A Colorado Constitutional Paradox:

Initiatives, Referenda, and the Eclipse of Original Intent in County Governance

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Executive Summary:

- County governments are the only legislative bodies in Colorado which are not subject to the people's right of initiative and referendum.

- The people's right of initiative and referendum was placed in Colorado's Constitution in 1910 by a contentious Extraordinary Session of the Colorado General Assembly, followed by a popular vote of the people.

- Examination of the ratification history shows that application of the initiative and referendum powers to county governments seems not even to have been a subject of discussion.

- The taken-for-granted omission of county governments from the explicit reservation of the powers of initiative and referendum made sense in 1910, when counties were seen as purely administrative arms of the state government with no independent legislative powers or functions of their own.

- The nature and functions of county governments in Colorado have evolved a great deal since 1910; now, county governments manifestly exercise extensive independent legislative powers.

- In our state constitution's structure, the only source of the county governments' new and evolving legislative powers is the explicit or implicit delegation of power from the General Assembly; the General Assembly is, of course, subject to the people's powers of initiative and referendum.

- The result is that if the General Assembly's power is exercised directly, by the General Assembly itself, the exercise of that power is subject of the checks and balances of initiative and referendum. But strangely, if that same power is exercised secondhand, as when a county government exercises power delegated

from the General Assembly, the exercise of the same power is not subject to the constitutional checks of balances of initiative and referendum.

- Thus, in terms of the original meaning of the constitutional amendment which created the initiative and referendum process, county governments are today operating without the appropriate opportunity for direct democracy to remedy legislative abuses or mistakes.

Introduction

This Issue Paper poses a structural paradox arising from the provisions of the Constitution of the State of Colorado that grant, or "reserve," to Colorado's citizens the power to circumvent their representative legislative institutions through "direct democracy"—*i.e.*, to exercise the powers of initiative and referendum. These powers were inserted post-statehood into the Colorado Constitution through a noisy reform-driven movement in 1910, and have evolved into a prominent and increasingly controversial component of the state's political landscape. The reformers, and the people, explicitly "reserved" these prerogatives of direct democracy from the "legislative power of the state" otherwise vested in the General Assembly, as well as from the local legislative boards and councils of "every city, town, and municipality" throughout the state. Yet, by all appearances and without the slightest explanation, the powers of initiative and referendum were withheld from one, and indeed only one, of the state's principal legislative arenas: county government.

It is common wisdom today that counties—alone among the state's governmental instrumentalities wielding legislative power—were intentionally omitted from the principal systemic constitutional reform to Colorado's legislative processes to occur since statehood in 1876. This wisdom has been accepted and enshrined by Colorado's highest courts.[1] The thesis of this Issue Paper is that the common wisdom has gotten it wrong, and, in the process, has let historical evolution obscure both logic and original intent.

Part I of this Issue Paper poses the nature of the constitutional dilemma—why would the framers and voters in 1910 have omitted counties from an otherwise uniform reservation of the powers of initiative and referendum from every statewide or local governmental body exercising legislative powers in the state.

Parts II through VI explore the historical roots of the dilemma from several directions, reaching back to the words and realities of the time and attempting to place them in a temporal context.

Finally, Part VII suggests that counties were in fact not omitted from this reservation at all. Rather, the manifest original intent was to reserve the rights and powers of "direct democracy" from *all* instrumentalities of state and local government wielding representative legislative power. In 1910, that did not happen to include counties. Over

[1] Board of County Comm'rs v. County Road Users Ass'n, 11 P.3d 432, 436 (Colo. 2000); Dellinger v. Bd. of County Comm'rs, 20 P.3d 1234, 1238 (Colo. App. 2000), *cert. denied* 2001 Colo.LEXIS 283 (April 9, 2001). This understanding of Colorado's constitutional structure has also been acknowledged at the federal level. *See* Save Palisade Fruitlands v. Todd, 279 F.3d 1204, 1207 (10th Cir.), *cert. denied* 123 S.Ct. 81 (2002). The author of this Issue Paper was one of the attorneys for the plaintiffs/petitioners in the *Dellinger* case.

the intervening years, however, county governments have acquired a range of indisputably legislative powers from the only source from whence such powers could have devolved—the state. Yet the state, its own legislative powers explicitly being subject to reservation by the people of the prerogatives of direct democracy, was in no position to devolve legislative power to county governments free of that essential reservation.

In sum, an historical slip, quite at odds with original intent, has insulated one of the state's primary legislative arenas from a popular reform that had been intended to apply systemically to all statewide and local legislative arenas.

I. The Roots of a Constitutional Dilemma

A. Direct Democracy Comes to Colorado

At its inception in 1876, the Colorado Constitution followed the federal model, dividing the powers of state government into "three distinct departments,—the legislative, executive and judicial,"[2] and vesting the legislative power exclusively "in the General Assembly, which shall consist of a Senate and House of Representatives, both to be elected by the people."[3] The form was "republican"—*i.e.*, the people exercised sovereign, and most particularly legislative, power solely through their elected representatives.[4] Consistent with the federal model, direct democracy—and its attendant proclivities toward the "mischiefs of faction"[5]—was eschewed.

The resurgence of interest in at least limited direct democracy, particularly in the agrarian states of the American West, has been documented and critiqued elsewhere.[6] First to gain acceptance was the referendum, with roots in post-revolution France[7] and initially sanctioned on this side of the Atlantic as the preferred process for ratification of state constitutions and constitutional amendments.[8] While the referendum required a

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[2] COLO. CONST. art. III. The Colorado Constitution as it appeared in 1876 may be viewed on the website of the Colorado State Archives at http://www.archives.state.co.us/constitution/1876.pdf

[3] COLO. CONST. art. V, § 1, in its original form. *See* note 2.

[4] BLACK'S LAW DICTIONARY 1306 (7th ed. 1999).

[5] *See* THE FEDERALIST No. 10 (James Madison).

[6] *See, e.g.*, DAVID S. BRODER, DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY (2000); THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL (1989); RICHARD J. ELLIS, DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA (2002); JOHN HASKELL, DIRECT DEMOCRACY OR REPRESENTATIVE GOVERNMENT? DISPELLING THE POPULIST MYTH (2000); RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 257-71 (1955); DAVID B. MAGELBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984); Richard B. Collins and Dale Oesterle, *Structuring the Ballot Initiative: Procedures that Do and Don't Work*, 66 U. COLO. L. REV. 47, 53-55 (1995); Todd Donovan and Shaun Bowler, *An Overview of Direct Democracy in the American States*, in CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 1 (Shaun Bowler, Todd Donovan, Caroline J. Tolbert ed. 1998); K. K. DuVivier, *By Going Wrong All Things Come Right: Using Alternative Initiatives to Improve Citizen Lawmaking*, 63 U. CIN. L. REV. 1185, 1186-89 (1995); Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11 (1997).

[7] Collins and Oesterle, *supra* note 6, at 54.

