until the last decade or so that [we have] obviously consumed beyond the capacity of nature to restore.

.....
This march of what [we] would take against what [we] must leave, if [our] progeny is to survive, cannot be solved by the Montana Constitutional Convention, nor can it provide the courage to some future legislator, nor [can it] protect [us] from [our] own avarice. However, within its framework, the constitution can provide the means and rights within which Montanans can protect themselves if they will.

There is no section in the present Montana Constitution which deals with natural resources and agriculture. Perhaps there should be. A great grass roots realization has grown among the people of the state that the time has come for a long range view of the use of natural resources.¹¹

The Committee on Natural Resources and Environment began its meetings in a friendly atmosphere in anticipation of the work of the convention. During the first few days we tried to assess each other's personalities and interests. However, before we concluded our work, and by the end of the final public hearing on February 10, 1972, the committee was completely polarized on the environmental article.¹²

While my remarks are not meant to be derogatory, or to diminish the good intentions or sincerity of any individual committee member, it seems to me that the makeup of the committee was unfortunate to begin with. I, evidently, was chosen as chairperson and member of the committee because of my known stand on the environment and natural resources. I presume that Henry Siderius, a farmer from Kalispell, was chosen for the same reason. The other seven were unknown quantities: John Anderson was a rancher from Dillon; Geoffrey Brazier was a lawyer from Helena; Douglas Delaney was a rancher from Grass Range; E.S. "Erv" Gysler, the vice-chairperson, was a manufacturer from Fort Benton; Arthur Kamhoot was a semi-retired businessman from Forsyth; Charles McNeil was a lawyer and metallurgical engineer from Polson; and

11. Helena Independent Record, Jan. 13, 1972, at 4, col. 1.

12. Seven committee members opposed the article and two supported it.

Donald Rebal was an automobile dealer from Great Falls.

The imbalance of the committee members relative to their feelings on what should be done in the area of the environment became apparent fairly early in the committee work, and by the time we reached the deadline for delegate proposals an impasse was a foregone conclusion.

It was in a joint hearing of the Natural Resources and Bill of Rights Committee on February 1, 1972, that I "lambast[ed] the status quo" and made what one reporter called a "fiery" plea for a strong environmental article.¹³ I pointed out that

[t]here comes a time when the status quo is not good enough—either in the lives of individuals or in the affairs of [humanity]. It has become increasingly clear that the status quo is woefully lacking as far as the environment and the use of natural resources is concerned. If this were not so, the outcry would not be so great. We have reached a point where nature no longer has the ability to restore what [humanity] consumes. Not too many years ago, it was thought that water, given enough miles, could clean itself. Now we have dead lakes and streams devoid of aquatic life. As one wag put it—too thick to drink and too thin to plow.¹⁴

I also criticized air pollution, clear-cutting, and the strip mining of coal.¹⁵

At the time of this joint hearing, I did not have a specific proposal. However, at the final public hearing on February 10, 1972, I presented Proposal 162—the environment as a public trust—coupled with the citizen's right to sue. The proposal read:

The state of Montana shall maintain and enhance a high quality environment as the public trust. Such obligation shall apply to all aspects of environmental quality including, but not limited to, air, water, land, wildlife, minerals, forests, and open space. The sole beneficiary of the trust shall be the citizens of Montana, who shall have the duty to maintain and enhance the trust, and the right to enforce it by appropriate legal proceedings against the trustee.¹⁶

The concept of "public trust" certainly was not new—it went back to the 19th century. Theodore Roosevelt thought it was a

13. Helena Independent Record, Feb. 2, 1972, at 8, col. 4.

14. Statement of Chairman Cross, Joint Hearing of Committee on Bill of Rights and Committee on Natural Resources and Agriculture, record series 22, folio 4-2, Montana State Archives, Helena, Montana.

15. Helena Independent Record, Feb. 2, 1972, at 8, col. 4.

16. I MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPTS 308 (1972) [hereinafter TRANSCRIPTS].

good idea.¹⁷ And several states had incorporated public-trust or similar concepts into their statutes.¹⁸ My personal mail—ranging from students to life-long Republicans—was running eight to one in favor of a public-trust proposal. Republicans wrote that two years earlier the idea of a public-trust proposal would have been unthinkable to them, but by the time of the convention they were acknowledging that such a proposal was proving to be a necessity.

Many witnesses appeared at the public-trust hearing to support the proposal. Among them were United States Senator Lee Metcalf, several legislators, and then-State Representative and chairman of Environmental Quality Council George Darrow. According to a report in the Helena Independent Record at the time, Darrow's "proposal would [have] give[n] the state and individual citizens the right to 'maintain the integrity of the environmental life support system' but also would [have] provide[d] for compensation for taking of private property."¹⁹ Calling the public trust "an important and necessary preventive measure to take for the future," Darrow stated: "If, after the pollution occurs, we're going to play cops and robbers trying to clean it up, we never will begin to catch up with our problems."²⁰

Both the public-trust and the citizen-suit concepts were later presented to the committee as a whole and debated vigorously. Delegate Cate moved to reinsert the public-trust language into section (1) of article IX.²¹ Speaking in support of that amendment, he said:

Our system of consumption in this country has got to change. We've got the Beartooth Mountains over there, they're the highest mountains in Montana, and I think they're the most beautiful mountains in Montana, and I've been in those Beartooth Mountains many times. We've got five mining companies that want to go in there, and they want to take those mountains, they want to rip them wide open. They want to dig a pit 5 miles long and 3 miles wide. And once they've dug that pit and taken that soil and

17. President Roosevelt ("working in concert with Gifford Pinchot, his chief forester") withdrew 150 million acres of land for national forest reserves in 1901 "with a few strokes" of his pen. FEDERAL PUBLIC LAND RESOURCES LAW (G. Coggins & C. Wilkinson ed. 1986).

18. Delaware, for example, has a statute that states "[r]are and endangered species are a public trust in need of active, protective management, and that it is the broad public interest to preserve and enhance such species." DEL. CODE ANN. § 7-2-201(2) (1989). Pennsylvania uses the doctrine in its more traditional applications, protecting the public's right to use navigable lakes or streams for "recreation, fishing or other public trust purposes." PA. STAT. ANN. § 32-25-693.15 (1988).

19. Helena Independent Record, Feb. 2, 1972, at 8, col. 4.

20. *Id.*

21. IV TRANSCRIPTS, *supra* note 16, at 1214.

that land out of there and polluted the rivers down below it, it's not going to be there any more, and you can't put it back. . . . Well, let's make it more expensive to go into those mountains and tear them down forever. . . . [Y]ou fly over these mountains from the west and you see this rim of pollution laying below the mountains, just waiting to come over into our state and pollute our air forever. . . . We've got one of the last vestiges in our country, one of the last places that can be saved; and we shouldn't be satisfied with the standard that Illinois has or the standard that Michigan has, because they're already ruined. . . . They're never going to come back. *But we can save Montana. We can make Montana a paradise in this country, and that's what we ought to do.*²²

Delegate Cate's remarks met with so much applause that Chairman Graybill had to caution the galleries against future demonstrations.²³ However, the Natural Resources Committee still turned the public-trust proposal down.²⁴

Unfortunately, Delegate Charles McNeil gave our committee's report to the committee as a whole on proposed article IX. Opposed to the public-trust proposal, which already had been considered and rejected, McNeil gave his rationale for that rejection on the floor of the convention.²⁵ Not surprisingly, as far as I was concerned, he and I were antagonists on the environmental issues until the adjournment of the convention.

In addition to Delegate McNeil's opposition to the public-trust proposal, some of the other delegates opposed the proposal with arguments that were just plain silly. For example, some of them tried to contend that the citizen-suit proposal meant that anyone could "sue for [a violation of the doctrine over] the slightest trace of dust,"²⁶ and that a transient who thought somebody's cow was a detriment to the environment could sue.²⁷ For example, opponents of the measure "expressed fears that environmental [harassment] lawsuits could be started by hitchhikers passing though the state or national organizations with no direct stake in the Montana environment" despite repeated assurances to the contrary.²⁸ Opponents also raised fears of confiscation of property, which, similarly, would not have happened.²⁹ However, when a member of my

22. *Id.* at 1227 (emphasis added).

23. *Id.*

24. II TRANSCRIPTS, *supra* note 16, at 565 (Montana Constitutional Convention, Natural Resources and Agriculture Committee Report)(Appendix B).

25. IV TRANSCRIPTS, *supra* note 16, at 1200-01.

26. Helena Independent Record, Feb. 2, 1972, at 8, col. 4.

27. Helena Independent Record, Feb. 16, 1972, at 18, col. 2.

28. *Id.*

29. Helena Independent Record, Feb. 29, 1972, at 8, col. 2.

committee labeled Delegate Proposal 162 on the Public Trust as "socialism,"³⁰ the resistance to it completely solidified, and the committee voted seven to two against it. After that, I had the dubious distinction of not even having the courtesy of a minority report from my own committee, and I told the committee of the whole as much during the debate on the majority report.³¹

The committee had debated at length the language to be contained in the environmental provisions. For instance, take the word "healthful" in the phrase, "clean and healthful environment."³² No one challenged the word "clean," but "healthful" caused some hangups because no one could agree as to how to define it. I told a newspaper reporter at the time that "I [had] heard arguments that individuals really don't have the right to a healthful environment—because it [was] too hard to define the term 'healthful.'"³³ My response was, "Do people have to become ill or drop in their tracks before the word 'healthful' can be defined?"³⁴

I wondered if "health" and "healthful" had ever been defined legally. The quickest place to go was the attorney general's office. My reputation must have preceded me. An assistant met me at the door and told me that the attorney general was not available. The attorney general's office doubted that the words had any precedent in relation to the environment. Later, I asked our research assistant to see what could be found in the law library. The term had been legally defined on several occasions.

II. RECLAMATION

Section 2 of article IX deals with the reclamation of land.³⁵ This very issue led to my running for a seat in the convention. I had been reading the book, *Night Comes to the Cumberlands* by Henry Caudill.³⁶ It told the tragic story of the devastation caused by strip mining in Kentucky and the Appalachian region. A United States report on Surface Mining told the same grim story: devastated farm land, polluted water, abject poverty, and people unable to control their own destinies for several generations.³⁷ Large-scale

30. Delegate Brazier later repeated this characterization of the public trust concept in a remark to the committee of the whole. V TRANSCRIPTS, *supra* note 16, at 1223.

31. IV TRANSCRIPTS, *supra* note 16, at 1199.

32. MONT. CONST. art. II, § 3.

33. Helena Independent Record, Feb. 2, 1972, at 8, col. 4.

34. *Id.*

35. Section 2 provides that "[a]ll lands disturbed by the taking of natural resources shall be reclaimed." MONT. CONST. art. IX, § 2.

