

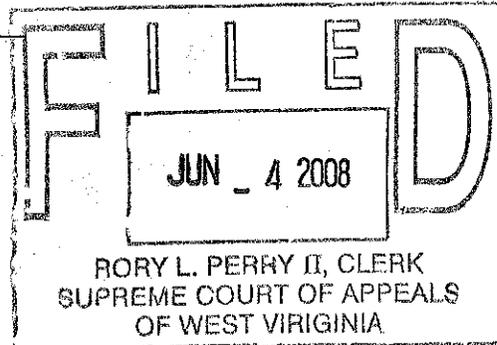
IN THE SUPREME COURT OF APPEALS  
STATE OF WEST VIRGINIA

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No. 33851

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THE COMMITTEE TO REFORM HAMPSHIRE  
COUNTY GOVERNMENT, MICHAEL HASTY,  
VERA ANDERSON, FRANK WHITACRE,  
KAY DAVIS, ROBERT WALKER,  
SHIRLEY CARNAHAN, and MARVIN HOTT,



Appellees-Plaintiffs Below,

V.

The HONORABLE RICHARD THOMPSON, Speaker of the  
West Virginia House of Delegates, and the  
HONORABLE EARL RAY TOMBLIN, President  
of the West Virginia Senate,

Appellants-Defendants Below.

**BRIEF FOR APPELLEES**

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KIND OF PROCEEDING, CIRCUIT COURT RULING, STANDARD OF REVIEW, AND  
STATEMENT OF FACTS

The appellants' brief fairly describes the prior proceedings in this case and its facts. Their brief also correctly identifies *de novo* as the applicable standard for review the circuit court's rulings of law.

ALLEGED ASSIGNMENTS OF ERROR

The circuit court committed no error. It correctly concluded that the Legislature has a duty to implement Article IX, § 13 of the Constitution and to respond to a properly presented request by a county to put before its voters a proposal to alter, modify or reform county government. This duty is not ministerial, but even if it were, if the Constitution requires it, then the Legislature must perform it. Satisfaction of that duty could hardly be said to violate Article VI, § 16, which requires of legislators an oath to support the Constitution.

A holding that "the Legislature had a constitutional duty to pass an unconstitutional act" would surely be reversible error. Appellants' Assigned Error B. Of course, the circuit court never made such a ruling. Rather, it correctly held that the proposed Hampshire County reform would be constitutional and that the Legislature had a constitutional duty to give that county's citizens the opportunity to vote on it.

In relying on the plain meaning of Article IX, § 13 and in giving effect to the important democratic values of self-determinism embodied in that section and in Article III, § 3, this Court reached the correct result in *Spencer v. Taylor County Commission*, 169 W.Va. 37, 285 S.E.2d 656 (1981). The Legislature has a mandatory duty to respond to a county's valid request for an alternative form of government and to permit the county's voters to adopt or reject the proposal.

The Legislature's obligation to comply with the Constitution does not expire at the end of the legislative session.

#### POINTS AND AUTHORITIES

I. A COURT MAY INTERPRET THE CONSTITUTION TO DETERMINE A LEGISLATIVE DUTY WITHOUT INTRUDING UPON LEGISLATIVE PREROGATIVE.

*West Virginia Education Association v. The Legislature of the State of West Virginia*, 179 W.Va. 381, 383, 369 S.E.2d 454, 456 (1988).

*State ex rel. Board of Education v. Rockefeller*, 167 W.Va. 72, 281 S.E.2d 131 (1981).

*Marbury v. Madison*, 5 U.S. 137 (1803).

II. THE LEGISLATURE HAS A MANDATORY DUTY TO ENACT THE ENABLING LEGISLATION THAT WILL PERMIT HAMPSHIRE COUNTY CITIZENS TO VOTE ON THE PROPOSED ALTERNATIVE FORM OF GOVERNMENT.

A. Article IX, § 13 Creates a Right to Local Autonomy That the Legislature Cannot Override Unless Necessary to Abide by the Constitution.

West Virginia Constitution, Article III, § 3 and Article IX, § 13.

*Taylor County Commission v. Spencer*, 169 W.Va. 37, 285 S.E.2d 656 (1981).

Robert M. Bastress, Jr., *Localism and the West Virginia Constitution*, 109 W. VA. L. REV. 683 (2007).

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

B. Section 13 Implements the Fundamental Principles of Democracy and Republicanism That Inspired and Provide the Foundation of Our Constitution.

ROBERT M. BASTRESS, *THE WEST VIRGINIA CONSTITUTION: A REFERENCE GUIDE* (1995).

John E. Stealey, III, *Quiet Revolution in Hampshire County: Who Says County Government Has to Be a Three-Member Throwback to Virginia's Old County Court System?* SUNDAY GAZETTE MAIL, Sec. C at 1 & 4, Mar. 26, 2006.

C. The 1880 Amendment Did Not Affect the Mandatory Nature of the Legislature's

Duty to Act in Response to a County's Application for a New Form of Government.

*State ex rel. Boards of Education v. Chafin*, 180 W.Va. 219, 376 S.E.2d 113 (1988).

- III. A COUNTY MAY ALTER ITS COUNTY COMMISSION BY CREATING A TRIBUNAL WHOSE MEMBERS ARE ELECTED ONLY BY THE VOTERS WITHIN EACH MEMBER'S DISTRICT.

West Virginia Constitution, Article VI, § 39a and Article IX, § 13.

*McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).

*Taylor County Commission v. Spencer*, 169 W.Va. 37, 285 S.E.2d 656 (1981).

- IV. THE LEGISLATURE'S DUTY UNDER ARTICLE IX, § 13 TO HONOR A COUNTY'S REQUEST FOR A REFERENDUM ON COUNTY GOVERNMENT REFORM DOES NOT EXPIRE WITH THE END OF THE LEGISLATIVE TERM.