[8] CRONIN, *supra* note 6, at 41. This acceptance extended even to the United State Congress, as reflected in the requirement of a public referendum in section 5 of Colorado's own Enabling Act. 1 COLO. REV. STAT. (2002) at 26.

popular vote, the measure at issue would have been formulated—and referred—in the first instance by the members of an elected legislature or constitutional convention. The initiative, with roots generally attributed to the Swiss cantons of the 1830s-60s,[9] was direct democracy of a purer form—allowing the people themselves to create, propose, submit to a popular vote, and adopt into law measures completely of their own formulation. In its most basic form, generally called the "direct" initiative, representative legislative institutions were completely sidestepped. In a less pure form, known as the "indirect" initiative, the proposed legislation would be submitted by its proponents initially to the appropriate representative body, and only upon failure of that body to adopt the measure could it be submitted to a popular vote of the people.[10]

The initiative, with a broader application of the referendum in tow, gained early popularity in this country with the Populist Party[11] in the late 1800s, followed by wider acceptance within the Progressive movement[12] at the turn of the 20th century. The initial focus of the Populists was primarily agrarian, rural, and directed against emerging corporate power within republican legislative bodies.[13] The Progressives added a more broadly held concern with what they viewed as widespread and manifest corruption within elected legislatures and a resulting need to restore basic democratic ideals.[14]

In 1910, Colorado was rural (population 799,024)[15], agrarian (46,170 farms)[16], and far, both geographically and sociologically, from the nation's corporate and industrial epicenters. Two years before, in July 1908, Denver had hosted the Democratic National Convention that had nominated populist firebrand William Jennings Bryan as its presidential candidate.[17] Bryan lost the election, but carried Colorado. Colorado voters in 1908 also chose Republican-turned-Democrat John F. Shafroth as Governor.[18] Of Swiss descent himself,[19] "Honest John" Shafroth had acquired an impeccable reputation for electoral integrity, having resigned rather than hold a Congressional seat in an election tainted with allegations of fraud in 1902.[20] Supported by the state Democratic Party and both of the state's major newspapers,[21] Shafroth propounded a platform of "reform"

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[9] ELLIS, *supra* note 6, at 28; Collins and Oesterle, *supra* note 6, at 54.

[10] In view of the "indirect" initiative's ultimate recourse to the same popular vote as would be available to a "direct" initiative, commentators have suggested that a better nomenclature would be "immediate" and "delayed" initiative. *See, e.g.*, Collins and Oesterle, *supra* note 6, at 50-51. As discussed below – see note 131 and accompanying text – the "direct" or "immediate" form of the initiative is found in Colorado at the state level, while the "indirect" or "delayed" process prevails – by legislative fiat if not altogether consistent constitutional mandate – at the local level.

[11] *See* BRODER, *supra* note 6, at 26-27; CRONIN, *supra* note 6, at 43-54.

[12] *See* BRODER, *supra* note 6, at 27-41; ELLIS, *supra* note 6, at 26-35; Collins and Oesterle, *supra* note 6, at 54-55.

[13] *See* BRODER, *supra* note 6, at 26-27; ELLIS, *supra* note 6, at 30.

[14] *See* BRODER, *supra* note 6, at 27; ELLIS, *supra* note 6, at 30-35; Collins and Oesterle, *supra* note 6, at 55-63.

[15] Colorado State Archives *at* http://www.archives.state.co.us/archist.html.

[16] *Id*.

[17] Bryan was a leading advocate for initiative and referendum rights. CRONIN, *supra* note 6, at 165-68.

[18] Colorado State Archives at http://www.archives.state.co.us/govs/shafroth.html.

[19] Collins and Oesterle, *supra* note 6, at 55.

[20] Colorado State Archives, *supra* note 18.

[21] Collins and Oesterle, *supra* note 6, at 55. For a flavor of the pro-reform/anti-corruption (the presence of rampant corruption being virtually presumed) editorial stance of Colorado's leading newspapers—the Denver Post and Rocky Mountain News—it is worth the time to scan the coverage both newspapers gave to

legislation—including adoption of the initiative and referendum—to the state's General Assembly at an Extraordinary Session convened on August 9, 1910.[22]

While adoption of the bulk of the reform platform was never much in doubt, the proposal to amend Article V of the state constitution to provide for the powers of initiative and referendum was an exception. The legislative reception, particularly from the minority Republicans, was understandably chilly.[23] Three competing bills were introduced—by House Speaker Lubers (an "indirect" initiative requiring initial submission of measures to the legislature[24]), Denver Representative Helbig, and Colorado Springs Senator Skinner.[25] The Skinner-Helbig "direct" version (H.B. No. 6) ultimately passed the House and was delivered to the Senate on August 23.[26] Spurred by criticism from the press and fearing the possible formation of a third party,[27] the Senate—with the majority Democrats aided by breakaway Republicans[28]—followed suit on September 1.[29] The referred constitutional amendment was adopted by a 75 percent majority of the electorate at the general election of November 8, 1910.[30]

As amended, Article V, Section 1, of the Colorado Constitution now provided, in pertinent part and in original text, [31] as follows:

> The legislative power of the State shall be vested in the General Assembly consisting of a Senate and House of Representatives, both to be elected by the people, but the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the General Assembly, and also reserve power at their own option to approve or reject at the polls any act, item, section or part of any act of the General Assembly.
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the Extraordinary Session of the Colorado General Assembly in 1910 (during which session the initiative and referendum were adopted and referred to a vote of the electorate).

[22] HOUSE JOURNAL OF THE 17TH GENERAL ASSEMBLY (EXTRAORDINARY SESSION) at 19 (August 9, 1910).

[23] Samuel J. Lewis, *All Party Pledges But Initiative Certain to Pass*, DENVER POST, Aug. 13, 1910, at 3; Samuel J. Lewis, *Initiative and Referendum Measure Seems Unlikely Ever to Become a Law*, DENVER POST, Aug. 25, 1910, at 1; Samuel J. Lewis, *Republicans Aim to Kill Initiative*, DENVER POST, Aug. 30, 1910, at 1.

[24] *See supra* text accompanying note 10.

[25] Samuel J. Lewis, *All Party Pledges But Initiative Certain to Pass*, DENVER POST, Aug. 13, 1910, at 3.

[26] SENATE JOURNAL OF THE 17TH GENERAL ASSEMBLY (EXTRAORDINARY SESSION) at 99 (August 23, 1910).

[27] Samuel J. Lewis, *Senate Majority, Stung by Criticism, Ready to Redeem its Every Pledge*, DENVER POST, Aug. 26, 1910, at 1.

[28] Samuel J. Lewis, *Initiative Sure to Pass the Senate with the Aid of Republican Members*, DENVER POST, August 27, 1910, at 1. Some credit for the Republican shift may also be due to the much celebrated mid-session descent upon Denver of their own former standard bearer, Theodore Roosevelt, who had vacated the White House only the preceding year and was himself a vocal supporter of initiative and referendum rights. Two years later Roosevelt would make the statement before the Ohio Constitutional Convention, oft quoted by initiative and referendum supporters in later years, "I believe in the initiative and the referendum, which should be used not to destroy representative government, but to correct it when ever it becomes misrepresentative." 1 PROCEEDINGS & DEBATES OF THE CONST. CONV. OF THE STATE OF OHIO 664 (1912).

[29] E.P. Gallagher, *Initiative is Put Through With Votes to Spare*, ROCKY MOUNTAIN NEWS, Sept. 2, 1910, at 1.

[30] *See* CRONIN, *supra* note 6, at 52.

[31] Constitutional Amendment, Initiative and Referendum, ch. 3, LAWS 1910 (Extraordinary Session), pp. 11, 14.

> The initiative and referendum powers reserved to the people by this section are hereby further reserved to the legal voters of every city, town and municipality as to all local, special and municipal legislation of every character in or for their respective municipalities. The manner of exercising said powers shall be prescribed by general laws, except that cities, towns and municipalities may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten per cent. of the legal voters may be required to order the referendum, nor more than fifteen per cent. to propose any measure by the initiative in any city, town or municipality.

With minor typographical revisions, the first provision above—now Article V, Section 1(1)—reads identically in the Constitution's current form. The second provision—now Article V, Section 1(9)—was amended in 1980[32] to substitute the words "registered electors" for "legal voters." Otherwise, except for minor typographical revisions, it too is identical. The remaining provisions of amended Article V, Section 1—then and now—are primarily procedural and virtually exclusively directed to statewide measures.[33]

In the years since the fateful Extraordinary Session of 1910, the initiative and referendum rights have become a prominent feature upon Colorado's political landscape, particularly at the statewide level. Colorado initiative and referendum scholar Dennis Polhill[34] tallied 129 constitutional and 63 statutory initiatives alone between the 1912 and 2005 elections inclusive.[35] Initiatives have been accorded less attention and critical analysis at the local level, though it was within the context of litigation surrounding a contested municipal initiative that the Colorado Supreme Court sweepingly, if a bit

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[32] SEN. CON. RES. No. 7, Laws 1979, p 1474, as submitted to and adopted by the voters at the general election in 1980 and effective upon proclamation of the Governor on December 19, 1980.