36. H. CAUDILL, NIGHT COMES TO THE CUMBERLANDS (1963).

37. U.S. DEP'T. OF THE INTERIOR, STUDY OF STRIP AND SURFACE MINING IN APPALACHIA

strip mining loomed on the horizon in eastern Montana. There were no protective laws, nor any regulations. Reclamation was practically unknown. I wrote more than 400 letters to legislators, people in state offices, and citizens' groups to alert them to the problem. When the Constitutional Convention was called, I decided it was the vehicle in which something could be done.

I went to the Montana Department of State Lands to find out if the mining companies were doing any reclamation. The word "stone-walling" was not in common usage in 1972 but should have been, because I was "stone-walled" all the way. Why reclamation generated such opposition is still hard for me to understand. Not only did opposition come from the expected quarters, but also from a good number of farmers and ranchers—the very people for whom I felt needed and could be helped by a reclamation provision. There were only a few times that my feelings got the better of me. But one afternoon, after listening to a parade of ranchers decry the proposed reclamation provision, I positively hated the sight of cowboy boots.

I addressed the convention on the reclamation proposal when it was presented for floor debate. One of the committee members had agreed to rise and speak to the issue, but some sixth sense warned me to be prepared and not take that chance. The day had been very long and tiring, but I stayed up until 2 a.m. working on a statement. When our committee was to rise and report, nothing happened. So I rose, read the statement, and then spoke to the issue. I said,

we have coal trains going out of this state at the rate of three a day. There are at least 100 cars in each train, and each of these trains contain[s] 10,000 tons of coal. . . . At night, I can tell when a coal train goes by because of the sound of the rails. The weight is so heavy there is a zing to them. And you can tell these trains are going through just by listening. Anybody who lives three blocks away from that train can also feel the reverberations which have been, at times, equivalent to the earthquake tremors that have happened in Helena, and the shades on the windows shake. . . . Now, I don't know how many of you have actually seen the spoilbanks in the strip-mining areas. As feats of engineering, they are awesome indeed. And if you're lucky enough to get past the areas where the tours are conducted and where some experiments in the revegetation of the area go[], you'll come back with a feeling of utter desolation. Those spoilbanks are as lifeless as the

moon.³⁸

Two floor amendments deleted the phrases “to as good a condition or use as prior to the disturbance.”³⁹ It was left to the legislature to develop effective reclamation requirements and standards.⁴⁰

In fairness to the committee, the work on the sections on water, water rights, and agriculture was well done and with agreement on most items. The committee recognized the importance of both and tried hard to reach agreement. It recognized the importance of agriculture in the state’s economy, and also that it was losing its representation in legislative halls. As a result, agriculture is one of two departments in state government that has constitutional status. But, ironically, several delegates were heckled badly at public meetings when they returned home and began to explain article IX of the constitution to their rural constituents.

When the convention had finished with the article on natural resources, President Leo Graybill told me I should not feel too disappointed, that the article contained much more than I realized at the time. Of course, he was right.⁴¹ I had known early in the convention that I needed help outside the committee. And at least twenty of those attending the convention were committed to the environment. Some were members of the Bill of Rights Committee. Miles Romney, now deceased, brought the group together to discuss other strategies with me. The group assured me that the right to a clean and healthful environment would be in the Bill of Rights, even if it did not make it into the Natural Resources article. To our great satisfaction, this right appears in *both* articles.

The constitution offers guidance. What it does not do is to give the courage to some legislators to stand up for what is right, or to protect us from our own avarice. If anyone thinks that the issue of the environment will go away, he or she is foolish indeed. The time for adversarial positions is past. We all breathe the same air, we drink the same water, we eat the same food, and, ultimately, we depend on the same earth. We must depend on ourselves to see that the water is clean, the food is safe, the air is pure, and the earth is renewed.

38. V TRANSCRIPTS, *supra* note 16, at 1276.

39. *Id.* at 1299.

40. *Id.*

41. Noted conservationist and public-land-law legal scholar Charles Wilkinson has called the environmental provisions of the 1972 Montana Constitution an “extraordinary document” and “the single strongest statement of conservation philosophy” in “any state[’s] constitution” and “very likely, of any nation in the world.” Wilkinson, *supra* note 1.

LOCAL GOVERNMENT

LOCAL GOVERNMENT UNDER THE 1972 MONTANA CONSTITUTION*

James J. Lopach**

I. INTRODUCTION

During the winter of 1972, members of the local government committee of the Montana Constitutional Convention debated and formulated what was to become one of the most inspired articles of a new Montana Constitution. The achievement of these men and women¹ is that they incorporated both enduring governmental values and unique features in the state's basic law. As a result of their work, an exceptionally well-conceived local government article continues to provide a basis for effective local government in Montana.

Two recurring themes are present in the local government article. First, constitutional convention delegates gave local residents wide discretion in designing and empowering their local governments. The delegates, representing communities from throughout the state, were aware of the social, economic, and geographical differences among the state's counties and municipalities. Because of this diversity, delegates believed that the new state constitution should allow maximum flexibility to local governments.

Secondly, convention delegates believed that the new constitu-

* This paper was presented as part of the Local Government Panel at the *Constitutional Symposium '89*, November 16, 1989. Members of the panel included James J. Lopach, moderator, Ann Mary Dussault, Kay Foster, C. Gordon Morris, James (Jim) Patrick Nugent II, David J. Patterson and Donald R. Peoples.

** Assistant to President and Professor of Political Science, University of Montana; Ph.D., University of Notre Dame, 1973.

1. The local government committee was comprised of Oscar L. Anderson (chairman), Virginia H. Blend (vice chairman), Franklin Arness, George W. Rollins, M. Lynn Sparks, Katie Payne, Thomas M. Ask, Marian S. Erdmann, Lucile Speer, Arnold W. Jacobsen, and Clark E. Simon. Jerry Holloron was the research analyst, and Pat Romine was the secretary.

tion should revitalize the critical political relationship between citizens and local government officials. They wanted the enhanced autonomy of local government—the article's first theme—to be balanced by an enhanced accountability of municipal and county officials to their constituents. The local government article, accordingly, provided for several ways to guarantee the representative quality of the state's local governments.

The delegates to the 1972 Montana Constitutional Convention were not unrealistic about the efficacy of mere constitutional language or the proper scope of local government authority. The proceedings of the convention demonstrate repeatedly that the delegates were aware of the nature of a constitution: an outline of principles adopted by the citizenry to serve as the basis for their public life. The delegates knew that the legislature would have the primary duty of providing the details to implement the spirit of government found in these guidelines. Additionally, the delegates knew that realizing the promise of the local government article would require a creative and good-will partnership of the constitution, legislature, and local governments.

Today there is no doubt that Montana counties and municipalities face serious problems. But the lesson of two decades under the local government article is that these problems stem from flaws in the partnership of the legislature and local governments and not from the local government article itself. The intent here is to argue that the solutions to four problems—inflexible governmental structure, inadequate county powers, excessive limitations on self-government powers, and insufficient local revenue—lie more in local and legislative politics than in constitutional revision.

II. LOCAL GOVERNMENT STRUCTURE

In 1972 little variety existed in the structure of Montana's local governments. One hundred and twenty-four of the state's 126 municipalities (today there are 128 municipalities) were operating under the mayor-council form of government (the exceptions were Helena and Bozeman with manager forms). Fifty-five of the state's fifty-six counties were organized under the commission form of government. The one exception, Petroleum County, had a manager system. Given the diversity of communities within the state, constitutional convention delegates asked why local governmental structures were not more varied. Their conclusion was that reform had been frustrated in the past by forms of government that favored inaction, by status-quo oriented local government officials, and by the lack of a review process that had a built-in reform bias.

The delegates' response was a call for a wide range of legislatively provided local government forms, a reform process that represented a balance between state mandate and local initiative, and several provisions that facilitated local government consolidation.²

In article XI, section 3, entitled "Forms of government," the state constitution directs the legislature to "provide such optional or alternative forms of government that each unit or combination of units may adopt, amend, or abandon . . . by a majority of those voting on the question." The delegates' intent was clear: "The proposal aims at creating the widest possible array of local government forms so that local structure may be tailored to local needs"³ Article XI provides even greater structural flexibility in section 5, which is entitled "Self-government charters." A charter, as the other optional forms, describes the legislative and executive branches of local government and determines the degree of separation between them. With a charter, however, local residents and not state legislators are responsible for the designing and drafting. The delegates anticipated that charter writing would allow "a locality to tailor its governmental structure to its own needs and offers an excellent method whereby more people can become directly involved in their government."⁴

The Montana Legislature's response to the constitution's mandates concerning optional forms and charter writing was quick and complete. The 1975 Legislature made available to counties and municipalities perhaps the widest choice of forms that exists in any state. Local governments may choose from among five optional forms, each of which can be modified by an array of secondary features. The sixth plan of government available to any local government in the state is the charter form.

The five optional forms of local government are: commission-executive, commission-manager, commission, commission-chairman, and town meeting. Each of these optional forms includes a number of structural sub-options that can be used in various combinations to modify the basic form of government. For example, one community might choose to elect certain officials, and another community might prefer to have those same officials appointed. Communities can decide to have either partisan or non-partisan elections. Citizens can decide for themselves how many members

2. See J. LOPACH & L. MCKINSEY, HANDBOOK OF MONTANA FORMS OF LOCAL GOVERNMENT (1975) for a full discussion of the convention's treatment of these issues.

3. VII MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPTS 2512 (1972) (Delegate Virginia Blend addressing the general convention) [hereinafter TRANSCRIPTS].

4. II TRANSCRIPTS, *supra* note 3, at 796 (Report of Local Government Committee).

should be in the legislative body. By combining the various structural sub-options⁵ with one of the five optional forms, a community can modify its government to suit its needs.

The commission-executive form⁶ is the most familiar plan of government that Montana municipalities and counties can adopt because of its extensive use in the state as the mayor-alderman form. Its familiarity is also due to the fact that the national and Montana governments resemble the commission-executive form. The essence of the form is an elected legislative body called the commission and an elected single chief executive. The choice of structural sub-options allows variations of the form ranging between the "weak mayor" and the "strong mayor" forms.

The commission-manager form⁷ has been the frequent object of reformers in Montana and throughout the nation. The form consists of an elected commission (often, but not necessarily, having a small number of members elected at-large in non-partisan elections for overlapping terms) and a manager appointed by the commission on the basis of merit for an indefinite term. The aim of the form is to increase the chances that governmental power will rest in the hands of a few competent persons. The basic rationale of the form is strict separation between policy-making and administrative functions.