West Virginia Constitution, Article IX, § 13.

*Crain v. Bordenkircher*, 193 W. Va. 362, 456 S.E.2d 206 (1995).

*Taylor County Commission v. Spencer*, 169 W.Va. 37, 285 S.E.2d 656 (1981).

*Pauley v. Kelly*, 162 W.Va. 672, 718, 255 S.E.2d 859, 883 (1979).

ARGUMENT

- I. A COURT MAY INTERPRET THE CONSTITUTION TO DETERMINE A LEGISLATIVE DUTY WITHOUT INTRUDING UPON LEGISLATIVE PREROGATIVE.

Appellants' brief (e.g., pages 10-11) talks in terms of judicial "edict" and the courts' inability to impose a "ministerial" duty on the Legislature because of that body's inherent power to exercise discretion. None of that is relevant to this case. What the circuit court rendered, and all that the appellees seek, is a judicial declaration about the meaning of a particular constitutional provision. That is what our Constitution contemplates that courts will and should do. "It is emphatically the province and duty of the judicial department to say what the law is." *United States v. Nixon*, 418

U.S. 683, 703 (1974), quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803); accord, W. Va. Constitution, Art. VIII, § 3 (“The [Supreme Court of Appeals] shall have appellate jurisdiction . . . in cases involving personal freedom or the constitutionality of a law”). The United States Supreme Court has observed that “the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court [interprets] the Constitution, it [acts] within the province of the Judicial Branch, which embraces the duty to say what the law is. [*Marbury*.] When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.” *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997). In other words, the Legislature may have broad discretion in making law, but courts define what constraints the Constitution imposes on that discretion.

Limits on legislative prerogative pervade the Constitution. Most notably, Article III prohibits the Legislature from enacting laws that infringe upon enumerated individual rights. If the Legislature violates one of those provisions, it is a court’s somber obligation to invalidate the enactment. *E.g.*, *State ex rel. Roy Allen S. v. Stone*, 196 W.Va. 624, 474 S.E.2d 554 (1996); *State ex rel. City of Princeton v. Buckner*, 180 W.Va. 457, 377 W.Va. 139 (1988). The Constitution also constricts legislative discretion by mandating particular actions. Article VI, § 18 requires the Legislature to assemble every year on the second Wednesday of January. According to Article VI, § 22, that assembly must last sixty days, and unless appropriate procedures are followed to extend the session, any legislative action beyond that period can be declared void by this Court. *State ex rel. Heck’s*

*Discount Centers v. Winters*, 147 W.Va. 861, 132 S.E.2d 374 (1963). Article VI, § 51 requires the Legislature to enact annually a budget bill. That budget must include sufficient funding to support the operations of the constitutional offices established by Article VII. *State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 207 S.E.2d 421 (1973). Article XII, § 1 commands the Legislature to provide for a thorough and efficient system of education, and if the Legislature fails to provide adequate funding, this Court can declare that failure to be unconstitutional. *West Virginia Education Association v. The Legislature of the State of West Virginia*, 179 W.Va. 381, 383, 369 S.E.2d 454, 456 (1988); *State ex rel. Board of Education v. Rockefeller*, 167 W.Va. 72, 281 S.E.2d 131 (1981). And Article XIV, § 2 directs the Legislature to cause any proposed amendment to the Constitution to be published in a newspaper in every county with a newspaper at least three months before the electorate is to vote on the proposal. Legislative failure to meet that mandatory (and ministerial!) duty could result in judicial invalidation of the amendment, even if approved by the voters. *State ex rel. Smith v. Kelly*, 149 W.Va. 381, 394-95, 141 S.E.2d 142, 150-51 (1965).

Appellants mischaracterize the relief sought in this case. Appellees seek no “edict” from this Court. What is being requested is a ruling that the proposed reform of Hampshire County’s government would, if adopted, be constitutional and that, accordingly, the Legislature has a duty under Article IX, § 13 to put the proposal before the county’s voters. Obviously, this Court cannot force the Legislature to do anything; if a majority of legislators wants to ignore a constitutional duty, be it assembling on the second Wednesday of January or passing a budget bill, a judicial decree cannot enjoin otherwise. This Court can, however, declare what the Constitution says and what legislative duties it imposes. *E.g.*, *State ex rel. Smith v. Gore*, 150 W.Va. 571, 143 S.E.2d 791 (1965); *Robertson v. Hatcher*, 148 W.Va. 239, 135 S.E.2d 635 (1964). “The law presumes the

Legislature to know its duty” once it has been instructed on the unconstitutionality of its action. *West Virginia Education Association v. The Legislature of the State of West Virginia*, 179 W.Va. 381, 383, 369 S.E.2d 454, 456 (1988); accord, e.g., *Crain v. Bordenkircher*, 180 W.Va. 246, 250, 376 S.E.2d 140, 144 (1988); *Pauley v. Kelley*, 162 W.Va. 72, 255 S.E.2d 859 (1979). Legislators are sworn to support the Constitution. W. Va. Constitution, Art. VI, § 16. Appellees presume, like the law, that a properly instructed Legislature will meet its Article VI, § 16 and Article IX, § 13 obligations.

Appellees contend that, under appellants’ argument, the Legislature must respond to a request to alter county government “without any decision being made on the constitutionality of the petition.” Appellants have never made that argument. The Legislature can certainly rely on its judgment that a proposed reform is unconstitutional as a basis to refuse to submit it to a county’s voters. (Note, however, that the “Legislature” has not made that determination in this case; there has never a collective action taken on the validity of the Hampshire County proposal. Rather, there has merely been a refusal by certain legislative leaders – different ones in different years – to take the steps needed to put the matter to a legislative vote. Hence, any call for deference to the Legislature fails because the Legislature did not do anything to defer to.) If the Legislature has concerns about the validity of a proposed reform, it could condition the county referendum on a judicial ruling on the proposal’s validity. Indeed, that condition was included in at least one of the bills submitted to initiate a vote on the Hampshire County reform. Appellants’ Brief at 4, n. 4. Alternatively, the Legislature could vote to take no action because of its judgment on the reform’s invalidity. That would put the burden on those seeking the reform to obtain a court ruling upholding the reform. If a court so ruled, that would then trigger the § 13 duty. What the Legislature should not do is what

it did in this case: nothing.