[33] In original form, eight percent of the legal voters of the state were required to propose a statewide initiative; this was amended in 1980 – *see* note 32 – to require petition signatures of registered electors in an amount of at least five percent of the total number of votes cast for all candidates for the office of Secretary of State at the previous general election. COLO. CONST. art. V, § 1(2), as amended in 1980 (*see* note 32). A similar requirement was imposed for voter-instigated referenda. COLO. CONST. art. V, § 1(3), as amended in 1980 (*see* note 32). [As COLO. CONST. article V, § 1(3), has provided from its inception that the General Assembly may remove any legislation from exposure to referendum simply by attaching the routine and inviolate "emergency clause—*i.e.*, that the law is "necessary for the immediate preservation of the public peace, health or safety"—voter-instigated referenda are rarely seen, and, in fact, have not appeared in Colorado since 1932. Collins and Oesterle, *supra* note 6, at 65-66 n. 76.] Both initiatives and referenda at the state level were exempted from the power of the Governor's veto. COLO. CONST. art. V, § 1(4). A 1994 amendment imposed a "single subject" requirement for all – at least statewide – measures submitted by petition (*i.e.*, both initiatives and the at least theoretical voter-instigated referenda). COLO. CONST. art. V, § 1(5.5).

[34] Dennis Polhill, *Protecting the People's Voice: Identifying the Obstacles to Colorado's Initiative and Referendum Process* (Independence Institute Issue Paper no. 7-2006, 2006) http://www.i2i.org/articles/IP_7_2006_b.pdf (see Appx. A for tabulation and p. 5 for discussion).

[35] The text and discussion of these initiatives can be viewed on the website for the Colorado General Assembly – http://www.state.co.us/_dir/leg.html – for each of these years. Collins and Oesterle rank Colorado in the forefront with California and Oregon in terms of the degree to which constitutional initiatives have come to "dominate state government." Collins and Oesterle, *supra* note 6, at 48. Between 1980 and 2000, these three states accounted for forty percent of statewide initiatives in the country. ELLIS, *supra* note 6, at 38.

contradictorily, stated in 1980 that "[l]ike the right to vote, the power of initiative is a fundamental right at the very core of our republican form of government."[36]

B. Direct Democracy at the Local Level – The Puzzle

It is at the local level where the interpretive issue at the heart of the discussion in this Issue Paper rests. As noted above, the 1910 amendments "further reserved" the rights and powers of both initiative and referendum "to the legal voters [now "registered electors"] of every city, town and municipality as to all local, special and municipal legislation of every character in or for their respective municipalities."[37] Counties are not mentioned. Or are they? Counties are clearly not cities or towns; do they fall within the scope of the term "municipality?" And if counties are not covered, under what conceivable rationale were these modern engines of localized legislative power omitted?

The developed consensus, almost a century after the fact, is that counties were designedly excepted in 1910 from the general reservation of local initiative and referendum rights now found in Article V, Section 1(9). Both the Colorado Court of Appeals and Supreme Court so stated, in 1998 and 2000 respectively, in the context of litigation surrounding a disputed effort to submit an initiative to the voters of Archuleta County that would have altered the distribution scheme for the county's sales tax revenue.[38] Though the initiative in question had been tendered pursuant to a specific statutory authorization unrelated to the constitutional reservation of Article V, Section 1(9),[39] the Court of Appeals observed preliminarily that "[a]t the outset, we note that the power of initiative and referendum is not generally reserved to the electors as to county governments."[40] The Supreme Court reversed on the merits of the statutory analysis,[41] but

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[36] McKee v. City of Louisville, 616 P.2d 969, 972 (Colo. 1980). The case involved an initiated measure to repeal an annexation ordinance adopted by the Louisville City Council. The Council, with the subsequent approval of the district court, withheld the measure from the municipal ballot upon the determination that it was beyond the city's legislative power – which would include such power as invoked by initiative – to disconnect theretofore annexed land without the consent of the affected property owners (who in this case had petitioned for the annexation and were unlikely to consent). *Id*. at 970-72. The Supreme Court, following precedent from an earlier case involving another municipal initiative – City of Rocky Ford v. Brown, 293 P.2d 974 (Colo. 1956), involving a petition for the grant of an exclusive 25-year franchise for the distribution of natural gas in the city – refused to let prejudgment as to an initiative's ultimate validity deprive the voters of their right to vote upon and adopt it in the first instance. *MeKee* at 972-73.

[37] COLO. CONST. art. V, § 1(9) by current designation.

[38] County Road Users Ass'n. v. Board of County Comm'rs, 987 P.2d 861 (Colo. App. 1998), *rev'd* 11 P.3d 432 (Colo. 2000).

[39] COLO. REV. STAT. § 29-2-104 (2002), initially adopted in 1967, provides a specific process for the adoption of countywide sales and use taxes through either referendum from the board of county commissioners or initiative by petition of five percent of the registered electors of the county. In the wake of the Archuleta litigation, the General Assembly amended the statute to provide that this topic-specific right of initiative "shall extend only to the initial proposal of a tax and shall not extend to the extension of an expiring tax, use of tax revenues, or changes in distribution of tax revenues among local governments." H.B. 02-1218, 2002 COLO. SESS. LAWS 1944.

[40] *County Road Users Ass'n.*, 987 P.2d at 863. The Court further commented that "[t]he General Assembly has not seen fit to extend [the broad and inclusive initiative and referendum powers of COLO. CONST. art. V, § 1] to the electors of counties by statute." *Id*.

[41] Reversing the district court, the Court of Appeals had held that the statutory duty of the Archuleta County Commissioners to submit initiated sales tax measures to the electorate was ministerial and non-discretionary and that pre-adoption judicial review of both the validity of the petitions and procedure

agreed with the Court of Appeals' constitutional point of departure, noting that "[t]he list of affected governmental units does not include counties, and this court has not recognized any constitutional initiative powers reserved to the people over countywide legislation."[42]

The issue was presented to the Colorado Court of Appeals again, and more directly, in the context of a growth limitation initiative barred from the 1998 general election ballot in Teller County by its Board of County Commissioners.[43] Here there was no arguable topic-specific statutory grant of initiative power—the invocation was directly to Article V, Section 1, of the Colorado Constitution.[44] The *Dellinger* petitioners and the Court of Appeals agreed that the "plain language" of Article V, Section 1(9), did not refer explicitly to counties,[45] nor would the "historical realities that existed at the time Section 1(9) was adopted" support a conclusion that counties were intended to fall within the ambit of the term "municipality."[46] Nevertheless, the *Dellinger* petitioners found those "historical realities" to be crucial in another respect. They, and the Court of Appeals, noted that, in 1910, "county governments did not exercise legislative functions to any significant extent, if at all."[47] Thus, no consideration was or would logically have been given by the drafters to reserving from county governments a right that was purely legislative in nature. Today, however, counties do exercise legislative power—a power "they could only have acquired . . . by devolution from the General Assembly."[48] Recognizing that the right of initiative had been reserved explicitly from the General

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followed in the petitioning process, as much as the ultimate constitutionality of the measure itself per *McKee*, *supra* note 36, was premature and impermissible. 987 P.2d at 864. Reversing the Court of Appeals, the Supreme Court held that COLO. REV .STAT. § 29-2-104 imposed a discretionary, rather than ministerial, duty upon the County Commissioners, that the courts retained jurisdiction to assure procedural compliance with the statutory requirements for submission of a sales tax initiative to the electorate, and that the proper statutory procedures had not been followed in this case. 11 P.3d at 436.