The commission form⁸ is primarily a county phenomenon both in Montana and the nation as a whole. Unification—not separation—of powers is the form's principal theme. The plan locates in the elected commissioners all legislative, executive, and administrative powers and duties. Structural sub-options allow a county to reconstruct the traditional Montana plan of fourteen elected administrative officials.⁹ The commission plan is the most criticized form of government because it exhibits characteristically little policy leadership, poor administrative coordination, and limited accountability to the electorate.

The commission-chairman form¹⁰ is virtually unknown

5. There are twelve structural sub-options, but not all of them are available to modify each of the five optional forms. The sub-options are: partisan or non-partisan election of officers, length of term of elected officers, presiding officer of the legislative body, concurrent or overlapping terms of office, budget authority of chief executive, appointment power of chief executive, veto power of chief executive, appointment of administrative assistants, selection process for chief administrative officers, district or at-large commissioner elections, size of legislative body, and use of community councils to advise the legislative body.

6. MONT. CODE ANN. §§ 7-3-201 to -224 (1989).

7. MONT. CODE ANN. §§ 7-3-301 to -318 (1989).

8. MONT. CODE ANN. §§ 7-3-401 to -442 (1989).

9. See MONT. CONST. art. XI, § 3(2).

10. MONT. CODE ANN. §§ 7-3-501 to -517 (1989).

throughout the United States. Its identifying characteristic is its partial fusion of legislative and executive powers, as is the practice under a parliamentary government. An elected commission selects a commission chairman from among its membership. The chairman has the powers of a strong chief executive and serves at the commission's pleasure. The chairman is similar to a prime minister because both officials have executive and legislative powers.

The town meeting optional form¹¹ is essentially the plan of government that has been used in some New England communities for at least 200 years. Its theme is direct democracy. The "town meeting" itself is an assembly of all the qualified voters of a town (the Montana Legislature has restricted town meeting government to municipalities of less than 2,000 persons). An annual town meeting enacts ordinances, levies taxes, and selects the town chairman (executive) and town meeting moderator.

The charter form¹² of government in Montana, like the five optional forms, describes a community's governmental organization. In this instance, however, the authors of the form are local residents and not legislators. If a community does not envision what it wants in the legislatively provided optional forms and structural sub-options, it can design its own government from scratch. The constitutional convention delegates provided that "[c]harter provisions establishing executive, legislative, and administrative structure and organization are superior to statutory provisions."¹³

Convention delegates anticipated that the initial and ordinary way for achieving structural reform of local governments would be a mandated and decennial process called "voter review of local government," provided for in article XI, section 9. A national observer of local government found the voter review process to be unique and engaging:

There has never been anything quite like it in American history: popularly elected study commissions, functioning as mini-constitutional conventions in each of the state's 182 counties and municipalities Perhaps the most surprising thing about Montana's broad-scale reform effort is that it's taking place at all. The state was once the province of rapacious copper kings and later the private satrapy of the Anaconda Copper Company¹⁴

The legislature performed admirably again in this area of con-

11. MONT. CODE ANN. §§ 7-3-601 to -613 (1989).

12. MONT. CODE ANN. §§ 7-3-701 to -709 (1989).

13. MONT. CONST. art. XI, § 5(3).

14. Sunday Sun-Times, June 13, 1976, at 38, col. 1.

stitutional implementation, allowing voter review of local government to become the citizen-dominated process envisioned by the constitutional convention. The legislature provided that the membership of each local government study commission would be from three to nine and elected. In 1974, during the first cycle of voter review, more than 700 persons filed for the 642 study commissioner positions on the 182 study commissions. Few study commissions ultimately proposed minor structural reforms. Seventy-one percent of the county proposals and fifty-three percent of the municipal proposals contained major reforms. In 1976 voters adopted four county and twenty-seven municipal reorganization proposals.¹⁵

After the first round of voter review of local government was completed in 1976, a discussion began that the review process was a waste of time and money in many communities, and that its observance every ten years should be optional rather than mandatory. This sentiment culminated in ratification of a constitutional amendment in 1978. It provided that, in 1984 and every ten years thereafter, residents of each Montana county and municipality would vote whether to have a study commission.

Despite the amendment's enhancement of local discretion in the voter review process, a surprisingly high fifty-four percent of the state's local governments (twenty-five of fifty-six counties and seventy-three of 128 municipalities) voted in 1984 to have a study commission.¹⁶ Study commission size ranged from three to nine members, and there were in total 364 study commission positions and 414 filings by candidates. Many study commissions made use of the legislature's newly provided option of "no recommendation."¹⁷ Fifty-two percent of the county study commissions and sixty-three percent of the municipal study commissions decided that no reform was needed and terminated the review process short of a referendum. The 1986 referenda outcomes were similar to the 1976 experience. The success rate in both instances was seventeen percent (seventeen adoptions among ninety-eight study commissions in 1986 and thirty-one adoptions among 182 local governments in 1976).

The two cycles of voter review of local government appear to have realized the aims of constitutional convention delegates. Hundreds of local residents became directly and intensely involved in

15. See L. MCKINSEY & J. LOPACH, *A STATE MANDATES LOCAL GOVERNMENT REVIEW: THE MONTANA EXPERIENCE* (1979) for a complete analysis of the 1976 voter review process.

16. See Lopach, *Voter Review of Local Government*, 76 NAT'L CIVIC REV. 501-03 (1987) for a more complete analysis of the 1986 voter review process.

17. MONT. CODE ANN. § 7-3-185 (1989).

questions of government. Many communities made what they thought were needed changes in their governmental systems. Today, as the following table indicates, far more variety exists in local government structure¹⁸ than in 1972:

Municipalities

Charter form 13

Commission executive form 109

Commission manager form 4

Commission chairman form 2

Counties

Charter form 2

Commission executive form 0

Commission manager form 1

Commission form 53

The voter review process, as designed by the constitutional convention and implemented by the state legislature, has provided the opportunity for structural flexibility in Montana's local governments. Structural reform has become, in fact, a frequently used prerogative of local communities. On this score, no constitutional revision is needed today.

Besides providing for increased flexibility concerning local government forms, the constitutional convention also sought to make structural consolidation easier to achieve for local governments. Section 2 of article XI reads: "No county boundary may be changed or county seat transferred until approved by a majority of those voting on the question in each county affected." The 1889 Constitution contained a more difficult county consolidation procedure that required the approval of a majority of qualified electors.¹⁹ Section 3 of the local government article mandates the legislature to provide procedures whereby local government units can alter their boundaries by "merging, consolidating, and dissolving such units." The legislature responded by permitting each of these

18. Montana's thirteen municipalities and two counties with charter forms are: Anaconda-Deer Lodge County (manager), Butte-Silver Bow County (commission-executive), Ennis (commission-executive), Helena (manager), Billings (manager), Bridger (commission-executive), Circle (commission-executive), Whitefish (manager), West Yellowstone (commission-executive), Belgrade (manager), Great Falls (manager), and Troy (commission-executive). The five communities that have adopted a commission-manager form provided by the legislature are Bozeman, Miles City, Livingston, Kalispell, and Petroleum County. The commission-chairman form organizes the municipalities of Broadview and Virginia City. No Montana town has a town meeting, but in 1976 seven municipalities rejected reform proposals for that plan of government: Manhattan, Eureka, Rexford, Valier, Terry, Outlook, and Judith Gap.

19. MONT. CONST. of 1889, art. XVI, § 8.

radical structural reforms to be accomplished by direct initiative²⁰ or by study commission recommendation and popular vote during voter review of local government.²¹ The constitutional convention also envisioned forms of local government cooperation short of disincorporation, city-county consolidation, and county merger. Section 7, "Intergovernmental cooperation," directly authorizes all local governments to enter into agreements with each other for service transfers and consolidations or any other kind of functional cooperation.

Montana's record concerning total local government consolidation since 1972 is amazing, to say the least. There has been consolidation activity in the three "Montana cases where consolidation is most suited," and electoral success in two of these communities.²² Butte-Silver Bow County and Anaconda-Deer Lodge County approved consolidation plans in 1976, and Missoula-Missoula County rejected consolidation in 1976 and in 1983. In 1976, the Billings study commission voted four-three against pursuing consolidation after the county study commission had favored merger by a three-two vote. The Montana record is noteworthy because the majority of consolidation plans requiring voter approval are rejected by voters.²³

One assessment of city-county consolidation in Montana attributed the state's high rate of merger success to the "facilitative advantage" of the voter review process: "There is little reason to believe that any of these localities would be trying consolidation otherwise even though consolidation has been available since 1923."²⁴ The dynamics of the voter review process that were especially instrumental in the "smaller size of the Montana communities" included the study commissions' citizen membership, wide discretion to design a reform plan, and tailoring the reform plan to specific community problems.²⁵

Assessments of the consolidation plans in operation have also been highly favorable. The former executive of Butte-Silver Bow believes that consolidation created a "low-cost government with excellent services. Tax savings have been immense, and employ-

20. MONT. CODE ANN. § 7-3-141 (1989).

21. MONT. CODE ANN. § 7-3-185 (1989).

22. L. McKinsey, *Montana Voter Review: The Case for City-County Consolidation at 19* (April 29, 1976) (paper presented at the Western Social Science Association annual convention, Tempe, Arizona).

23. *Id.* at 9.

24. *Id.* at 18.

25. *Id.*

ment was reduced through attrition from 600 to 325."²⁶ The government of Anaconda-Deer Lodge County had lost seventy-five percent of taxable valuation but today is able to provide adequate services because of consolidation. In 1982, an Anaconda-Deer Lodge majority of 2500 to 1013 voted against a proposal to return to separate city and county governments. "The support for consolidation had increased from fifty-six percent in favor in 1976 to seventy-one percent in favor in 1982."²⁷

City-county consolidation most likely will not occur elsewhere in Montana because of community characteristics, rather than legal obstacles. Counties other than Silver Bow and Deer Lodge are larger in area, have multiple population centers, and have greater opposition to consolidation in outlying areas.²⁸ Partial consolidation, however, has been successfully implemented by many communities in the state. In 1976, during voter review of local government, three sets of governments adopted some form of law enforcement consolidation or transfer. They were Hardin and Big Horn County, Scobey and Daniels County, and White Sulphur and Meagher County. Other Montana communities that have entered into joint law enforcement agreements are Shelby and Toole County, Harlowton and Wheatland County, Cut Bank and Glacier County, Forsyth and Rosebud County, and Wolf Point and Roosevelt County. Many other local governments have service agreements covering areas other than law enforcement—for example, snow plowing, road maintenance, welfare, and court administration.²⁹ The consensus of Montana local government officials is that the existing constitutional and statutory framework promotes interlocal cooperation.³⁰

26. Address by Don Peoples, Taft Seminar Presentation, University of Montana (July 7, 1989) [hereinafter *Peoples*].

27. K. WEAVER & J. MATHRE, *MONTANA'S VOTER REVIEW OF LOCAL GOVERNMENT: A SUMMARY OF RESULTS OF 1976 AND 1986* 33 (1986) [hereinafter *WEAVER & MATHRE*].