That legislative failure has led to this law suit and to uncertainty about whether or why the Legislature collectively believed the Hampshire County proposal was unconstitutional. The appellants identified in their complaint the issue (district-specific elections) that was most discussed in the Legislature and sought a declaratory judgment on both the validity of that procedure and the Legislature's § 13 duty to set up a referendum. A final judicial ruling on those issues will end the constitutional debate.

The circuit court declared that the reform, if implemented, would be valid and that § 13 obligates the Legislature to put the proposal to a vote before the Hampshire County voters. In so acting, the court did what our Constitution contemplates courts doing – deciding what the Constitution means. And this Court has the awesome, delicate, but essential duty of rendering the final interpretations of our Constitution – even as to aspects affecting legislative duties. *E.g.*, W. Va. Const., Art. VIII, § 3; *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993); *State ex rel. Board of Education v. Rockefeller*, 167 W.Va. 72, 281 S.E.2d 131 (1981); *Pauley v. Kelley*, 162 W.Va. 72, 255 S.E.2d 859 (1979); *Robertson v. Hatcher*, 148 W.Va. 239, 135 S.E.2d 675 (1964); *State ex rel. Heck's Discount Centers v. Winters*, 147 W.Va. 861, 132 S.E.2d 374 (1963).

II. THE LEGISLATURE HAS A MANDATORY DUTY TO ENACT THE ENABLING LEGISLATION THAT WILL PERMIT HAMPSHIRE COUNTY CITIZENS TO VOTE ON THE PROPOSED ALTERNATIVE FORM OF GOVERNMENT.

A. Article IX, § 13 Creates a Right to Local Autonomy That the Legislature Cannot Override Unless Necessary to Abide by the Constitution.

Article IX, § 13 provides, in its entirety:

§ 13. *Reformation of County Commissions.* The legislature shall, upon the application of any county, reform, alter or modify the county commission established by this

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

The circuit court correctly held that the Legislature has a duty to comply with a properly presented request from a county commission for a § 13 referendum and that it may not alter the substance of a valid proposed reform. To rule otherwise and to accept the appellants' position in this case, this Court would have to ignore the literal language of the Constitution, overrule precedent directly on point, and turn its back on the salutary purposes of § 13 in promoting local self-determination, democracy, and republican government.

In *Taylor County Commission v. Spencer*, 169 W.Va. 37, 43, 285 S.E.2d 656, 660 (1981), this Court held that § 13's language, "the Legislature *shall* upon the application of any county reform, alter or modify the county commission . . . with the assent of the voters," means exactly what it says:

Article 9, section 13 clearly anticipates that when the Legislature responds by the enactment process to a communication from a county commission that ten percent of the voters of the county have requested by petition an alternative form of county government, it has an obligation to see that the act upon which the people of the county will vote embodies the substance, spirit and intent of the petition. The use of the word "shall" connotes a mandatory duty on the part of the Legislature. Its role in the reformation process is to expedite, within constitutional parameters, the will of the citizens of the county by producing enabling legislation which reflects the stated preference of the petitioning voters and provides the other voters of the county an opportunity to approve or to reject that alternative to the existing form of government. In effect, the Legislature is obliged by the

constitution to vindicate the desires and designs of the voters of the county. This it is constitutionally required to do and beyond this it cannot act.

*Taylor County Commission v. Spencer*, 169 W.Va. at 44-45, 285 S.E.2d at 661; *see also, e.g., Perry v. Miller*, 166 W. Va. 138, 139, 272 S.E.2d 678, 679 (1980) (“‘shall’ means ‘shall’”). As demonstrated below, *Spencer* was clearly correct.

Generally speaking, the Legislature enjoys plenary power to regulate the health, welfare, and morals for any public purpose, and the power is essentially unlimited, except as expressly or implicitly constrained by the federal or state constitutions. *E.g., Thorn v. Roush*, 164 W.Va. 165, 167-68, 261 S.E.2d 72, 74 (1979); *Robertson v. Hatcher*, 148 W.Va. 239, 250-51, 135 S.E.2d 675 (1964); *Tanner v. Premier Photo Service, Inc.*, 147 W.Va. 37, 125 S.E.2d 609 (1962); *Harbert v. The County Court of Harrison County*, 129 W.Va. 54, 39 S.E.2d 177 (1946). As a general proposition, too, local governments derive their powers from the Legislature, and unless otherwise stated in the Constitution, the Legislature has complete control over the State’s local governments. *E.g., Booten v. Pinson*, 77 W.Va. 412, 89 S.E. 985 (1915); *see generally* Robert M. Bastress, Jr., *Constitutional Considerations for Local Government Reform in West Virginia*, 108 W. VA. L. REV. 125, 136-38 (2005).

Article IX, § 13 is one of those constitutional provisions that expressly restricts legislative prerogative and that establishes a local power immune from legislative preemption. It establishes a form of home rule that spread across the country in the late nineteenth and early twentieth centuries and that came to be known as *imperium in imperio*, a government within a government. Robert M. Bastress, Jr., *Localism and the West Virginia Constitution*, 109 W. VA. L. REV. 683, 691-92, 707-11

(2007). *Imperium* home rule creates a “sphere of local immunity,”<sup>1</sup> which necessarily qualifies the exercise of legislative discretion.

B. Section 13 Implements the Fundamental Principles of Democracy and Republicanism That Inspired and Provide the Foundation of Our Constitution.