[42] *Id.* The Supreme Court explained its insistence upon adherence to the specific statutory procedures – *see* note 41, *supra* – in part by noting that the alternative "would potentially require the County to submit to the voters proposals having no relationship to a county sales tax," a result the Court characterized as "absurd." *Id*. at 438. This conclusion, of course, presupposes the utter inapplicability to counties of the broader grant of initiative rights under COLO. CONST. art. V, § 1(9). The Court explicitly viewed counties as falling in the same pot as soil conservation districts, invoking a 1948 opinion – People *ex rel*. Cheyenne Erosion District v. Parker, 192 P.2d 417, 420 (Colo. 1948) – that had determined the latter not to be within the scope of "a city, town or municipality" under COLO. CONST. art. V, § 1(9). As discussed below, this comparison is tellingly illustrative of the point upon which the modern understanding has gone awry.

[43] Dellinger v. Bd. of County Comm'rs, 20 P.3d 1234 (Colo. App. 2000), *cert. denied* 2001 Colo. LEXIS 283 (April 9, 2001). The initiated measure would have required Teller County to "place a one percent limit on the annual increase in new residential dwelling units in unincorporated [areas]" of the county. 20 P.3d at 1235.

[44] The petitioners also invoked and followed the procedures set forth in COLO. REV. STAT. § 30-11-103.5 (2002). 20 P.3d at 1235. This provision, adopted in 1996, provides simply that county initiatives and referenda—when authorized by statute or the state constitution (the latter reference being to home rule counties as discussed at text accompanying notes 57-58, *infra*)—shall, absent specific statutory direction to the contrary, be governed by the procedures applicable to "municipal initiatives and referred measures" under COLO. REV. STAT. § 31-11-101, *et seq*. There was no contention that this provision contained its own substantive grant of initiative rights.

[45] 20 P.3d. at 1236-37.

[46] *Id*.

[47] 20 P.3d at 1237.

[48] *Id*.

Assembly under Article V, Section 1(1), the *Dellinger* petitioners submitted that the later devolution of legislative power to county governments by the General Assembly "could not . . . be free of the right of initiative" reserved from the General Assembly itself.[49] The Court of Appeals acknowledged that "[t]he argument has a certain ring of logic."[50] "Nevertheless," the Court continued, "given the absence of support in the language or historical intent of this constitutional provision, we must reject plaintiffs' contention."[51] Rather than pick up the issue in the wake of its intervening pronouncements in the *County Road Users Association* case,[52] the Colorado Supreme Court denied certiorari to the *Dellinger* petitioners on April 9, 2001.[53]

The United States Court of Appeals for the Tenth Circuit accepted the Colorado courts' interpretation of their own Constitution, appropriately and with minimal discussion, in 2002.[54] The federal court then turned its attention to the issue of whether or not this general exclusion of county initiative rights, juxtaposed against a statutory mandate of such rights in the context of the two Colorado counties operating under "home rule" charters,[55] violated the equal protection guarantees of the Fourteenth Amendment to the United States Constitution. The Court concluded it did not.[56]

The judicial perspective on the matter is clearly shared by Colorado's legislative branch. In the wake of the amendment of the Colorado Constitution in 1970 to provide for the optional formation of "home rule" counties,[57] the General Assembly in 1971 specifically mandated that any county home rule charter "shall contain procedures for the initiative and referendum"[58]—a mandate that would hardly have been necessary were Article V, Section 1(9), understood to be already perforce applicable. The same may be

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[49] *Id*.
[50] *Id*.
[51] *Id.*
[52] *See* text accompanying notes 38-42, *supra*.
[53] 2001 Colo. LEXIS 283 (April 9, 2001).
[54] Save Palisade Fruitlands v. Todd, 279 F.3d 1204, 1207 (10th Cir.), *cert. denied* 123 S.Ct. 81 (2002).
[55] COLO. CONST. Art. XIV, § 16, permits county electors to adopt a "home rule" charter under which they are freed from many of the specific constitutional mandates otherwise applicable to "statutory" counties regarding such matters as the qualification, election, terms and compensation of county commissioners and officers. The General Assembly saddled this option, however, with a requirement that "[e]very [county home rule] charter shall contain procedures for the initiative and referendum of measures and for the recall of elected officers." COLO. REV. STAT. § 30-11-508 (2002). Only two of Colorado's 64 counties (Weld and Pitkin) have availed themselves of this option, and the City and County of Denver (organized specially under COLO. CONST. Art. XX, § 1) and City and County of Broomfield (organized specially under COLO. CONST. Art. XX, § 10) are directly subject to Art. V, § 1(9).
[56] The Tenth Circuit first noted the absence of a "suspect class" in county electors. 279 F.3d at 1210. Second, the court declined to recognize the state-created right of initiative as rising in itself to the level of a "fundamental right" that, once created "for one political subdivision . . . must necessarily be created for all political subdivisions." *Id*. at 1212. The court did acknowledge that the "fundamental rights" to vote and to free speech may be implicated by improper regulation of a state-created initiative right – as it had suggested previously in Montero v. Meyer, 13 F.3d 1444, 1448 (10th Cir. 1994) – though no such impropriety was found here. *Id* at 1210-11. Finally, applying a purely rational basis analysis, the court concluded, simply and without any real discussion, that it was rational enough to require initiative and referendum powers in the context of home rule charters that were otherwise designed to enhance local autonomy and facilitate a broader spectrum of governmental powers. *Id*. at 1214.
[57] COLO. CONST. art. XIV, § 16. *See* discussion at note 55, *supra*.
[58] COLO. REV. STAT. § 30-11-508 (2002). *See* discussion at note 55, *supra*.

said of the 1967 statute[59] specifying initiative and referendum procedures for the adoption of countywide sales (and later use[60]) taxes. (The 1967 statute was the focus of the Archuleta County litigation.[61]) The same point may be made, arguably, about the 1987 legislation which subjected certain "local government" development agreements to referendum review.[62] Most tellingly, were the General Assembly to hold a contemporary view different from that of the courts, legislation would not have been introduced—and "postponed indefinitely" by the House Committee on Local Government—in 2001 for the precise purpose of granting "initiative and referendum powers similar to those reserved to the people by section 1 of article V of the state constitution . . . to the registered electors of every county of the state as to all countywide legislation of every character in or for their respective counties."[63]

The present consensus poses, rather than answers, the dilemma which is the focus of this Issue Paper. Why would county governments have been omitted in 1910 from a sweeping constitutional reform manifestly designed to purge legislative processes—both state and local—of corruption and undue fealty to moneyed special interests and assure their ultimate responsiveness to the will of the people? What would have been the rationale for imposing the initiative and referendum upon cities and towns, as well as the General Assembly itself, while exempting boards of county commissioners? Could our present understanding be wrong? To answer these questions, this Issue Paper must, of course, journey back to the perspective and realities of 1910.

II. The 1910 Constitutional Amendment

A good place to start any historical analysis of a constitutional amendment or statute is with the words used. The powers of initiative and referendum were reserved specifically by the people from the General Assembly[64] and "to the legal voters of every city, town and municipality as to all local, special and municipal legislation of every character in or for their respective municipalities."[65] Indisputably, there is no explicit reference to counties. At first blush, the key word may appear to be "municipality"—apparently intended to suggest something in addition to cities and towns, yet also contextually a category inclusive of cities and towns. Could it be that counties were viewed as falling within the ambit of "municipalities?"