28. Interview with Alec Hansen, Executive Director, Montana League of Cities and Towns (Aug. 16, 1989).

29. Interview with Gordon Morris, Executive Director, Montana Association of Counties (Aug. 18, 1989).

30. One exception to the generosity of the *MONTANA CODE ANNOTATED* in promoting service agreements among local governments is § 7-11-1102, concerning multijurisdictional service areas. The legislature here limits, as allowed by *MONTANA CONSTITUTION*, art. XI, sec. 7(1), the use of multijurisdictional service areas to recreation, road and highway maintenance, jails, libraries, and animal control. The statute would not allow the city of Missoula, for example, to enter into a fire protection agreement with a rural fire district. Interview with Mike Sehestedt, Chief Deputy County Attorney, Missoula County (Aug. 22, 1989).

III. COUNTY POWERS

The traditional configuration of local governments in Montana was typical and common-sensical. Municipalities, or incorporated cities and towns, were true local governments in that they were formed by residents to provide governance and services to defined areas of relatively high population density. At the request of the local population, the state granted a charter of incorporation that empowered the municipality to tackle its problems and provided a governmental structure befitting these ordinance-making powers.

Counties were the other principal part of Montana local government, but ironically they were not designed to be true local governments. The state government created counties to help it administer important state duties and services outside of the capital. The sole function of county governments was administrative; they lacked the ordinance-making function of municipalities. County commissioners and the other elected county officials—clerk and recorder, clerk of district court, county attorney, sheriff, treasurer, surveyor, county superintendent of schools, assessor, coroner, and public administrator—assisted the state in such functions as elections, recording vital statistics, adjudicating, prosecuting, collecting taxes, maintaining roads, and collecting and transmitting information needed in Helena.

In the middle of the twentieth century, a new phrase entered the jargon of local government practitioners and students. “Urban county” was the description given a county government whose citizens were requesting it to be more than an administrative arm of the state. The situation was easy to understand. Population growth occurred outside of the boundary of a municipality, and residents of the new urban area had the same desires for governmental services as the urban residents of the municipality. To get these services they had several options. They could ask to be annexed to an existing municipality—a local government empowered and organized to see to the public needs of urban residents—or incorporate themselves as a new municipality. They could form a separate special district, a substantially independent governmental entity, for each service desired. Or they could ask the county government to respond to their needs.

At different times, county residents used all of these options. They sought help from their county commissioners frequently enough, however, to put the county commissioners in the frame of mind of mayors and city council members. Why should county elected officials not have the power to regulate traffic, establish recreation areas, restrict shooting guns, and provide sanitation ser-

vices? County commissioners from urban counties requested such authority from the Montana Legislature, which responded in a way befitting the counties' traditional status. The legislature in a piecemeal fashion authorized counties to address urban problems but only in the manner detailed in the legislative authorization. Whereas each municipality could use its ordinance-making power to implement as it chose a general legislative grant of power, each county had to administer a program exactly as the legislature dictated.

This is the situation that confronted the delegates to the 1972 Montana Constitutional Convention. They heard arguments that counties should become true local governments, freed from the paternalistic supervision of the legislature and granted the liberating discretion of ordinance-making powers. The convention's resolution of the matter was its adoption of section 4(1)(b) in article XI: "A county has legislative, administrative, and other powers provided or implied by law." Rather than taking the direct and full step of equating counties with municipalities in the language of the constitution, the convention left the question of whether to extend ordinance-making powers to counties to the judgment of the legislature. Subsequent to this authorization, the legislature has chosen not to act. The consensus among local government law experts in the state is that only in the area of animal control has the legislature directly provided counties with ordinance-making power.³¹ An example of an implied grant of county legislative power is regulation of air pollution.

Since the ratification of the 1972 Montana Constitution, commissioners of urban counties and the Montana Association of Counties have sought a systematic grant of legislative powers to counties. The principal battlegrounds were the 1977 and 1979 Legislatures, where a proposal to authorize county ordinance-making power was part of a massive reform measure that would have made county governments akin to municipalities. The failure of the legislature during the 1977 and 1979 sessions and thereafter to raise counties to the status of true local governments raises the question of whether this step should be taken constitutionally. Analysis of the legislative battles will be instructive in formulating an answer.

House Bill 122, taken up by the 1977 Montana Legislature, was a complete revision and recodification of local government law. It was 876 pages long, eventually amended 450 times in the House

³¹ *Id.*
<https://scholarworks.umt.edu/mlr/vol51/iss2/13>

of Representatives, and widely termed a “monster” by legislators.³² It was the largest bill the Montana Legislature ever handled.³³ In 1977 the House of Representatives gave majority approval to the bill after the transmittal deadline, but the Senate failed to give the bill the necessary two-thirds approval for consideration. The legislature then established an interim committee to study House Bill 122. After months of study, the committee separated the original bill into thirteen separate bills—“pups of HB 122”—but voted seven to five to urge the 1979 Legislature to reject the measures.³⁴ That session of the Montana Legislature complied with the interim committee’s recommendation.

Both the parent bill and its offspring would have broadened the power of local governments in general and would have significantly broadened the power of counties. The proposed local government code would have given municipalities and counties the “same authority to deliver services.”³⁵ For many services, county power would have been far in excess of the power municipalities then possessed. The code also specified certain services that counties would have the “first option to provide.”³⁶ The code proposed that each county and municipality be authorized “to determine its own administrative organization by ordinance.”³⁷ Then counties would have been able to bring existing and future boards, commissions, and service districts within the county’s administrative structure. County duties mandated by the state would have been “made a responsibility of the county rather than a responsibility of a particular county office.”³⁸ The county commission by ordinance then could have determined how many or how few positions were necessary for carrying out these responsibilities. The governing body of all general power counties would have been given complete discretion to design their internal departmental structure and “eight methods” for delivering each authorized service. House Bill 122 would have switched counties from thirty-eight single-purpose mill levies to an all-purpose levy for property taxation and authorized five new taxes to be adopted at the option of the counties. Finally, the proposed code would have implemented “in a systematic fashion” the constitution’s authorization of county legislative

32. Missoulian, March 20, 1977, at 1, col. 4.

33. Great Falls Tribune, March 9, 1977, at 1, col 1.

34. Great Falls Tribune, January 17, 1979 at 35, col. 1-2.

35. Wanzonried, *Analysis of the Proposed Montana Local Government Code*, 4 LOCAL GOV'T REV. BULL. 11-35 (June, 1977).

36. *Id.*

37. *Id.*

38. *Id.*

powers.³⁹

The proposed local government code met defeat in 1977 and 1979 for several reasons, most of which are still pertinent to the discussion of enhanced county powers. There is substantial irony in the fact that the proposed code was drafted by the State Commission on Local Government, the body that had drafted the legislation to implement the optional forms, charter writing, and voter review provisions of the 1972 Constitution. These earlier measures respected religiously the local government article's theme of citizen involvement and local control. A principal criticism of House Bill 122 was that it sought to impose significant reforms on counties that had been rejected just a year previously by local government study commissions and county electorates. Senator William Murray of Missoula was quoted as saying: "The arrogance of the language of this bill is almost unbelievable" because it "forces changes already turned down by voters during the state's first mandatory local government review."⁴⁰ Senator Ed Smith of Dagmar made the same point when he said "he refuse[d] to go home and tell his constituents they didn't know what they were doing when they turned down changes in their local government by a 3-to-1 margin last year."⁴¹ The lesson is that Montanans have already constitutionally reserved to local communities the right to reform in a major way county governments. The legislature has respected this prerogative, and there is no reason for such a basic principle to be overridden constitutionally.

Another reason for the defeat of the proposed local government code was that it would have effectuated a major reform of county powers without an accompanying reform of county governmental structure. In 1977 two House members, Representatives Jack Ramirez of Billings and R. Budd Gould of Missoula, "criticized the bill for granting 'tremendous power' to the county commission form of government."⁴² The same criticism was made two years later in the interim study committee: "The majority objected to the code's elimination of the historic distinctions between the powers of municipalities and counties and particularly opposed the granting of ordinance-making powers to county commissioners, claiming it would give most county governments the power to both pass and carry out laws."⁴³ The 1975 Legislature, at the urging of

39. *Id.*

40. Missoulian, March 20, 1977, at 2, col. 1.

41. *Id.*

42. Great Falls Tribune, February 20, 1977, at 2, col. 2.

43. Great Falls Tribune, January 12, 1979, at 5, col. 3.

the State Commission on Local Government, had denied the exercise of self-government powers to local governments organized under the commission form. In 1977 the Commission set aside the principle of separation of powers when it insisted that all counties, most of which still used the commission form, should be given broad ordinance-making powers. The same anomaly would exist if the state constitution were to grant legislative power directly to all counties.

The interim study committee's other criticism is probably the key argument against wholesale extension of ordinance-making power to counties, whether by the legislature or by the constitution. The committee wanted to preserve the historic distinction between county government and municipal government. The crux of the issue is presented succinctly by Missoula City Attorney Jim Nugent: "The correct response to the question of enhanced county powers is, what, then, is the point of municipalities—why create two similarly empowered governments with jurisdiction over the same area."⁴⁴ At least in Montana, it is still good public policy to retain the identity of counties as administrative arms of the state and rural governments and the identity of municipalities as urban governments. Where counties need ordinance-making power to handle problems and no other solution makes good sense, the legislature can respond with limited authorizations in a case-by-case fashion. Where residents of urban areas just outside of the boundary of a municipality seek a governmental response to their needs, county officials can recommend that the residents seek annexation to the municipality. To facilitate annexation, it is highly arguable that the state constitution should include the principle of expeditious and unimpeded annexation and mandate its implementation by the legislature.

The long-sought remedy of county empowerment has a serious flaw. It would increasingly bring about the prevalent problems of American urban government: overlapping government, duplicated services, and inequitable taxation. Why does the urban area need two local legislative bodies? Why should the urban area have two law enforcement agencies? Why should municipal residents be the sole-providers of city streets, traffic control, and parks that are also enjoyed by non-tax paying urban residents? Across-the-board extension of ordinance-making power to counties would lead to even greater pressure for total or partial governmental consolidation and interlocal agreements. Eventually, constitutionally mandated

44. Interview with Jim Nugent, Missoula City Attorney (Aug. 24, 1989).

consolidation in some instances would make sense, but its ratification would be politically impossible because it would violate so profoundly the Montana Constitution's basic principle of local determination. On the other hand, constitutional status for a facilitative annexation policy would not be as violative of the basic principles of the local government article. By choosing to live in an urban area, residents have voluntarily surrendered their option of living under a rural government. And an annexation amendment would give constitutional status to the principles of community and equity.