Section 13's original antecedent appeared as Article VIII, § 34 in the 1872 Constitution. At that time, the framers included the county court provisions in the Judicial Article, Article VIII, because those bodies were given substantial judicial authority as well as executive and legislative powers. The 1872 Constitution thus restored to the State the county court system that had prevailed in antebellum Virginia but was replaced by the New England township model in the 1863 Constitution. Former Confederates dominated the 1872 constitutional convention, and they were intent on eliminating anything they identified with the North. *See, e.g.*, ROBERT M. BASTRESS, *THE WEST VIRGINIA CONSTITUTION: A REFERENCE GUIDE* 15-21 (1995); Milton Gerofsky, *Reconstruction in West Virginia: Part II*, 7 W. VA. Hist. 5 (1945). As a compromise with representatives from a number of counties who preferred the township system, a convention leader proposed that counties be allowed to adopt a form of government different from the county courts. John E. Stealey, III, *Quiet Revolution in Hampshire County: Who Says County Government Has to Be a Three-Member Throwback to Virginia's Old County Court System?* SUNDAY GAZETTE MAIL, Sec. C at 1 & 4, Mar. 26, 2006.

As originally drafted, the proposal depended on the Legislature to start the process, but a committee amended the draft to confer the power to initiate a reform on the county court and the power to approve or reject a proposal on the county's voters. *Id.* at 4. That revised version became

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<sup>1</sup>Bastress, 109 W. Va. L. Rev. at 692, *quoting* GORDON L. CLARK, *JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY* 7 (1985).

Article VIII, § 34 in the 1872 Constitution. The 1880 amendment then eliminated most all of the judicial authority of the county courts but kept them in Article VIII and retained the reform of government provision as § 29. In 1974, the Judicial Reorganization Amendment changed the county courts to county commissions and finally moved them to the local government article, Article IX. That Amendment also moved § 13 to its current location and added the mechanism for citizen-initiated reforms. See *BASTRESS* at 236; *Bastress*, 108 W. Va. L. Rev. at 157-58. This history affirms that this Court in *Spencer* accurately described § 13's rationale:

The framers of this provision and the people of the state wisely chose to leave the ultimate determination of the form of government which would best serve the interests of the county in the hands of those most directly affected by it: the people of the county. The constitution provides for a standard county government in the form of a county commission, but vests in the voters of the county the power to choose an alternative tribunal to suit their particular needs.

*Taylor County Commission v. Spencer*, 169 W.Va. at 43-44, 285 S.E.2d at 660.

As the Court in *Spencer* noted, § 13 specifically implements foundational principles of our Constitution. *Id.*, 169 W.Va. at 44, 285 S.E.2d at 661. Article III, § 3 provides that, “when any government shall be found inadequate or contrary to [constitutional] purposes, a majority of the community has an indubitable, inalienable, and infeasible right to reform, alter or abolish it in such manner as shall be judged most conducive to the public weal.” That is a powerful statement: “an indubitable, inalienable, and infeasible right to reform.” In addition, Article II, § 2 guarantees that “[t]he powers of government reside in all the citizens of the State, and can be rightfully exercised only in accordance with their will and appointment.” Just as significant is Article III, § 2. It proclaims: “All power is vested in, and consequently derived from, the people. Magistrates are their trustees and servants, and at all times amenable to them.” See also Article III, § 16 (“The right of

the people . . . to instruct their representatives . . . shall be held inviolate”).

The Legislature has forgotten these basic precepts. Article IX establishes the form of county government and then bestows the power to change its form upon the citizens of the respective counties. By ignoring the appellees’ petition and its constitutional duty to put the petition’s proposal to a vote in Hampshire County, the Legislature not only trammels on the appellees’ fundamental rights to petition, to instruct their representatives, and to attempt a reform of their county government, but it also disenfranchises the voters of Hampshire County on the issue of their form of government. Section 13 says that the proposed reform shall take effect “with the assent of the voters of said county,” but if the Legislature does not act on the petition, the voters never get that opportunity.

The appellants now argue – for the first time in this litigation – that the second sentence of § 13, which was the one added by the Judicial Reorganization Amendment of 1974, makes a citizen-initiated application to reform county government discretionary with the Legislature because the Amendment “insert[ed] the necessity of legislative action before the citizens’ wished could be put to a vote in the county[.]” Appellants’ Brief at 35. What the Amendment did was simply to provide an alternative reform method, one more attentive to the populist goals of § 13, by which the local citizenry could shape its own county government. *Spencer*, 169 W.Va. at 44-45, 285 S.E.2d at 660-61; *BASTRESS*, *supra*, at 237. Nothing in that section, in its underlying purposes, or in common sense supports differential treatment for an application initiated by citizens as opposed to one originating with the county commission.

- C. The 1880 Amendment Did Not Affect the Mandatory Nature of the Legislature’s Duty to Act in Response to a County’s Application for a New Form of Government.

The appellants contend that the 1880 Amendment to § 13's original antecedent conferred discretion on the Legislature to alter the substance of a county's request to alter its form of government. Appellants reason that was accomplished by the deletion in the amended version of the language, "which shall conform to the wishes of the county making application." See Appellants' Brief at 22-36 & n. 14. The argument fails for several reasons.

Regardless of what language was dropped, the voters in 1880 and 1974 still had to read the plain language that remained in the amended versions of what is now § 13. As explained above, that plain language says the Legislature "*shall*" create an altered tribunal upon the voters' assent and this Court held in *Spencer* that that language plainly imposed a duty on the Legislature to respond. Reading the amended sections, the ratifying voters would have no reason to think that the Legislature would have the "unfettered ability," Appellants' Brief at 35, to rearrange willy-nilly the contents of a county's application. Voters would, however, have every reason to reject such an interpretation because it makes no sense. Why would a Constitution confer on county residents the not inconsiderable right to choose its own form of government if the Legislature could alter the county's choice? The appellants' reading would virtually repeal § 13. That reading would also create a direct conflict between § 13 and Article VI, § 39, which prohibits local laws "[r]egulating or changing county . . . affairs." Clearly, changing a county's form of government is "changing [its] affairs" and permitting the Legislature to do so, except as requested by the local entity, would create the resulting conflict. An interpretation of a constitutional provision that creates a conflict with another provision is an interpretation to be avoided. *E.g.*, *State ex rel. Boards of Education v. Chafin*, 180 W.Va. 219, 376 S.E.2d 113 (1988). That is especially the case when that interpretation is implausible to begin with.