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[59] COLO. REV. STAT. § 29-2-104 (2002). *See* discussion at note 39, *supra*.
[60] Per S.B. 75-56, 1975 COLO. SESS. LAWS 961-62.
[61] *See* note 38, *supra*, and text accompanying notes 38-42, *supra*.
[62] COLO. REV. STAT. § 24-68-104(2) (2002) provides that development agreements entered into by "local governments" that vest property rights in landowners that exceed three years in duration "shall be adopted as legislative acts subject to referendum." "Local governments" are defined by COLO. REV. STAT. § 24-68-102(2) (2002) to include "any county, city and county, city, or town, whether statutory or home rule" – all of which, except counties, would be subject to referendum review under COLO. CONST. Art. V, Sec. 1(9) in any event.
[63] H.B. 01-1121. The text of this legislation may be viewed through Adobe Acrobat via the Colorado General Assembly's web site for the 2001 regular session at http://www.leg.state.co.us/2001/inetcbill.nsf/Frameset?ReadForm&viewname=3&resultformat=1.
[64] COLO. CONST. art. V, § 1(1) as presently numbered.
[65] COLO. CONST. art. V, § 1(9) as presently numbered.

Unfortunately for our purposes, the textual language by itself does not answer the question. Technically, a county is not a "municipality,"[66] yet it is generally viewed as a "quasi" municipal entity[67] and the language of the moment—both then and now—literally wallows in imprecision.[68] Roughly contemporaneous with the historical events at issue, the Colorado Supreme Court alluded to counties variously as "quasi municipal corporations,"[69] a "municipality,"[70] and "municipal corporations"[71]—while concurrently noting that "a county is not, strictly speaking, a municipal corporation."[72] In the latter instance, the court promptly cautioned that "the term 'municipal corporations' is sometimes used in statutes to include counties,"[73] though noting approvingly that three

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[66] In his hornbook on local government, REYNOLDS draws the definitional distinction between "public or municipal corporations" and "public quasi-corporations." OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW 17-19 (1982). Municipal corporations "are legal entities with broad powers of local government" – *Id*. at 17 – existing "to serve a particular locality." *Id*. "Examples are the units of local government called cities, towns, and villages." *Id.* They exist "to serve a particular locality" and "exercise the functions allowed them by [state] law for the good of their own populace and not for state-wide purposes." *Id*. at 17-18. "[A] municipal corporation is created at the behest of the inhabitants of a certain area to serve their peculiar needs." ROBERT S. LORCH, COLORADO'S GOVERNMENT 45 (1983). BLACK'S LAW DICTIONARY similarly defines "municipality" as a "municipal corporation" or governing body thereof and "municipal corporation" as "[a] city, town, or other local political entity formed by charter from the state and having the autonomous authority to administer the state's local affairs." BLACK'S LAW DICTIONARY 1037 (7th ed. 1999).

[67] Public quasi-corporations, per REYNOLDS, "are historically mere arms of the state, created for purposes of convenience of administration." REYNOLDS, *supra* note 66, at 17. "Although (like municipal or public corporations) they generally have definite geographic limits, they serve *state* needs and interests, not local ones, within those limits. They act as administrative agents of state government." *Id*. (emphasis in the original). Counties are "not created at the instance of their residents." *Id*. at 18. "A county is not (in theory) created for the particular advantage of its inhabitants, but is created by the state to serve the purposes of the state." LORCH, *supra* note 66, at 45. "In legal theory a county differs from a city in that while a city is established to serve the special needs of its inhabitants, a county is set up to serve the needs of the state at large." *Id.* at 56. MCQUILLIN notes that "although counties have the general characteristics of municipal corporations, they are not considered such unless made so by constitution or statute" and therefore fall into the class of "quasi-public or quasi-municipal corporations organized to aid in the proper administration of state affairs . . . ." EUGENE MCQUILLIN, 1 THE LAW OF MUNICIPAL CORPORATIONS 214 (3d ed. 1987).

[68] MCQUILLIN notes that "As used in a state constitution or statute not defining the word [municipality], it is generally confined to its meaning to include only municipal corporations in the proper and strict sense, including a city of any class, but sometimes it is used in a broader sense . . . ." MCQUILLIN, *supra* note 67, at 214. "Whenever it appears that the legislature so intended, the term 'municipality' will be construed to include quasi-municipal corporations." *Id*. "If one purpose of a county is to provide local self-government, this brings it very close to being a municipal corporation, and in fact several jurisdictions in the United States hold counties to be municipal corporations . . . ." LORCH, *supra* note 66, at 56. "As the natures and functions of many public quasi-corporations have become more similar to those of cities over recent decades, the distinction between public or municipal corporations on the one hand, and public quasi-corporations on the other, has become increasingly blurred." REYNOLDS, *supra* note 66, at 18.

[69] Gorrell v. Bevans, 179 P. 337 (Colo. 1919) ("The legislature changes the boundaries of counties and other quasi municipal corporations . . .").

[70] Berkey v. Bd. of Comm'rs, 110 P. 197, 200 (Colo. 1910) ("Where a statute imposes upon a city, county, levee district, or other municipality . . .").

[71] Taxation of Mining Claims, 21 P. 476 (Colo. 1886) (". . . so far at least as counties and other municipal corporations are concerned . . .").

[72] McFerson v. Bd. of County Comm'rs, 241 P. 733 (Colo. 1925).

[73] *Id*.

prior 1895 Court of Appeals opinions[74] had excluded counties specifically from the scope of 1891 legislation authorizing the garnishment of "municipal corporations."[75] The court similarly contrasted counties with "purely municipal corporations" in finding the former not to be within the purview of general laws regulating the rate and payment of interest.[76] In later years, the same court would readily refer to counties as "municipal," though opining that "[t]he inclusion of counties in the term 'municipal' recognizes the increasing role of counties in providing local services considered to be 'municipal functions'"[77]—an evolution, as discussed below,[78] not extant in 1910.

The principal opinion in the group of Court of Appeals decisions dealing with the 1891 garnishment statute[79] had indeed bemoaned the "loose and indiscriminate use" of the term "municipal corporations" when "speaking of cities, towns, and counties, in cases where it was not disputed that some particular law which was the subject of construction applied equally to all of them."[80] Noting that "[t]he object to be attained in the construction of any statute is the intention of the legislative body which enacted it," the court commented that "in determining the sense in which the term [municipal corporations] is employed in the act of 1891, cases where it is loosely used, or even misapplied, the facts not calling for critical accuracy in that respect, are of no assistance whatever."[81] This caveat bears relevance to our present inquiry.

Turning to the records of the 1910 Extraordinary Session, it is not particularly surprising to find that the heavy emphasis in the legislative records[82] and contemporaneous press coverage[83] was upon the statewide, rather than local, initiative and referendum powers. Governor Shafroth's opening message to the Session on August 9, while calling at some length for the adoption of a statewide initiative and referendum amendment, noted only in passing that "[a] great number of cities, by vote, have made these measures applicable to their respective municipal governments."[84] In the context of a debate in the House between Speaker Lubers and Representative Helbig on August 17, Helbig is quoted as decrying the competing, and ultimately unsuccessful, Lubers bill as denying the initiative power "to cities, towns, and counties."[85] In the same debate, Helbig apparently launched what was to become the principal bone of contention regarding the application of initiative powers at the local level, noting that "if the people desire it, this bill, if it becomes a law, will give the people of the different towns the privilege of voting

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[74] Stermer v. Bd. of County Comm'rs, 38 P. 839 (Colo. App. 1895); Gann v. Bd. of County Comm'rs, 41 P. 829 (Colo. App. 1895); Bd. of County Comm'rs v. Brown Bros., 39 P. 989 (Colo. App. 1895).
[75] *McFerson*, *supra* note 72, at 733.
[76] Bd. of Comm'rs v. Wheeler, 89 P. 50, 52 (Colo. 1907).
[77] City of Durango v. Durango Transportation, Inc., 807 P.2d 1152, 1156 (Colo. 1991).
[78] *See* text accompanying notes 145-169, *infra*.
[79] *See* note 74, *supra*.
[80] *Stermer*, *supra* note 74, at 840.
[81] *Id.*
[82] *See* the Senate and House Journals of the 17th General Assembly (Extraordinary Session).
[83] See the coverage in both the *Denver Post* and *Rocky Mountain News*, Colorado's principal daily newspapers then and now, spanning the period from the convening of the Extraordinary Session on August 9 through the reporting of the passage of the initiative and referendum provisions on September 1 (reported on September 2, 1910).
[84] HOUSE JOURNAL OF THE 17TH GENERAL ASSEMBLY (EXTRAORDINARY SESSION) at 19 (August 9, 1910).
[85] E.P. Gallagher, *Speaker and Helbig Rap Each Other's Initiative Bills*, ROCKY MOUNTAIN NEWS, August 18, 1910, at 2.

wet or dry, with no interference from a state law after that."[86] Reference was to the statutory "Local Option" provision then in effect, which afforded any "political subdivision" of the state the very limited legislative option to vote to become an "anti-saloon territory" upon petition by 40 percent of its legal voters.[87] Per Helbig, his proposed local initiative amendment would drop the petition requirement to 15 percent at least in the context of "towns," and presumably "cities" and "municipalities," as well.