IV. LIMITATIONS ON SELF-GOVERNMENT POWERS

The delegates to the 1972 Montana Constitutional Convention did provide for enhanced county and municipal powers in a way that was in line with their overarching principle of local determination. The goal of the convention, a delegate said, was "to provide options of self-determination by local government, whether in a town of 25 people or a city of 80,000, whether in a county of under 500 or a county of eighty or ninety thousand."⁴⁵ The convention's principal vehicle for achieving local determination was Section 6 of the local government article, "Self-government powers." It reads:

A local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter. This grant of self-government powers may be extended to other local government units through optional forms of government provided for in section 3.⁴⁶

Very little debate in the constitutional convention was devoted to self-government powers. Restricting self-government powers to a narrow category of local units was barely mentioned. The discussion that did occur centered on how self-government units might use their power and what limitations on self-government units the legislature might eventually impose. Fear of "little city-states"⁴⁷ that would "enact right-to-work laws and sales taxes, permit wide-open gambling, prostitution, drug sales, and one thing or another of that character" was expressed.⁴⁸ To the question, "What's to stop them?" a proponent replied: "I think that the Legislature is the battleground for these things."⁴⁹

45. VII TRANSCRIPTS, *supra* note 3, at 2513 (Delegate Virginia Blend addressing the general convention).

46. MONT. CONST. art. VI, § 6.

47. See VII TRANSCRIPTS, *supra* note 3, at 2531 (Delegate Arness speaking).

48. *Id.* at 2533 (Delegate Romney posing questions to Delegate Arness).

49. *Id.*

The actions of the Montana Legislature several years later gave little indication of diminished reform fervor. The 1974 assembly provided that self-government powers would be made available to each of the state's counties and municipalities. The first opportunity for adoption would be in 1976 during voter review of local government. The legislature authorized self-government powers to be proposed in two ways. A locally written charter automatically would include self-government powers, and four of the five optional forms provided by the legislature (not the commission form because it lacked separation of powers) could be proposed with either self-government or general government (Dillon's Rule) powers.⁵⁰

The 1975 Montana Legislature completed its task of implementing the constitutional home rule provision by determining the extent of self-government powers. The constitutional convention had placed Montana in the ranks of a handful of states which had adopted the shared or residual powers approach to home rule. In deciding which governmental powers would be "prohibited" to self-government units, the legislature gave the constitutional term a broad definition. It identified four categories of statutory restrictions.

Outright denial was the first type of prohibition. Some governmental functions were viewed as belonging strictly to the state as, for example, defining criminal activity, regulating utilities and common carriers, and determining the environmental compatibility of major industrial facilities. The legislature specifically precluded the entry of self-government units into these and other fields.

Second, the legislature said that certain specified powers could be exercised only pursuant to an express legislative delegation. The rationale for this category of prohibition was that the nature of some admittedly local powers required that they be exercised uniformly; harmony could be achieved only through state grants of power. Included in this set of delegated powers were local sales and income taxes, extraterritorial powers, local judicial functions, and regulation of gambling. Legislators appeared not to have appreciated the irony of their tempering the residual powers doctrine with its theoretical opposite, Dillon's Rule.

50. J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, (5th ed.) (1911). Dillon's Rule of local government powers, formulated by judge and commentator John F. Dillon, stated that local governments possess only the powers expressly granted by the legislature; any doubt about the existence of a power should be resolved by the courts against the local government. Montana courts strictly followed this formulation until ratification of the 1972 Constitution.

The third category of prohibited powers involved concurrent state and local activities. The Montana Legislature required consistency in regulation in areas where both the state and self-government units have a legitimate interest and are actively involved. Active involvement of the state existed "if a state agency or officer is directed to establish administrative rules governing the matter or if enforcement of standards or requirements established by statute is vested in a state officer or agency."⁵¹ The legislature permitted a self-government unit to act concurrently with the state as long as its standards or requirements would not be lower than the state's. A self-government unit, for example, could require a higher level of air quality than the state, but it could not undermine clearly enunciated state standards.

Mandatory provisions were the final kind of limitation that the 1975 Montana Legislature placed on self-government units. The rationale for these requirements differed from provision to provision. Some mandates were duties that all local government units were required to perform as agents of the state as, for example, conducting the election of local officials. Other mandatory provisions were obligations that the state, pursuant to the 1972 Constitution, imposed on all units of local government. Included here were voter review of local government and regulations concerning accounting procedures, debt limit, and investment of local funds. Other mandatory provisions were justified as being necessary to protect citizens from arbitrary local government action. Adopted by reference and placed in this category of prohibited powers were regulations covering annexation, disincorporation, consolidation, ordinance-making procedures, planning and zoning, and eminent domain.

The legislature also included some general language in the "mandatory provisions" section of the self-government code that was potentially troublesome. This was: "Any law directing or requiring a local government or any officer or employee of a local government to carry out any function or provide any service."⁵² Fears that some state law enacted prior to 1972 would be applied to self-government units via this provision were reasonable. The legislature arguably meant to head off such a development by distinguishing services mandated of all local governments from services a self-government unit elects to provide:

A local government unit with self-government powers which

51. MONT. CODE ANN. § 7-1-113(3) (1989).

52. MONT. CODE ANN. § 7-1-114(1)(f) (1989).

*elects to provide a service or perform a function that may also be provided or performed by a general power government unit is not subject to any limitation in the provision of that service or performance of that function except such limitations as are contained in its charter or in state law specifically applicable to self-government units.*⁵³

The legislature made a further declaration that should have been sufficient for resolving any ambiguity created by Montana Code Annotated Sections 7-1-114(1)(f) and 7-1-103. The legislature instructed judges to favor self-government units in close cases:

The powers and authority of a local government unit with self-government powers shall be liberally construed. Every reasonable doubt as to the existence of a local government power or authority shall be resolved in favor of the existence of that power or authority.⁵⁴

Today there are twenty-three local government units in Montana that have self-government powers. The vehicles for these adoptions were either the two cycles of voter review of local government or locally initiated procedures. In thirteen instances, communities wrote self-government charters. In ten instances, communities adopted an optional form to which was attached self-government powers. The charter communities are Anaconda-Deer Lodge County (1976), Butte-Silver Bow County (1976), Ennis (1976), Helena (1976), Billings (1976), Bridger (1976), Circle (1976), Sunburst (1976), Whitefish (1980), West Yellowstone (1980), Belgrade (1986), Great Falls (1986), and Troy (1987). Poplar and Madison County also adopted self-government charters in 1976, but both have since rescinded that action. The ten communities that added self-government powers to their forms of government are: Broadview, Browning, Clyde Park, Fort Peck, Fromberg, Glasgow, Hingham, Neihart, Red Lodge, and Virginia City.

Some self-government communities have experienced a portion of the local determination that constitutional convention delegates expected. Butte's movement from twenty percent unemployment in 1983 when the Anaconda Company suspended operations to six percent unemployment in 1989 was "enabled by self-government powers" in the judgment of Don Peoples, former Butte-Silver Bow executive: "Self-government powers are a catalyst, and Butte hasn't used them to the degree they should be used. It is abso-

53. MONT. CODE ANN. § 7-1-103 (1989) (emphasis added).

54. MONT. CODE ANN. § 7-1-106 (1989).

lutely desirable to have them."⁵⁶ In Troy, self-government powers permitted the city to purchase an electric utility company, buy power from the Bonneville Power Administration, and market electricity to its new customers.⁵⁶ Helena was enabled by self-government powers to construct a parking garage without first seeking legislative authorization.

Even general government units have benefited indirectly from the pioneering actions of self-government units. The 1979 Montana Legislature enacted Senate Bill 503 which permitted each local government to charge a fee for any authorized service it provides. The legislature's eye had been caught by the fee-setting practice of Madison County, then a self-government unit. The legislature in 1981 passed Senate Bill 96 which authorized all local governments to adopt a five percent charge for reviewing special improvement districts. The legislature's model was Helena's regulatory program, adopted pursuant to self-government powers.

Not all self-government communities have proceeded with the vigor of Butte and Helena. In 1977 a survey of self-government units found a good deal of misunderstanding and apathy. Only three of the eighteen governments contacted had passed self-government ordinances. In one instance, the chair of the governing body said that self-government powers had been exercised on sixteen separate occasions; the chief executive of the same government said that self-governing powers were yet to be used. A councilman in another self-government unit denied that his town had home rule.⁵⁷ Twelve years later some self-government units remain hesitant to use their enhanced ordinance-making discretion. Belgrade, for example, delayed departing from a forty-five hour work week in its city hall until the 1989 Legislature permitted all third-class cities to set their own hours. Such legislative dependency in routine matters was exactly what self-government powers were designed to eliminate.⁵⁸ In Great Falls, the city commission has not used self-government powers since they became effective in 1986. The commission has been essentially conservative, not viewing city problems as opportunities to implement self-government powers.⁵⁹

The reluctance of some self-government units to act more vigorously does not stem principally from legislatively created

55. *Peoples*, *supra* note 26.

56. *WEAVER & MATHRE*, *supra* note 27, at 39.

57. J. Lopach, *Implementation of Self-Government Powers in the State of Montana* (Nov. 14, 1977) (paper presented to the National Conference on Government, Denver, Colorado).

58. Interview with Mark Bordsen, Belgrade City Manager, (Aug. 24, 1989).

59. Interview with David Gliko, Great Falls City Attorney (Sept. 22, 1989).

prohibitions or ambiguity. The legislature, acting as the supreme partner under the residual home rule approach, was perfectly correct in declaring the prohibitions it did. The legislature, though, could have done more to clarify to what degree legislation enacted prior to 1975 limited the self-government units. This was a goal of House Bill 122, the massive recodification of local government law proposed in 1977. It would have sharply distinguished the authorizations for general powers units from the limitations on self-government units to prevent judges from interpreting general powers grants as prohibitions on self-government powers.

Because the legislature failed to complete its job, it fell to the Montana Supreme Court. The justices have had many opportunities to clarify and preserve the intent of the constitutional convention and legislature for home rule. Billings alone found itself in the supreme court on six occasions when it tried to use its self-government powers. The following evaluation of the justices' performance is both commendatory and critical.

Since self-government units began to implement their powers, the supreme court has decided at least nine cases that turned upon statutory and constitutional language concerning home rule.⁶⁰ In four of these cases the court upheld the action of the self-government unit.⁶¹ In the remaining five cases the court voided the local government activity.⁶² Judgment of the court's role, however, should not turn solely on the court's disposition of these nine cases. It should be based primarily on the court's support in its opinions of the constitutional convention's and legislature's intent.