A far more likely explanation, and one far more consistent with the plain language that the Legislature in 1879 and 1974 produced, is that the 1880 Amendment's framers simply concluded that the original section's repetition of the Legislature's duty to conform to the wishes of the county was excess and unnecessary verbiage. So they dropped it. Appellants offer no evidence to support their reading of § 13. It would be expected that if the 1880 Amendment was intended to work so radical a change in the meaning of the § 13's antecedent, that the change would have provoked legislative and public discussion. Appellees' search of the contemporaneous record, however, has produced not one reference to the change. A review of the *Wheeling Intelligencer*<sup>2</sup> during the 1879 legislative session, which produced the proposed amendment, found reports on the sentiment of legislators endorsing judicial reform (Jan. 10<sup>th</sup> edition at page 2), information on a joint resolution to appoint a joint committee to review proposals to modify Article VIII because it was "evident that numerous propositions" for such modification were to be submitted (Jan. 11 at 2), interviews with seven legislators about their opinions on amending Article VIII (Jan. 20 at 2), reports on the progress of the proposal (e.g., Jan. 25 at 2, Mar. 7 at 2), and reprints of the submitted bill and the enacted bill (Feb. 11 at 1, Mar. 7 at 2). The focus in all of the reporting and the interviews was on judicial reform and on removing judicial powers from the county courts. Other than inclusion of the provision on alternative tribunals in the two reprints, there was no reference made to changes to that section.

The same thing occurred the following year, in the months leading up to the October 12, 1880, referendum on the proposed amendment. The *Intelligencer* reprinted (from the *Charleston Leader*) an extended speech by Judge J. H. Ferguson (July 10<sup>th</sup> edition at 3), described some of the

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<sup>2</sup>The Legislature in 1879 met in Wheeling and met in regular session only in odd-numbered years..

implications of voting on the proposed amendment on local judgeships (Oct. 4 at 1), and editorialized in support of the amendment (e.g., Oct. 4 at 3). Again, no mention was made to the section authorizing reform of county government.

III. A COUNTY MAY ALTER ITS COUNTY COMMISSION BY CREATING A TRIBUNAL WHOSE MEMBERS ARE ELECTED ONLY BY THE VOTERS WITHIN EACH MEMBER'S DISTRICT.

Article IX, § 13 “vests in the voters of the county the power to choose an alternative tribunal to suit their particular needs” and thus specifically implements the “indefeasible right” conferred on the majority of a community by Article III, § 3 “to reform, alter or abolish” their government. *Taylor County Commission v. Spencer*, 169 W.Va. at 43-44, 285 S.E.2d at 660-61 (citing Art. III, § 3 for the proposition that “counties are free to modify their local government in any way that comports with the mandates of the constitution”).

These provisions do not constrain the voters' discretion in shaping the form of their alternative tribunals.<sup>3</sup> Rather, they confer in capacious language the discretion to fashion whatever form of government the majority finds “most conducive.” Section 13, steeped in promoting democratic rights, presumably could not be used to create an unelected tribunal. *Cf. Dunham v. Morton*, 115 W.Va. 310, 175 S.E. 787 (1934) (statute authorizing governor to break any tie votes in elections of county court judges – now county commissioners – was unconstitutional because only a county's voters could elect county court). Beyond that, however, there is no language in either Article IX, § 13 or Article III, § 3 to support restricting the manner in which the reform tribunal is elected. Nor is there a good reason for doing so. On the other hand, there are good reasons for

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<sup>3</sup>For an explanation of the use of the word, “tribunal,” in § 13, see BASTRESS, *supra*, at 236-37 (1995); Bastress, 108 W. VA. L. REV. at 156-60.

adhering to a literal reading of those provisions and permitting the voters to form whatever democratic government they want.

As explained above, the Legislature's power is plenary, except as expressly or impliedly restrained by the Constitution. Section 13 limits legislative power and correspondingly grants power to a county's voters. *Taylor County Commission, supra*. That grant of power conferred on citizens should carry the same presumption that the Legislature has when it acts: if the action is not expressly prohibited, then it is valid. Because there is no express or implied restraint on the arrangement of a county's constituencies for the election of alternative tribunals, the citizens have the power to arrange the voting on any basis that satisfies the equal apportionment requirements of Article II, § 4, the federal Equal Protection Clause, and other basic limitations that constrain all exercises of power.<sup>4</sup> Constitutional grants of power should be liberally construed to permit maximum flexibility for the State and its citizens to deal with exigencies and circumstances as they arise. *E.g., McCulloch v. Maryland*, 17 U.S. 316, 407, 415-16 (1819).<sup>5</sup>

In addition, and significantly, there is no premise in democratic values – which are those promoted by Article IX, § 13 and Article III, § 3 – that would dictate the adoption of a countywide

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<sup>4</sup>Such limits include, for example, the Due Process Clauses and the prohibitions against political and religious discrimination contained in Article III, §§ 7, 10 and 11 of the West Virginia Constitution and the First and Fourteenth Amendments to the United States Constitution.