Within days of Helbig's pronouncements, the "wets" and "drys" were at war, with the local initiative provision—if not the entire amendment—clearly at stake.[88] By this time, Helbig's local initiative language had been added to the Skinner bill and the entire legislation had passed the House and was before the Senate.[89] To save the bill, Senator Skinner reversed course from Helbig's earlier statements, opining that the "Local Option" statute would not be overridden by the application of the initiative to "cities and municipalities," as the statute had been imposed at the "state level" and involved a "purely state question."[90] Skinner was quoted in the *Denver Post* as continuing, "[o]ur law on the initiative and referendum cannot in any way delegate the power to cities and municipalities to submit the question to local option because the policing powers of the state must remain in the hands of the state."[91] The same quote appeared in the *Rocky Mountain News*, though the language appeared as "cities and towns."[92] Whatever its scope, the tactic worked and the amendment passed the Senate, with the local initiative language intact, on September 1.[93] The event was described in the *Rocky Mountain News*, as pertinent to the local initiative provision, as follows:

> Included in the bill is a provision which will give all cities and towns the right to the initiative and referendum in their local affairs, as soon as the people adopt the amendment at the polls. The bill, therefore, establishes the people's rule not only in statewide affairs, but in the affairs of the political units within the state.[94]

What is remarkable about the minimal legislative attention devoted to the local initiative and referendum measures is the utter absence on the record of any real discussion—let alone any definitional precision—as to exactly which units of local government were intended to be affected. The matter appears simply not to

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[86] Samuel J. Lewis, *Lubers and Helbig Have Long Debate Over Initiative*, DENVER POST, Aug. 18, 1910, at 2. This was preceded, as reported, by Helbig's philosophical pronouncement that "I favor home rule in municipalities on home rule questions, as I feel the people of a municipality know better what they want than the residents of some other part of the state. I favor the initiative—always have and always will . . . ." *Id*.

[87] REV. STAT. OF COLO. Chap. LXXXVI, § 4094-11 (1908). A "political subdivision" was defined to mean "any city, town, ward, election district, or precinct, as the case may be"—with an "election district" defined to include any "subdivision of a county or city for voting purposes." *Id* at § 4094.

[88] Samuel J. Lewis, *Initiative Bill Success Depends Upon Minority*, DENVER POST, Aug. 24, 1910, at 3.

[89] SENATE JOURNAL OF THE 17TH GENERAL ASSEMBLY (EXTRAORDINARY SESSION) at 99 (August 23, 1910).

[90] Samuel J. Lewis, *Initiative and Referendum Measure Seems Unlikely Ever to Become a Law*, DENVER POST, Aug. 25, 1910, at 4.

[91] *Id*.

[92] E.P. Gallagher, *Platformists Turn Tide; Senate to Get Pure Initiative*, ROCKY MOUNTAIN NEWS, Aug. 26, 1910, at 2.

[93] E.P. Gallagher, ROCKY MOUNTAIN NEWS, *Initiative is Put Through With Votes to Spare*, Sept. 2, 1910, at 1.

[94] *Id*.

have been on the legislators' minds. Certainly no one appears to have dwelt in more than an incidental fashion upon whether counties were in or out. It may be presumed that the use of the phrase "every city, town and municipality" implies at least the possibility of something more than "every city and town"—lest the word "municipality" be deprived of any meaning at all in violation of a basic tenet of statutory draftsmanship and construction[95]—but what we are never really told.

Perhaps, however, the "local option" debate provides an analytical clue—pointing us slightly further along in the text. The next phrase tells us that the initiative and referendum reservations are made as to "all local, special and municipal legislation of every character." The crux of the "local option" debate was whether some of the localities covered by the "Local Option" statute would invoke the legislative power of the local initiative to bring about a conversion to an "anti-saloon territory." Even before reaching the issue of state versus local police powers, the preliminary presumption underlying the debate was the power of an affected locality to "legislate" at all. Absent legislative power, the reservation of the rights of initiative and referendum as to "local, special and municipal legislation" would be a non sequitur—and concern with the impact upon the "Local Option" statute would be moot. The salient question then may be more of a functional, and less of a lexicographical, one. The reservation, logically, could only have been to the "legal voters" (now "registered electors") of those units of local government, and only those units, empowered by the state to "legislate." And—critically—there is virtually nothing in the record to suggest that the consideration went much beyond that premise.

III. The Oregon Parallel

The acknowledged model for the Skinner-Helbig version of the initiative and referendum amendment ultimately adopted in Colorado came from Oregon,[96] which in 1906 had added a local initiative and referendum reservation to its own 1902 statewide provision.[97] Oregon's local provision read as follows:

> The initiative and referendum powers reserved to the people by this Constitution are further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation.

The textual similarity is obvious. While the sweep of the terms "municipality" and "municipal" are no more apparent on the surface, Oregon's courts began wrestling with

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[95] *See, e.g.*, Mission Viejo Co. v. Douglas County Bd. of Equalization, 881 P.2d 462, 464 (Colo. App. 1994).

[96] Samuel J. Lewis, *Initiative and Referendum Measure Seems Unlikely Ever to Become a Law*, DENVER POST, Aug. 25, 1910, at 4.

[97] OR. CONST. art. IV, § 1(5)—initially § 1a. as adopted in 1906.

the issue far earlier than Colorado's—and, more importantly, within and reflecting the milieu of the time.

By 1912 the Oregon Supreme Court, while acknowledging that "[a] county is not, in a strict sense, a municipal corporation,"[98] had declared unequivocally that "a county is clearly a municipality or district within the meaning of this section [Ore. Const. art. IV, sec. 1a]."[99] The court placed its principal reliance for this conclusion upon an 1891 analysis of the word "municipal" as used in a separate constitutional provision excepting corporations created for "municipal purposes" from a general prohibition upon the creation of "corporations" by special legislation.[100] Further, the same court in 1907 had meshed the terms "municipality" and "district" in Oregon's 1906 amendment as referring essentially to the same thing and, without specific reference to counties, had construed the words "local" and "special" as applicable to "such municipal corporations as are described" in the same 1891 opinion (which had explicitly included counties).[101] In 1917, in the context of a challenge to a countywide initiative election calling for the relocation of the county seat, the Oregon Supreme Court reaffirmed that "a county is a municipality or district within the purview of this constitutional amendment."[102]

Oregon's analysis bore the seeds of a problem, however. The 1891 opinion from which all else seemed to spring predated, and had nothing whatsoever to do with, the local reservation or exercise of initiative, referendum, or any other form of legislative power. It had to do with an act of the state legislature "to establish and incorporate" the Port of Portland.[103] The crux of the court's opinion in that case was its construction of the "municipal" exception to the constitutional prohibition upon the creation of corporations by special legislation as applying "in the broader and more general sense"[104] not only to cities and towns, but also to "agencies or instrumentalities of the state to promote the convenience of the public at large"[105]—*i.e.*, formed for "public, political or governmental"[106] purposes. The opinion dealt with ports, but dicta swept in "counties, school districts, road districts, etc."[107] It is one thing to except such public-purpose instrumentalities from a prohibition upon their creation by special legislation. It is quite another to imbue them, and their constituents, with a power that explicitly and manifestly involves the capacity to legislate.