It is clear that the constitutional convention and legislature wanted to give home rule units a boost in their governing discretion and yet maintain the legislature's supremacy in defining the

60. *State ex rel. Swart v. Molitor*, 190 Mont. 515, 621 P.2d 1100 (1981); *Billings Firefighters Local 521 v. City of Billings*, 214 Mont. 481, 694 P.2d 1335 (1985); *Tipco Corp. v. City of Billings*, 197 Mont. 339, 642 P.2d 1074 (1982); *D. & F. Sanitation Serv. v. City of Billings*, 219 Mont. 437, 713 P.2d 977 (1986); *Montana Innkeepers Assoc. v. City of Billings*, 206 Mont. 425, 671 P.2d 21 (1983); *Brueggemann v. City of Billings*, 221 Mont. 375, 719 P.2d 768 (1986); *Clopton v. Madison County Comm'n*, 216 Mont. 335, 701 P.2d 347 (1985); *Diefenderfer v. City of Billings*, 223 Mont. 487, 726 P.2d 1362 (1986); *Harlem, Thompson, & Parish v. City of Helena*, 208 Mont. 45, 676 P.2d 191 (1984).

61. *State of Montana ex rel. Swart v. Montana*, 190 Mont. 515, 621 P.2d 1100 (1981); *Billings Firefighters Local 521 v. City of Billings*, 214 Mont. 481, 694 P.2d 1335 (1985); *D. & F. Sanitation Serv. v. City of Billings*, 219 Mont. 437, 713 P.2d 977 (1986); *Diefenderfer v. City of Billings*, 223 Mont. 487, 726 P.2d 1362 (1986).

62. *Tipco Corp. v. City of Billings*, 197 Mont. 339, 642 P.2d 1074 (1982); *Montana Innkeepers Assoc. v. City of Billings*, 206 Mont. 425, 671 P.2d 21 (1983); *Brueggeman v. City of Billings*, 221 Mont. 375, 719 P.2d 768 (1986); *Clopton v. Madison County Comm'n*, 216 Mont. 335, 701 P.2d 347 (1985); *Harlem, Thompson, & Parish v. City of Helena*, 208 Mont. 45, 676 P.2d 191 (1984).

scope of local authority. The legislature's approach was to set out the four categories of prohibitions on self-government units, provide that limitations on general powers government would not be applicable, and provide that self-government powers should be liberally construed. The Montana Supreme Court deserves praise to the degree that its constitutional and statutory interpretations developed a clear framework for the guidance of local governments. In seven of the nine self-government powers cases, the court provided this kind of guidance.⁶³ In two cases it created unnecessary but not disastrous confusion.⁶⁴

The Montana Supreme Court did not start out well in its first self-government powers case. In *State of Montana ex rel. Swart v. Molitor*⁶⁵ the court upheld a Madison County ordinance and accompanying fee requiring that final subdivision plats and certificates of survey be reviewed for errors and omissions by a land surveyor. The question before the court was whether Madison County was mandated by the state to do otherwise: "does the fact that a self-governing unit is mandatorily subject to laws which regulate planning and zoning preclude the unit from prescribing a fee for reviewing certificates of survey where the state statutes are silent on the subject."⁶⁶ The pertinent language in state law was: "A local government with self-government powers is subject to the following provisions: . . . all laws which require or regulate planning or zoning."⁶⁷ To uphold the ordinance, the court unnecessarily went beyond the "mandatory provisions" section of the self-government powers code. All that was necessary for deciding the case was, first, a finding that state laws mandating all local governments to follow certain planning and zoning policies and procedures did not address the topic of the Madison County ordinance and, second, a citation of the instruction to construe liberally self-government powers.⁶⁸ Madison County had not ignored an express state mandate, that is, acted "other than as provided."⁶⁹ It was free to act as

63. *Tipco Corp. v. City of Billings*, 197 Mont. 339, 642 P.2d 1074 (1982); *D. & F. Sanitation Serv. v. City of Billings*, 219 Mont. 437, 713 P.2d 977 (1986); *Montana Innkeepers Assoc. v. City of Billings*, 206 Mont. 425, 671 P.2d 21 (1983); *Brueggeman v. City of Billings*, 221 Mont. 375, 719 P.2d 768 (1986); *Clopton v. Madison County*, 216 Mont. 335, 701 P.2d 347 (1985); *Diefenderfer v. City of Billings*, 223 Mont. 487, 726 P.2d 1362 (1986); *Harlem, Thompson, & Parish v. City of Helena*, 208 Mont. 45, 676 P.2d 191 (1984).

64. *State ex rel. Swart v. Molitor*, 190 Mont. 515, 621 P.2d 1100 (1981); *Billings Firefighters Local 521 v. City of Billings*, 214 Mont. 481, 694 P.2d 1335 (1985).

65. 190 Mont. 515, 621 P.2d 1100 (1981).

66. *Id.* at 520-21, 621 P.2d at 1103-04.

67. MONT. CODE ANN. § 7-1-114 (1)(e) (1989).

68. MONT. CODE ANN. § 7-1-106 (1989).

69. MONT. CODE ANN. § 7-1-114(2) (1989).

it chose because the statute was silent.

To decide the *Molitor* case, the court resorted to statutory language from a different category of prohibitions on self-government units, "consistency with state regulation required."⁷⁰ The court stated:

Madison County's ordinance does not prescribe a lower standard than required by the state statute, nor is it less stringent. Therefore, under the statutory definition of inconsistency found in section 7-1-113(2), MCA, Madison County's ordinance is not the exercise of a power inconsistent with state law.⁷¹

The legislature had provided that this category of state prohibitions would be applicable only "if a state agency or officer is directed to establish administrative rules governing the matter or if enforcement of standards or requirements established by statute is vested in a state officer or agency."⁷² The court in *Molitor* made no such critical finding.

The *Molitor* court further confused Montana's statutory law concerning self-government powers when it used Montana Code Annotated Section 7-1-103 to qualify Montana Code Annotated Section 7-1-114(1)(f). The former section states that only statutory limitations that are "specifically applicable to self-government units" can restrict a self-government unit "which elects to provide a service or perform a function that may also be provided or performed by a general power government unit."⁷³ The latter section states that self-government units are subject to "[a]ny law directing or requiring a local government or any officer or employee of a local government to carry out any function or provide any service."⁷⁴ The language of the two sections clearly addresses two different situations—one optional and the other mandatory—and the court was wrong to confuse the law by juxtaposing the sections.

The other case in which the Montana Supreme Court wrongly interpreted the state's self-government code was *Billings Firefighters Local 521 v. City of Billings*.⁷⁵ Billings, pursuant to its self-government charter, adopted an ordinance "to create a fire service that is exempt from all but two provisions of state law regarding municipal fire departments."⁷⁶ The question the court considered

70. MONT. CODE ANN. § 7-1-113 (1989).

71. *Molitor*, 190 Mont. at 521, 621 P.2d at 1104.

72. MONT. CODE ANN. § 7-1-113(3) (1989).

73. MONT. CODE ANN. § 7-1-103 (1989).

74. MONT. CODE ANN. § 7-1-114(1)(f) (1989) (emphasis provided).

75. 214 Mont. 481, 694 P.2d 1335 (1985).

76. *Id.* at 483, 694 P.2d at 1336.

was similar to the *Molitor* situation: whether a self-government unit can exempt itself from statutory provisions mandating "fire departments in every city or town organized under whatever form of municipal government."⁷⁷ Conflicts between the self-government ordinance and state law existed with respect to "qualifications for firefighters, physical examination of applicants for the position of firefighter, and funding of group insurance for firefighters."⁷⁸

As in the *Molitor* case, the court should have proceeded by applying Montana Code Annotated Section 7-1-114(1)(f). The legislature in Montana Code Annotated part 41 of title 7, chapter 33 had directed all local governments to have a fire department. The pertinent question, then, was whether Billings was "acting other than as provided,"⁷⁹ that is, did the mandatory fire service statute specifically cover the subject matter of the self-government ordinance. Instead, the court chose to use extraneous constitutional and statutory provisions to decide the case.

First the court cited the "consistency with state regulation required" section of the self-government code⁸⁰ and then argued:

Because the state statutes regarding the qualifications of physical examination of and group insurance for firefighters define minimum state standards and the Billings Ordinance sets forth no standards governing these areas of legislative concern, the local provisions are "lower or less stringent than those imposed by state law."⁸¹

The legislature, however, intended Montana Code Annotated Section 7-1-113 to apply to the situation of state-local concurrent powers.⁸² Its application requires a finding that the legislature has vested a state agency with administrative responsibility parallel to the identical subject area within the local government's jurisdiction. In the *Billings Firefighters* case, however, the court made no such finding and appeared to confuse legislating a regulatory statute with direct state administrative involvement.

The court also misused the Montana Constitution in its opinion voiding the Billings ordinance. Section 5(3) of article XI reads: "Charter provisions establishing executive, legislative, and administrative structure and organization are superior to statutory provi-

77. MONT. CODE ANN. § 7-33-4102(1) (1989).

78. *Billings Firefighters*, 214 Mont. at 487, 694 P.2d at 1338.

79. MONT. CODE ANN. § 7-1-114(2) (1989).

80. MONT. CODE ANN. § 7-1-113 (1989).

81. *Billings Firefighters*, 214 Mont. at 488, 694 P.2d at 1338.

82. See, State Commission on Local Government, *Voter Review Laws, Comments, and Summary*, 2 LOCAL GOV'T REV. BULL. 113 (June 2, 1975).

sions." This statement has no pertinence to an ordinance passed by a municipality or county with a self-government charter. The court, however, concludes "that the three statutory provisions cited above are not executive, legislative or administrative in nature."⁸³ The court's point is that the constitutionally provided charter's superiority does not come into play because the fire department statute deals with standards and not structure or organization. This argument misses the point. The issue is the legality of a Billings ordinance, not of the charter provisions themselves.

In seven other self-government powers cases the Montana Supreme Court worked effectively with the several sections of the self-government code, occasionally correcting implicitly the mistakes of the *Molitor* and *Billings Firefighters* cases.⁸⁴ In *Tipco Corp. v. City of Billings*,⁸⁵ the court voided on equal protection grounds an ordinance banning door-to-door solicitation by some merchants.⁸⁶ In its dicta, however, the court significantly distinguished the state's Dillon's Rule tradition from the new era of liberal construction of local government powers:

We expressly overrule statements in *DeLong* that a county, city or town can only exercise powers expressly conferred on it by the Constitution and statutes or arising by necessary implication and that any reasonable doubt concerning such powers should be resolved against the municipality. This was the law under Montana's 1889 Constitution and cases decided thereunder. It is not the law under Montana's 1972 Constitution and statutes enacted thereunder.⁸⁷

Four years later, in *D. & F. Sanitation Service v. City of Billings*, the court took similar action, here even more pointedly with respect to self-government powers:

We expressly overrule statements in *City of Billings v. Weatherwax* . . . that municipalities have only such power as is granted

83. *Billings Firefighters*, 214 Mont. at 487, 694 P.2d at 1338.