<sup>5</sup>Chief Justice Marshall eloquently explained in *McCulloch* that the nature of a constitution “requires, that only its great outlines should be marked, its important objects be deduced from the nature of the objects themselves. . . . [W]e must never forget that it is a *constitution* we are expounding.” 17 U.S. 407 (emphasis in original). Moreover, “a constitution [is] intended to endure for ages to come, and, consequently to be adapted to the various *crises* of human affairs. . . . It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.” *Id.* at 416-17 (emphases in original).

voting system over district-specific voting. Both methods have their advantages. Countywide voting makes for perfect equality in the weight of each vote (everyone's vote counts exactly the same) and every voter gets a say on each of the tribunal's members. On the other hand, district-specific voting allows each community to select its own representative to be its advocate, prevents population-dense areas from dominating the voting on the tribunal,<sup>6</sup> enhances voter familiarity with the candidates, facilitates delivery of constituent services,<sup>7</sup> and maximizes the opportunity for racial, ethnic, religious, and political minorities to elect one of their own.<sup>8</sup> As noted, the districts would have to be sufficiently equal in population to satisfy federal and state one-person-one-vote standards. Compliance with those standards would essentially offset one of the advantages of at-large voting.

The Court in *Taylor County Commission v. Spencer* recognized that deference is owed to the citizens' judgment on how to shape their government to ensure that that "ultimate determination" in fact rests "in the hands of those most directly affected by it: the people of the county." 169 W.Va. at 43, 285 S.E.2d at 660. According to that Court, § 13 functions like "a limited grant of the right of initiative, by which the power is reserved to the people to propose laws and to enact or reject them

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<sup>6</sup>Residency requirements, which are currently imposed on county commissions by Article IX, § 10, help to ensure some degree of geographical diversity, but it remains a fact in at-large voting that a county's populous area(s) can control who gets elected and effectively nullify the preferences of voters in outlying districts. With district elections, however, the populous areas elect only their own representatives, leaving the rural areas to choose their own, as well.

<sup>7</sup>A member elected only by the voters in her home district is more likely to be more responsive to the inquiries and concerns of her home district's residents, who would constitute one hundred percent of those electing her, than members who are elected countywide and whose home district residents contribute only a fraction of the vote electing them. The size of the fraction would be inversely proportional to the size of the commission or tribunal.

<sup>8</sup>See, e.g., *Rogers v. Lodge*, 458 U.S. 613 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

at the polls, either independent of or with only the indirect participation of the Legislature. . . . The right of the people to enact and to approve or disapprove legislation under such a grant of authority is absolute and cannot be abridged directly or indirectly by the Legislature.” 169 W.Va. at 45, 285 S.E.2d at 661. Consequently, that Court held that the Legislature had no authority to enact an enabling statute calling for a referendum in a county on a form of government that was different from that which had been proposed by the voters in their petition. *See* Part II, *supra*.<sup>9</sup> Ironically, in that case the Legislature altered the proposed tribunal to provide for district-specific elections, rather than the countywide elections with district residency requirements for which the voters had petitioned. (Obviously, that Legislature thought district-specific elections are constitutional.)

It is instructive, too, that the practice of district-specific election of the members of an alternative tribunal has a long tradition in this State and dates back to at least 1879, not long after § 13 was originally created and simultaneous to its repositioning in 1880 as § 29 of Article VIII. On March 7, 1879, the Legislature adopted a Joint Resolution to amend Article VIII and Chapter XLIX to submit the proposed amendment to the voters. Just three days earlier, on March 4, 1879, the Legislature had enacted Chapter XXIV, which provided for a vote by the voters of Preston County on whether to establish an alternative tribunal to exercise the powers of the county court and to consist of one judge and at least one justice elected in each of eight districts of equal population.

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<sup>9</sup>Appellants maintain at page 31 of their brief that *Spencer* “held that Article IX, § 10 requires county commissioners to be elected by the voters of the entire county rather than by magisterial districts.” *Spencer* may have said that as applied to § 10 commissions, but it made no such holding as applied to § 13 alternative tribunals. The Court’s holding as to alternative tribunals was that they had to be in the form requested by the county or its petitioners.

1879 ACTS OF W. VA., CH. XXIV, §§ 5-6.<sup>10</sup> Apparently, the voters rejected that proposal. Eight years later, however, Chapter 10 of the 1887 ACTS OF THE LEGISLATURE provided for another vote on the reformation of the Preston County Court, this time to create a tribunal consisting of eight members, each of whom would be elected separately by the voters in each of the county's eight magisterial districts. *See Taylor County Commission v. Spencer*, 169 W. Va. at 47, n. 2, 285 S.E.2d 662; Defendants' Exhibit 6. These contemporaneous interpretations, by both the Legislature and the citizens of Preston County, of a newly drafted constitutional provision is persuasive evidence that § 13 should not be read so restrictively as to bind the citizens to, in effect, one form of government with only the ability to tinker with the number of seats on the tribunal. In addition, the Legislature has on numerous other occasions put to a county's voters requests for alternative tribunals with members elected only by the voters of their individual districts.<sup>11</sup>

Finally, the West Virginia Constitution's provision bestowing an analogous power to "reform, alter or abolish" municipal governments has been applied to permit district and ward

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<sup>10</sup>Section 10 of the Act specified that the justices would receive \$3 for each day's attendance. Two other laws that year provided for votes on county government reform. Chapter LIX provided for a new commission for Mason County. Its § 9 set up staggered two year terms for the tribunal members and § 10 set compensation at \$3 for each day's attendance at meetings with an extra dollar for the president's attendance. *See also* Chapter LXXIX (proposing a board of commissioners for Wood County).