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[98] Schubel v. Olcott, 120 P.375, 378 (Or. 1912). The case concerned an initiative at the county level to exempt "trades, labor, professions, business, occupations, personal property, and improvements on, in, and under land" from county taxation, and the Oregon Attorney General's contention that "counties are not municipalities" within the meaning of the reservation of the initiative right. *Id*. at 376.

[99] *Id*. at 379.

[100] Cook v. Port of Portland, 27 P.263 (Or. 1891). While the matter at issue concerned ports and had nothing to do with counties, the court commented that "the word municipal is defined by the lexicographers as belonging to a city, town or place having the right of local government." *Id*. at 264. – and that, in addition to cities, "there is another class of corporation, such as counties, school districts, road districts, etc., which . . . are, in the broadest use of the term, for municipal purposes." *Id*.

[101] Acme Dairy Co. v. Astoria, 90 P. 153, 155 (Or. 1907).

[102] Barber v. Johnson, 167 P. 800, 801 (Or. 1917).

[103] *Cook*, *supra* note 101, at 263.

[104] *Id*. at 264.

[105] *Id.* The court commented that "It would be a narrow and unwarranted construction of language to say that municipal purposes means only city, town or village purposes." *Id*.

[106] *Id.* at 265.

[107] *Id* . at 264.

The functional distinction was posed when a group of voters within the same Port of Portland attempted in 1912 to amend their charter to include an expanded power to expend public funds to dredge a slough that lay outside the incorporated port limits.[108] The Oregon Supreme Court in 1917—the same year it was unequivocally reaffirming that a county was a "municipality" within the meaning of the local initiative reservation[109]—declared the power of a local "municipality" or "district" to amend its own charter rested exclusively with cities and towns as "a type of municipal government containing higher attributes of sovereignty than any other local subdivision."[110] Reference was made to a separate specific constitutional enabling provision for cities and towns.[111] The court declared that the constitution "does not permit the legal voters of any other municipality or district to enact or amend their charter or act of incorporation without outside [read "State"] legislative aid"[112] or to "appropriate legislative power unto itself."[113] The next year, the court struck down a county initiative adopting a bounty on jackrabbits upon the conclusion that "[n]o act has ever been passed by the legislature or by the people of the whole state granting unto the voters of a county the right to enact [such legislation] for themselves."[114] As stated by the court on rehearing, and over the contrary argument of the acknowledged father of the Oregon initiative and referendum movement himself,[115] "[a] county cannot enact a law unless the power to enact that law is referable to a grant of power made by the people of the whole state or by their representatives, the legislature."[116] In other words, notwithstanding its earlier and virtually contemporaneous definitional pronouncements, Oregon's local initiative and referendum amendment "is not self-executing as to counties."[117]

The story in Oregon did not end here,[118] though the proposition had been established that the exercise of legislative power in the context of counties—either by their governing bodies or by the local voters through the initiative or referendum process—required enabling legislation at the state level conferring that legislative power. In other words, a prerequisite to county legislation by initiative or referendum was an affirmative grant by the state of the power to legislate at all.[119] Further and

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[108] Rose v. Port of Portland, 162 P.498, 500 (Or. 1917).
[109] *See* note 102, *supra*, and accompanying text.
[110] *Rose*, *supra* note 108, at 554.
[111] OR. CONST. art. XI, § 2.
[112] *Rose*, *supra* note 108, at 558.
[113] *Id*. at 556.
[114] Carriker v. Lake County, 171 P. 407 (Or. 1918).
[115] William S. U'Ren. *See* BRODER, *supra* note 6, at 35-38.
[116] Carriker v. Lake County, 89 Or. 240, 246 (1918) (on rehearing).
[117] *Id*. at 247.
[118] In apparent response to *Carriker*, *supra* notes 114-117 and accompanying text, the Oregon legislature provided in 1919 that "[t]he people of every county are authorized to enact, amend or repeal all local laws for their county by the initiative and referendum process." *See* Allison v. Washington County, 548 P.2d 188, 193 (Or. App. 1976), quoting repealed OR. REV. STAT. § 254.310. This was replaced in 1957 by current OR. CONST. art. VI, § 10, which provides "[t]he initiative and referendum powers reserved to the people by this Constitution hereby are further reserved to the legal voters of every county relative to the adoption, amendment, revision or repeal of a county charter and to legislation passed by counties which have adopted such a charter."
[119] *See, e.g.*, Hansell v. Douglass, 380 P.2d 977, 978 (Or. 1963) (regarding school districts); Bd. of Directors v. Kelly, 137 P.2d 295, 298-99 (Or. 1943) (regarding utility districts); Smith v. Hurlburt, 217 P. 1093, 1096 (Or. 1923) (regarding water districts).

concomitantly, as developed much later, the reservation of the initiative and referendum power applied only to municipal "legislation"—that is, to "making laws of general applicability and permanent nature."[120] "Proposed initiative measures addressing administrative matters properly are excluded from the ballot."[121] The operative word is "legislation."[122]

IV. The 1913 Enabling Legislation

The issues that were perplexing the Oregon courts find no contemporaneous reflection in Colorado. There are no pertinent judicial pronouncements. In 1913, the General Assembly adopted its initial implementing legislation for the 1910 amendment.[123] The title to the bill referred sweepingly to "carrying into effect the initiative and referendum powers . . . on general, local, special and municipal legislation . . . ."[124] After establishing detailed procedures for statewide measures, the legislators provided that, when "local and municipal affairs"[125] were involved, "the city or town clerk or other official designated by law to receive petitions"[126] shall carry out the duties assigned at the state level to the Secretary of State, and that the text of local initiatives and referenda would be disseminated in newspapers "published within the municipality or local district"[127] wherein the vote was to be taken. Later in the statute, the "local option" debate was laid to rest by an exception for "local option liquor laws providing methods for determining whether the sale of intoxicating liquors shall be prohibited in any county, city, district, ward or precinct."[128] The language is broad, and there is nothing evidencing an understanding or intent to limit local applicability to cities and towns. Yet, when dealing with the specific provisions for voter-instigated referenda,[129] and when imposing an "indirect" or "delayed" process requiring the initial submission of local initiatives to the relevant local "legislative body" for consideration prior to submission to

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[120] Lane Transit District v. Lane County, 957 P.2d 1217, 1220 (Or. 1998), quoting Foster v. Clark, 790 P.2d 1, 6 (Or. 1990).
[121] *Id*.
[122] *Id.*
[123] H.B. 13-1, 1913 COLO. SESS. LAWS 310-18.
[124] *Id*. at 310.
[125] *Id*. at 315 (§ 7).
[126] *Id*. This language remained until 1993, when it was changed to "designated election official." S.B. 93-135, 1993 COLO. SESS. LAWS 691. The section was ultimately repealed in its entirety in connection with the 1995 amendments discussed at note 131, *infra*.
[127] H.B. 13-1, 1913 COLO. SESS. LAWS 315 (§ 7). This language remained until 1993 as well, when it was changed to "political subdivision." S.B. 93-135, 1993 COLO. SESS. LAWS 691. This section was also repealed in its entirety in connection with the 1995 amendments discussed at note 131, *infra*.
[128] H.B. 13-1, 1913 COLO. SESS. LAWS 317 (§ 12).
[129] *Id*. at 315 (§ 9). *See* discussion of voter-instigated referenda at the state level, under present COLO. CONST. art. V, § 1(3), at note 33, *supra*. While this rarely seen process is not specified in the local reservation of what is now COLO. CONST. art. V, § 1(9), its legislative adoption in 1913 would seem consistent with the breadth of the "further" reservation at the local level of the powers immediately theretofore specified. What may be questionable, and a bit amusing, was the saddling of the all-powerful "emergency clause" exception with the additional requirement, only at the local level, that the "reasons why it is thus necessary" be set forth in a separate section of the ordinance.

a popular vote,[130] specific reference was made exclusively to the legislative bodies of the affected "city or town."[131]

In the end, there is little by way of historical evidence or logic to support a conclusion that the Colorado voters and legislators of 1910 and 1913 had developed a reasoned intention to *exclude* counties from the local initiative and referendum reservation. On the other hand, it is apparent that virtually no attention was given to *including* them. Allusion to counties was rare and, at best, incidental. Yet it may be suggested that mere rarity of allusion is a very weak historical basis upon which to proclaim a formulated legislative intention to exclude.