84. *Tipco Corp. v. City of Billings*, 197 Mont. 339, 642 P.2d 1074 (1982); *D. & F. Sanitation Serv. v. City of Billings*, 219 Mont. 437, 713 P.2d 977 (1986); *Montana Innkeepers Assoc. v. City of Billings*, 206 Mont. 425, 671 P.2d 21 (1983); *Brueggemann v. City of Billings*, 221 Mont. 375, 719 P.2d 768 (1986); *Clopton v. Madison County Comm'n*, 216 Mont. 335, 701 P.2d 347 (1985); *Diefenderfer v. City of Billings*, 223 Mont. 487, 726 P.2d 1362 (1986); *Harlem, Thompson, & Parish v. City of Helena*, 208 Mont. 45, 676 P.2d 191 (1984).

85. 197 Mont. 339, 642 P.2d 1074 (1982).

86. *Id.* at 345, 642 P.2d at 1078. The Montana Supreme Court used constitutional grounds in another case to void a self-government ordinance. In *Harlem, Thompson, & Parish v. City of Helena*, 208 Mont. 45, 676 P.2d 191, 194 (1984), the court held a business license tax on attorneys to be violative of MONT. CONST. art. VII, § 2, ch. 3.

87. *Id.* at 344, 642 P.2d at 1077 (overruling statements in *DeLong v. Downes*, 175 Mont. 152, 573 P.2d 160 (1977)).

them by the legislature. This was the law under the 1889 Constitution. It is not the law under the 1972 Constitution. Under the new Constitution, the City of Billings has all powers save those expressly prohibited.⁸⁸

More important than recognizing the theoretical underpinnings of self-government powers was the court's proper interpretation of the self-government code. In *D. & F. Sanitation Service*, the court upheld the city's regulation of garbage service against a charge that no statutory authority existed for the ordinance.⁸⁹ Focusing on the "powers denied" section of the self-government code,⁹⁰ the court stated:

The only way the doctrine of preemption by the state can co-exist with self-government powers of a municipality is if there is an express prohibition by statute which forbids local governments with self-government powers from acting in a certain area. The doctrine of implied pre-emption, by definition, cannot apply to local governments with self-government powers The powers specifically denied to local governments are enumerated in section 7-1-111, M.C.A.⁹¹

Here the court declared that it would not treat ambiguous statutory provisions as prohibitions on self-government units.

Two cases dealt with the "powers requiring delegation" section of the self-government code.⁹² In *Montana Innkeepers Association v. City of Billings*,⁹³ the court ruled that a tax on renting a room is a sales tax and therefore void: "The power to tax the sale of goods or services has not been delegated to local governments."⁹⁴ Similarly straightforward was the decision in *Brueggemann v. City of Billings*.⁹⁵ Here the court found a tax on the revenues generated by attorneys to be a sales tax, prohibited by Montana Code Annotated Section 7-1-112(1).⁹⁶ In both cases the court worked with the applicable category of prohibitions on self-government units, interpreted its language, and made its decision.

The remaining two cases demonstrate that the Montana Supreme Court has in fact given the troublesome sections of the self-

88. *D. & F. Sanitation Serv. v. City of Billings*, 219 Mont. 437, 445, 713 P.2d 977, 982 (1986) (*Weatherwax*, ___ Mont. ___, 630 P.2d 1216 (1981)).

89. *Id.* at 443-44, 713 P.2d 980-81.

90. MONT. CODE ANN. § 7-1-111 (1989).

91. *D. & F. Sanitation Serv.*, 219 Mont. at 444-45, 713 P.2d at 982.

92. MONT. CODE ANN. § 7-1-112 (1989).

93. 206 Mont. 425, 671 P.2d 21 (1983).

94. *Id.* at 429, 671 P.2d at 23.

95. 221 Mont. 375, 719 P.2d 768 (1986).

96. *Id.* at 377-78, 719 P.2d at 770.

government code, Montana Code Annotated Section 7-1-113, "Consistency with state regulation required" and Section 7-1-114, "Mandatory provisions," a proper reading. In *Clopton v. Madison County Commission*,⁹⁷ the court decided "whether or not sections 7-13-201 through 7-13-243, MCA, are mandatory requirements for a charter form of government establishing a refuse disposal district."⁹⁸ The decision of the court was that these provisions did not limit self-government units because they did not implicate Montana Code Annotated Section 7-1-114(f):

Sections 7-13-201 through 7-13-243, MCA, do not direct or require a local government to provide a service within the meaning of section 7-1-114(1)(f), MCA. Sections 7-13-201 through 7-13-243, MCA, contain provisions that are not consistent with the directives or requirements anticipated by section 7-1-114(1)(f), MCA. For example section 7-13-211, MCA, allows sufficient public protest to bar action on a refuse disposal district.⁹⁹

Here, again, the court focused carefully on the exact language of the pertinent section. It ruled that the implication of Montana Code Annotated Section 7-1-114(1)(f) depended on a finding of a state mandate to all local governments.¹⁰⁰ Unlike its reasoning in *Molitor*,¹⁰¹ the court did not borrow the language of Montana Code Annotated Section 7-1-103, which governs elective provision of services, to decide a case arising under Montana Code Annotated Section 7-1-114(1)(f), which governs situations where the state mandates self-government units to provide a service.

In 1986 the court gave further consideration to Montana Code Annotated Sections 7-1-113 and 7-1-114. A Billings ordinance required developers to pay a surcharge, calculated at five percent of the total cost of improvements, prior to creation of a special improvement district.¹⁰² The plaintiff in *Diefenderfer v. City of Billings*¹⁰³ argued that statutory provisions¹⁰⁴ were controlling because they mandated a local government service, established affirmative state control of the area, and established an exclusive funding arrangement for special improvement district expenses.¹⁰⁵ The court quickly turned aside the Montana Code Annotated Section 7-1-114

97. 216 Mont. 335, 701 P.2d 347 (1985).

98. *Id.* at 338, 701 P.2d at 349.

99. *Id.* at 339-40, 701 P.2d at 350.

100. *Id.*

101. *See supra* text accompanying notes 65-74.

102. *See Diefenderfer v. City of Billings*, 223 Mont. 487, 726 P.2d 1362 (1982).

103. *Id.*

104. MONT. CODE ANN. §§ 7-12-4169 to -4122 (1989).

105. *Diefenderfer*, 223 Mont. at 488, 726 P.2d at 1362.

“Mandatory provisions” argument and focused on the Montana Code Annotated Section 7-1-113 “consistency with state regulation” issue, giving the statutory provision a critical reading that was absent in the *Billings Firefighters* case.¹⁰⁶ The conclusion of the court was that the argument concerning concurrent jurisdiction and inconsistent local regulation was inappropriate: “Nor do we find the area to be affirmatively subjected to state control. There is no state agency authorized to establish administrative rules or enforce the standards prescribed by statute.”¹⁰⁷

The Montana Supreme Court’s interpretation of the constitution and self-government code in these nine cases has been sometimes flawed but generally reflective of the convention’s and legislature’s intent. In *Diefenderfer*, the most recent case, the court honored the legislature’s pointed instruction to the judiciary: “The powers of local self-governing units are to be liberally construed pursuant to section 7-1-100, MCA. Therefore, [the Billings ordinance] was a valid exercise of its self-governing power.”¹⁰⁸ Even though the spirit of the court in self-government powers cases has been proper, its crafting has been occasionally clumsy. But a sufficient number of times the justices have demonstrated attentiveness and proficiency in their work with respect to each of the key provisions of the self-government code. The court’s underlying disposition in the self-government powers cases should obviate any move to correct its mistakes by constitutional reform.

Similarly, the constitution should not make revisions in the legislature’s implementation of self-government powers—except concerning revenue matters, which will be discussed below. The reason is that the essence of Montana’s version of home rule is legislative supremacy and local residual discretion. Ordinarily, then, legislative judgment should prevail, and legislative error should be corrected by the legislature. The discussion above of nine self-government powers cases pointed out some statutory language in need of legislative revision. The present language of Montana Code Annotated Section 7-1-114(1)(f) is, in its sweep, not sufficiently in tune with the constitutional intent for self-government powers. It sets out one of the mandatory provisions for self-government units: “Any law directing or requiring a local government or any officer or employee of a local government to carry out any function or provide any service.” The problem with the statute is that it adopts by careless reference pre-home rule legislation as the

106. *Diefenderfer*, 223 Mont. at 489-90, 726 P.2d at 1363-64.

107. 223 Mont. at 490, 726 P.2d at 1363.

108. *Id.* at 490, 726 P.2d at 1364.

state mandates to self-government units. The legislature should amend the section to read: "Any law *specifically* directing or requiring a local government *with self-government powers* to carry out any function or provide any service."

The constitutional convention meant to enhance the routine governing discretion of home rule communities. Legislation enacted prior to the availability of self-government powers should not be applied as limitations on self-government units unless legislators so decide explicitly. For example, self-government powers are a "misnomer" if a home rule city is restricted in the management of its fire department by statutes pre-dating the 1972 Constitution.¹⁰⁹ The legislature should eliminate this travesty by at least assuming the responsibility of approving specifically each state mandate placed on self-government units.

V. LOCAL OPTION TAXES

The 1972 Montana Constitutional Convention was broadly reform-minded concerning local government. The delegates' primary goal was to make local government stronger and more responsible to its citizenry. About its proposal, the local government committee wrote: "Flexibility' and 'accountability' perhaps are over-used at this Constitutional Convention, but no terms better describe the goals embodied in the majority proposal of the Local Government Committee."¹¹⁰ The reform goals of the delegates were impeded, however, by both self-imposed restrictions and unforeseen developments. Continuing legislative supremacy meant, in the delegates' own assessment, that enhanced empowerment of local governments would not extend to taxation. Delegate Thomas Ask, a leader on the local government committee, said on the convention floor:

Under a charter, all the Legislature is going to do is set the limits . . . [a]nd I assume one of the limits will be taxation . . . [t]hey can operate within that and they don't have to follow any of the other statutes, except for taxation or wherever they're limited.¹¹¹

Another delegate further spelled out the convention's fears about overly broad local discretion: "We won't have a situation of little city-states under the proposal that we have here."¹¹² Subsequently the Montana Legislature took actions that probably circumscribed

109. Interview with Robert Stockwell, Great Falls City Manager (Sept. 22, 1989) [hereinafter *Stockwell*].

110. II TRANSCRIPTS, *supra* note 3, at 785 (Local Gov't Committee Comments).

111. VII TRANSCRIPTS, *supra* note 3, at 2527-28.

112. *Id.* at 2531 (Delegate Arness speaking).

local governments even more than the convention delegates had contemplated. The legislature denied to self-government units the authority to use local income and sales taxes, as convention delegates had predicted. But the legislature went even further with its restrictions, repeatedly adding to the responsibilities and expenses of local governments and reducing the efficacy of the property tax, the local governments' only significant source of revenue. Because the state constitution contains the judgment of Montanans about what governmental principles are fundamental, a legitimate inquiry is whether the principles of "flexibility" and "accountability" concerning local revenue discretion need further attention, especially given the local revenue predicament that Montanans face today.