<sup>11</sup>Those enactments were collected by the defendants and submitted as Exhibits 6-9 to their memorandum in the circuit court. The Acts included the following: 1883 ACTS OF THE W. VA. LEGISLATURE Chap. LI (Preston County) (Defs. Ex. 8); 1895 ACTS OF THE W. VA. LEGISLATURE Chap. 73 (Marion County) (Defs. Ex. 6); 1913 ACTS OF THE W. VA. LEGISLATURE Chap. 49 (Tucker County) (Defs. Ex. 6); 1913 ACTS OF THE W. VA. LEGISLATURE Chap. 53 (Grant County) (Defs. Ex. 7); 1915 ACTS OF THE W. VA. LEGISLATURE Chap. 95 (Randolph County) (Defs. Ex. 6); 1925 ACTS OF THE W. VA. LEGISLATURE Chap. 117 (Barbour County) (Defs. Ex. 9); 1927 ACTS OF THE W. VA. LEGISLATURE Chap. 147 (Grant County) (Defs. Ex. 7); 1978 ACTS OF THE W. VA. LEGISLATURE Chap. 112 (Taylor County) (Defs. Ex. 6). *See also* Appellants' Brief at 28-30.

election of candidates. Article VI, § 39a conferred home rule powers on the State's cities and authorized them to draft their own charters pursuant to general laws laid down by the Legislature. Responding to that section, the Legislature has created a menu of five different forms of government from which cities can choose in creating their charters. W. Va. Code § 8-3-2.<sup>12</sup> In four of the five forms, cities have the ability to choose between electing council members citywide or by districts or wards. The Court in *Spencer* suggested that the Legislature could enact a similar provision to facilitate county reform under Article IX, § 13. 169 W.Va. at 44, 285 S.E.2d at 660.

Against this array of reasons calling for a literal and citizen-friendly interpretation of § 13, the appellants latch onto the word, "reform," in § 13 as if that word somehow limits the scope of a county's discretion under that section. Even using petitioner's definition of "reform," which is "to put or change into an improved form or condition,"<sup>13</sup> Appellants' Brief at 17, it is extremely difficult to see why that would not authorize reforming a county government from an at-large commission into a district-specific tribunal. The appellants provide no explanation why that would not be the case. Certainly, the Court in *Taylor County Commission* thought the choice went to the "form of county government" because its opinion repeatedly referred to the Legislature's decision to change the proposed reform from county-wide to magisterial district elections as altering the "form of

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<sup>12</sup>One of the forms of municipal government authorized by the Legislature is essentially the same as the governmental form proposed by the plaintiffs in this case. W. Va. Code § 8-3-2 (Plan IV – "Manager Plan").

<sup>13</sup>Other dictionaries provide somewhat broader definitions. The Random House (Unabridged) Dictionary, *supra* note 2, at 1621, defines the word (in relevant part) as "to change to a better state, form, etc.; improve by alteration, substitution, abolition, etc." The Oxford Unabridged Dictionary, *supra* note 2, defines it as "to make a change for the better in (an arrangement, state of things, practice or proceeding, institution, etc.); to amend or improve by removal of faults or abuses." (Definition 5 of the verb.)

government.” Obviously, the Legislature that changed Taylor County’s proposed reform thought that going to district-specific election was within the contemplation of § 13. And the United States Supreme Court, in two cases considering the federal constitutional validity of at-large elections for local governments, referred to the selection of an at-large system as relating to the “form of government.” *E.g., Rogers v. Lodge*, 458 U.S. 613, 618 (1982); *City of Mobile v. Bolden*, 446 U.S. 55, 60 (1980).

Appellants ignore the fact that § 13 accords a county the right not only to “reform” its government but also to “reform, alter, or modify” the county commission. Use of all three words conveys an expansive grant of authority and discretion. The latter two words can be synonymous with each other and with reform but they confer some enhanced capacity for change. One dictionary<sup>14</sup> defines “alter” as “to make different in some particular, as size, style, course or the like” and “modify” as “to change somewhat the form of qualities of; alter partially, amend[.]”

The Appellants’ Brief includes some confusing discussion about senatorial and delegate voting districts. Those districts are neither co-extensive with Hampshire County nor in any way relevant to this case. The voting districts contemplated by the proposed reform refer to the districts required to be created by West Virginia Code § 3-1-9(d) for the purpose of electing political party executive committees. In many, if not most, counties, those districts coincide with the magisterial districts required to be created by West Virginia Code § 7-2-2, and that is the case with Hampshire County.<sup>15</sup> Subsection 3-1-9(e) compels a recasting of the sections’ boundaries after each census if

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<sup>14</sup>Random House (Unabridged) Dictionary, *supra* note 2.

<sup>15</sup>Section 3-1-9(d) requires that counties with less than 20,000 population have executive committee districts coextensive with magistrate districts. Hampshire County exceed 20,000 population for the first time in the 2000 census.

needed to preserve equal apportionment.

Appellants point to the language in Article IX, § 10 providing that county commissioners “shall be elected by the voters of the county” and infer from that clause a bar to the district-specific election of tribunal members under a § 13 form of government. But to read § 10's form of government as a limitation on § 13 tribunals would effectively repeal the latter. It cannot be, if § 13 is to have *any* effect, that the section means that citizens can “reform, alter or modify the county commission established by this article” as they please except that they have to cast it in the form provided by § 10 of this article. As stated above, we can assume that § 13 tribunals should be elected, but that conclusion derives from the section’s purposes and our traditions, not some directive on the form of § 10's county commissions.

In addition, even if the § 10 language does apply to alternative tribunals, there is no reason to conclude that “shall be elected by the voters of the county” would necessarily mean that *each* of the members must be elected by *all* of the county’s voters. Obviously, West Virginia counties have historically elected commissioners on a countywide basis, but just as obviously, Preston County had district-based tribunal elections for over one hundred years, going back to 1887. Grant County’s alternative form of government also used district-elected commissioners from 1913 to 1921 and from 1927 until 1967. 1927 ACTS OF THE W. VA. LEGISLATURE 325, Chap. 147; 1967 ACTS OF THE W. VA. LEGISLATURE 1254, Chap. 210; Defendants’ Exhibit 7. More importantly, tribunals that are elected in district-specific elections are “elected by the voters of the county” just as surely as are commissions elected by a countywide vote. Certainly, our Legislature is “elected by the voters of the [State]” even though none of our legislators is elected by a statewide constituency.

The operative language in this case provides that the voters of a county can “reform, alter,

or modify” their county government (Article IX, § 13) and that the majority in any community of this State “has an indubitable, inalienable, and indefeasible right to reform, alter or abolish [its government] in such manner as shall be judged most conducive to the public weal” (Article III, § 3). To read into the Constitution unstated and unwarranted limitations on those rights<sup>16</sup> offends the most basic notions of self-determination, democracy, and the Lockean premises upon which our government is grounded. Those provisions clearly authorize the citizens of Hampshire County to reform their county government into a tribunal, each of whose members is elected by the voters in the district in which the member resides.

IV. THE LEGISLATURE’S DUTY UNDER ARTICLE IX, § 13 TO HONOR A COUNTY’S REQUEST FOR A REFERENDUM ON COUNTY GOVERNMENT REFORM DOES NOT EXPIRE WITH THE END OF THE LEGISLATIVE TERM.

All the reasons set forth in Part I, *supra*, explaining why the Legislature’s § 13 duty is nondiscretionary also defeat the appellants’ argument that the duty dies at the end of the two year legislative term during which a county submits a request for an election on county government reform. Simply put, defendants’ argument, if accepted, would nullify the plain meaning of § 13 and render it a meaningless bauble, an empty promise for local self-control. The argument is also without logic or reason, which might explain why it lacks any authority whatsoever. The principal case that appellants rely on, *Des Moines Register v. Dwyer*, 543 N.W.2d 491 (Iowa 1996), provides them no comfort. It dealt with the enforcement of the Legislature’s own rules, not those laid down

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<sup>16</sup>Appellants also suggest that the two year terms for commissioners provided for in the Hampshire County proposal are unconstitutional as inconsistent with Article IX, § 10. Appellants’ Brief at 19. Again, the whole point of § 13 is to allow for county governments that are different from those in § 10. Moreover, on the day after the 1879 Legislature decided to put to the voters the Judicial Amendment of 1880, it authorized a vote on an alternative tribunal in Mason County whose members would serve two year terms. 1879 ACTS OF THE W. VA. LEGIS., Chapter LIX, § 9. In any event, the issue was nowhere raised in the pleadings or the record below.

in the Constitution. While appellants cannot find support in the case, the appellees can. The Iowa court recognized that courts would intervene if fundamental rights were at stake. Appellees' fundamental right to reform or alter their government is at issue here. *Taylor County Commission v. Spencer*; *supra*. In addition, the *Des Moines Register* court allowed only that it would not interfere with the Legislature's procedural rules "so long as constitutional questions are not implicated." (Emphasis added.) Again, that is this case.<sup>17</sup>

In fact, this Court has not hesitated to enforce constitutional duties on the Legislature that have extended past the existence of a single Legislature. *E.g.*, *Crain v. Bordenkircher*, 180 W.Va. 246, 250, 376 S.E.2d 140, 144 (1988) (adding Senate President, for and on behalf of the Senate, and Speaker of the House, for and on behalf of the House of Delegates, as parties to litigation challenging constitutionality of conditions at Moundsville State Prison and ordering the construction of a new prison), *modified by Crain v. Bordenkircher*, 191 W. Va. 583, 447 S.E.2d 275 (1994), *supplemented by Crain v. Bordenkircher*, 192 W. Va. 416, 452 S.E.2d 732 (1994), *and by Crain v. Bordenkircher*, 193 W. Va. 362, 456 S.E.2d 206 (1995); *Pauley v. Kelly*, 162 W.Va. 672, 718, 255 S.E.2d 859, 883 (1979) (directing Senate President and Speaker of the House to be joined as defendants and ordering overhaul of State's educational system), *supplemented by Pauley v. Bailey*, 174 W.Va. 167, 324 S.E.2d 128 (1984).

Practical factors work against defendants' novel and illogical contention that a Legislature's

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<sup>17</sup>The other two cases cited by the appellants are similarly unavailing to their argument. *Abood v. League of Women Voters* 743 P.2d 333 (Alas. 1987), concluded that the Alaska Constitution did not impose an open meetings requirement on the Legislature. *Moffitt v. Willis*, 459 So.2d 1018 (Fla. 1984), held that the Legislature can make and interpret its own operating procedures for the conduct of its meetings. Neither result informs this Court about the West Virginia Legislature's duty under Article IX, § 13.

failure to comply with a constitutional duty acts as a suspension of the duty. For one, when a petition for reform of county government is circulated and submitted to a county commission, and when a commission requests the Legislature to submit the proposed reform to the county's voters, are events wholly unrelated to any legislative schedule. Thus, if the commission's request happens to reach the Legislature late in the session of that Legislature's second year, the request and the legislative duty to act would – according to the defendants – expire almost immediately. Moreover, requiring citizens like the appellees to undertake the substantial and costly effort of re-circulating a petition in order to try, once again, to get the Legislature to comply with its § 13 duty imposes a senseless, demoralizing, and constitutionally indefensible burden on them.

The appellants would take a provision that promises local self-determination and read it in such a way as to reduce it to no more than a hope dependent on legislative whim. That reading mocks the clear language of § 13 and betrays its framers' obvious intent.

#### CONCLUSION

The appellees have proposed a reform of their county government that is in all respects constitutional. They and the Hampshire County Commission have done all that Article IX, § 13 requires to put before the voters of that county the proposed reform. All they need is for the Legislature to comply with the plain directive of § 13 and enact legislation permitting the voters of Hampshire County to have their say on the subject. This Court should facilitate that and sustain the decision of the circuit court by affirming the lower court.

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CERTIFICATE OF SERVICE

I have on this the 3<sup>rd</sup> day of June, 2008, mailed a copy of the foregoing Petition to the following counsel for the appellants:

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