Contemporary local revenue problems are more of an urban than a rural phenomenon. For years cities and urban counties have felt that their revenue needs were not adequately addressed by their lobbying associations, the Montana League of Cities and Towns and the Montana Association of Counties. In 1981 six cities and six counties formed a new association because of their poor financial condition. The members were Butte-Silver Bow, Billings, Great Falls, Missoula, Helena, Bozeman, and the counties of Yellowstone, Cascade, Missoula, Lewis and Clark, and Gallatin. The Urban Coalition is no longer functioning, but there is still a feeling among its former members that the revenue situation of larger local governments deserves special attention. Recently Great Falls withdrew from the Montana League of Cities and Towns because the League's too frequent position was, "we have to watch out for small cities."¹¹³ The judgment of the Great Falls city manager is that "the Montana League of Cities and Towns and the Montana Association of Counties really represent small towns and rural counties, and those governments don't want local option taxes."¹¹⁴

Much of the effort of the Urban Coalition went into documenting its members' poor financial condition. For example, the Urban Coalition's June, 1982, position paper pointed out that the state's seven most populous counties pay seventy-five percent of the state's general assistance welfare costs while having fifty-six percent of the state's population and pay \$7 million in district court costs each year, compared to the state's \$375,000. The paper also said that the taxable valuation (adjusted for inflation) of the coalition's members declined twelve percent between 1979 and

113. *Stockwell*, *supra* note 109.

114. *Id.*

1982 and property taxes increased by twenty-two percent during the same period. There are indications that the situation has grown worse in recent years. In 1978 a mill would raise \$92,000 in property tax revenue in Cascade County. In 1989 the figure was \$85,000. If the Montana Legislature had not exempted certain properties from the local property tax, a Cascade County all-purpose mill would have raised \$168,000 in 1989.¹¹⁵ The annual deficit for operating the district court in Cascade County runs between \$650,000 and \$700,000, and the county has regularly negotiated loans from the state Board of Investments.¹¹⁶

Any number of state governmental actions have weakened the revenue situation of local governments. In the 1983 Legislature alone, 550 bills were introduced that could have affected the level of local property taxes.¹¹⁷ The decisions most frequently mentioned by local government officials are removing business inventories and farm machinery from property tax rolls, reducing the assessment on Burlington Northern's Montana property, aligning the tax rate on commercial properties with other properties, and reducing motor vehicle license fees. At the same time the legislature has regularly added to the cost of running a local government, for example, by doubling the fee for jurors. Some legislators recognized the tight situation in which they had placed local governments and their residents. Representative Verner Bertelsen observed in 1983: "We've got to figure out some way to put back into local government funding not only the loss they've suffered because of our actions, but also to give them the control of where it comes from and how it's used."¹¹⁸ Lacking amelioration by the legislature, local officials warned that there soon would be a property tax revolt.

The predicted citizen resistance came to fruition in 1986 with voter adoption of Initiative 105. That measure froze property taxes at their 1986 levels and invited the legislature to supersede the freeze by acting prior to July 1, 1987, to reduce property taxes and establish other revenue sources. The intensity of the electorate's dissatisfaction becomes obvious when the fate of Constitutional Initiative 27 is considered. On the same November 1986, election day, voters rejected an attempt to abolish all property taxes, but only by the margin of 140,168 to 176,437. Arguments from the "1986 Voter Information Pamphlet" give some explanation of what

115. Interview with Jack Whitaker, Chairman, Cascade County Commission (Sept. 22, 1989).

116. Interview with Patrick Paul, Cascade County Attorney (Sept. 22, 1989).

117. Missoulian, April 3, 1983, at 2, col. 1.

118. *Id.*

was behind the voters' mood. Between 1980 and 1986 property taxes in Montana had risen more than fifty percent, placing the state second in the nation in terms of property taxes paid as a percentage of income. Property taxes had come to represent the principal source of local governmental revenue: sixty percent of all school funds, nearly fifty percent of all county funds, and fifty percent of all city funds.

The Montana Legislature failed to accept the challenge of Initiative 105 and reform the state's tax system. Hostility and inactivity with respect to local government tax reform have been the typical legislative responses since 1977 when the proposed recodification of local government law was rejected. The legislature again rejected the proposed code's local option taxes in 1979. In 1985, the House of Representatives voted down on third reading House Bill 804, which would have allowed local governments to impose an income or sales tax after the approval of the local electorate. A similar measure met the same fate in 1987. That session's local option tax bill would have authorized a county or municipality to impose any type of tax not prohibited by law, subject to the voters' approval. Included in the authorization would have been a local sales tax and a local income tax.¹¹⁹

The Montana Legislature has repeatedly refused to surrender to local governments its power over local fiscal affairs. Legislators have not accepted the central argument of local government officials that taxing authority should be linked with responsibility for providing services. Instead, legislators have continued to mandate duties and withhold taxing discretion. The apparent openness of the Montana public to local option taxes has not been persuasive with legislators. A 1986 poll asked Montana voters their opinions about various methods of increasing public revenues.¹²⁰ The following figures represent the aggregate percentage of respondents who favored "strongly" and "somewhat" the different options: state sales tax—fifty-two percent; state-wide hotel and motel room tax—sixty-eight percent; state-run lottery—seventy-five percent; eliminating some existing personal income tax and business tax deductions—forty-two percent; and local option taxes—seventy-two percent. Included in the definition of local option tax was voter approval before implementation. The pertinent conclusion from this data is that the large majority of Montanans who favor local option taxes do not think that the legislature is a necessary check

119. MONT. LEGISLATIVE COUNCIL, FUNDING LOCAL GOVERNMENT INFRASTRUCTURE: A REPORT TO THE 50TH MONTANA LEGISLATURE, 72 (Dec. 1986).

120. Flemming & Lenihan, *The Montana Poll*, 24 MONT. BUS. Q., 18 (Summer 1986).

on local tax policy. Local residents favor local governments having enhanced revenue-raising discretion as long as they, the voters, can have final say on adoption.

The legislature's stubborn refusal to breathe new life into the constitutional principles of local government flexibility and accountability will probably be overcome only by one of two methods: local government fiscal crisis or constitutional revision. The legislature's characteristic mode of activity—distracted, fragmented, and pluralistically provincial treatment of too many topics—would be set aside in the instance of local option taxes if all concerned parties were crying doom. Waiting for such a day, however, is irresponsible and unnecessary. The people of Montana can be both consistent with their immediate constitutional past and responsible sovereigns in amending their constitution to bring about a measure of local fiscal autonomy.

Despite the long-time failure of the legislature, the needed constitutional revision should be cautious, respectful of not only the plight of local governments but also existing constitutional themes and statewide political realities. The constitutional locus of the reform should be article XI, section 6, "Self-government powers." An amendment should add a final sentence, to read: *Legislative prohibitions shall not include a voter-approved income tax.* The conservative nature of this reform stems from its being limited to self-government units, tied to the existing state income tax, and conditioned upon a referendum.

Article XI, as it exists, contains an excellent legal framework that should continue to guide the practices of Montana local government. One of its central principles is that self-government units have more discretion than local governments with general powers. A justification for the special status of self-government units is voter approval. Enhanced local government power, therefore, is reserved for communities that have gone through the process of popular reflection and judgment. The constitutional amendment to make available a local option income tax should honor this fundamental dichotomy among local governments. Only self-government units should enjoy the option of a local income tax.

The constitutional amendment concerning local taxing power should be limited to the income tax. The income tax is an established part of the state's system of raising revenue. It does not share in the controversy that surrounds the sales tax. A bureaucracy of experienced employees and settled procedures oversees its administration. Using the state income tax as the vehicle for administering a local income tax would create a minimum of confu-

sion and adjustment.

Local politics would be a sufficient check on the wisdom of providing and retaining a local income tax. Local residents, far more capably than a distant legislature, could assess the arguments of local officials concerning such issues as the need for the tax, its use, and its impact on the local property tax. Local officials would be the best discussants of the measure's benefits and disadvantages, knowing more than anyone the intricacies of local needs, finances, and politics. Some self-government communities would adopt a local income tax, and others would undoubtedly resolve the tangle of issues the other way. In either instance, the constitution would have made true flexibility and accountability the factors of local fiscal politics, replacing the baneful paradox of legislative arrogance and timidity.

VI. CONCLUSION

Article XI is one of the most solid parts of the Montana Constitution. The constitution's reputation as a thoughtful, progressive, and highly functional document is due in no small part to article XI. It incorporated the best thinking and practices nationally concerning local government. It continues to provide a legal framework for effective local government in the state. There is nothing wrong with article XI. Any revisions of article XI that were advocated in this essay are to correct legislative failings.

This essay discussed four problems related to local government and asked in each case whether the best solution was constitutional revision. These problems suggested themselves because of the principal concerns of the constitutional convention delegates in 1972 and of the local government officials who have worked under the new state constitution since that time. The problems discussed were insufficient structural flexibility, inadequate county powers, overly restrictive limitations on self-government powers, and too limited revenue-raising discretion. The conclusions with respect to recommended solutions were: (1) local governments presently have sufficient structural flexibility and have used such opportunities well; (2) the addition of a facilitative annexation provision in the constitution would keep counties in the desirable mode of rural governments functioning as administrative adjuncts of the state; (3) judges should be more respectful of the discrete nature of the legislative limitations on self-government powers, and the legislature should take steps so that pre-1972 grants of general powers could not be applied unwittingly to self-government units; and, (4) the constitution should guarantee the availability of a local option

income tax to self-government units.

The further conclusion of this essay is that, from the perspective of local government law and practice, the people of Montana should not call a constitutional convention to consider reforms. Today it is crucial that the state constitution enhance the ability of municipalities to be the principal government in urban areas and of self-government units to tax incomes. These reforms, however, can be achieved by amendment. A convention should be resorted to only when the solution to a critical governmental problem turns upon the application of up-to-then unarticulated basic principles, is too complex for the amendment process, or requires full discussion and has been repeatedly ignored by the legislature. The ideas for local government reform presented here do not require opening up the Montana Constitution and jeopardizing all that is good within it.