V. Counties in the Context of 1910

With the Oregon experience and the "local option" debate in mind, an explanation in terms of context—for what otherwise appears as a bank of legislative fog—may well suggest itself. The context is the functional nature of counties, at least as they existed at the turn of the last century. As Reynolds explains, counties (and other "public quasi-corporations")

> are historically mere arms of the state, created for purposes of convenience of administration. It was not practical in the early days of this country for a state to be governed entirely from the state capital. Geographic subdivisions were needed. Therefore, the "quasi-corporations" [*e.g.,* counties] were created. Although (like municipal or public corporations) they generally have definite geographic limits, they serve *state* needs and interests, not local ones, within those limits. They act as administrative agents of state government.[132]

"Municipalities," on the other hand, according to Reynolds

> are legal entities with broad powers of local government.

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[130] H.B. 13-1, 1913 COLO. SESS. LAWS 316 (§ 10). *See* note 10, *supra*, and accompanying text. This provision, imposing a wholly different and manifestly more cumbersome form of initiative process at the local level than the "direct" form reserved to the people at the state level, with no apparent basis for doing so in the fairly straightforward language of what appears to be purely a "further" reservation at the local level of the powers immediately theretofore specified a the state level, may be viewed as stretching the bounds of constitutional propriety. Having said this, no one appears to have been much bothered by the issue, then or since.

[131] *Id*. at 315-317. Section 9 subjected only ordinances, resolutions, and franchises "passed by the legislative body of any city or town" to voter-instigated referenda. *Id*. at 315. Section 10 provided for the initial submission of local initiatives, under the "indirect" or "delayed" mechanism, "to the legislative body of any city or town." *Id*. at 316. Through sundry amendments over the years, this language persisted until the transfer and re-adoption of the implementing provisions for local initiatives and referenda in Title 31 of the Colorado Revised Statutes, dealing with "municipal" government, in 1995. H.B. 95-1211, 1995 COLO. SESS. LAWS 422-30. Here, as reflected in present COLO. REV. STAT. §§ 31-11-104 (initiatives) and 31-11-105 (voter-instigated referenda) (2002), the phrase "city or town" was changed to, of all things, "municipality." Yet, it may be presumed that this change reflected the definition in the 1975 recodification of "municipal" laws that defined "municipality" as "a city or town . . . and any city, town, or city and county which has chosen to adopt a home rule charter . . . ." H.B. 75-1089, 1975 COLO. SESS. LAWS 1005, and as it appears in current R. § 31-1-101(6) (2002).

[132] REYNOLDS, *supra* note 66, at 17 (emphasis in the original).

> . . .
> The municipal or public corporations . . . are not mere administrative arms of the state and never have been. They don't exist to serve the state but to serve a particular locality—that is, they exist to provide municipal services. Though their powers are limited by state law, they exercise the functions allowed them by that law for the good of their own populace and not for state-wide purposes.[133]

Colorado's historians have commented similarly. Thomas Cronin and Robert Loevy note that "[i]n Colorado, as in many other states, counties were intended to be administrative units of the state and were organized according to laws passed by the legislature."[134] Historian John Banks comments:

> A county is merely a subdivision of the state for the purposes of state government. It is nothing more than an agency of the state in the general administration of the state policy. Its powers are solely governmental. It does not, like a municipal corporation, possess a complete local government of its own, executive, legislative, and judicial. It is clothed with certain executive powers but these are only such as are specially granted to it by the state.[135]

If one accepts this traditional view of counties, two points are key: (1) counties were designedly and functionally *administrative* organs and (2) they served and derived their powers solely from the *state*. Absent is a locally derived governmental—and particularly a locally derived *legislative*—function.

As discussed above,[136] Colorado's courts were not always consistent with the definitional classification of counties. Yet when discussing their function and the functions of their commissioners, they evinced a consistent understanding much in keeping with the traditional view outlined above. In 1913, the Colorado Supreme Court explained:

> The general scope of [county commissioners'] duties being the administration of the affairs of the county, they must be *administrative* officers, and though vested with a large amount of discretion, which this court has many times said cannot be controlled by the courts, yet it is *administrative* discretion, rather than judicial. *Nor are they legislative officers*. They do not make law, but are themselves wholly subject to the Constitution and the statutes, and are concerned only in the administration of the business of the county as therein directed.[137]

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[133] *Id*. at 17-18. *Accord* MCQUILLIN, *supra* note 67, at 219: "[Counties] are organized as subordinate agencies of the state government for the purpose of exercising some of its functions, and not exclusively for the common benefit of the citizens or property holders within their boundaries. In this respect they are distinguishable from municipal corporations proper which are usually voluntary corporations organized primarily for the purpose of endowing the inhabitants of a specified territory with powers of local self government for the benefit of the citizens and property holders within their limits."

[134] THOMAS E. CRONIN AND ROBERT D. LOEVY, COLORADO POLITICS AND GOVERNMENT 270 (1993).

[135] JOHN C. BANKS, COLORADO LAW OF CITIES AND COUNTIES 17 (1971). *See also*, LORCH, *supra* notes 66, 67.

[136] *See* text accompanying notes 66-81, *supra*.

[137] Sheely v. People, 129 P. 201, 202-03 (Colo. 1913) (emphasis added). The issue in *Sheely* was whether a county commissioner would be deemed a "ministerial" officer within the meaning of the state's anti-bribery laws; as evident from the quotation cited, the court concluded he would.

A similar statement had issued from the same court the preceding year, describing counties as "involuntary political and civil divisions of the territory constituting the state created to aid in the administration of governmental affairs. . . ."[138] The court again characterized the function of county commissioners as "administrative"—in this case as distinguished from judicial—in 1924.[139]

As discussed below,[140] these functional descriptions hardly do justice to counties as we know them today. But we are talking here about 1910. The archetype of what we may now view as a county legislative power—zoning—did not even exist in a practical sense.[141] People in Colorado and elsewhere did not look to county officials to perform functions we would, then or now, characterize as "legislative." Rather, these officials served as custodians and caretakers of county property; examined and settled accounts of receipts and expenses; made contracts pertinent to county affairs; built and maintained county buildings; levied taxes and borrowed money to maintain buildings, roads, and bridges; established precinct boundaries and voting places; and laid out, altered, and discontinued roads—indeed, such was essentially the enumeration of county powers as it appeared in the contemporaneous Revised Statutes.[142]

Viewing counties in this manner, it is hardly surprising that they were not much on anyone's mind during the Extraordinary Session or electoral season of 1910. Counties were simply administrative organs carrying out the legislative or executive will of the state, devoid of any local legislative, or even locally-derived governmental, power or function of their own. As pure subsidiary agents of the state government, they were, further, utterly incapable of creating anything resembling a localized legislative function out of whole cloth for themselves. Cities and towns could and certainly did do that, but not counties.[143] Critically, the absence of legislative capacity was not just a matter of structural academics but manifestly a matter of contemporaneous practical public understanding and perception. Counties were simply irrelevant in the context of a debate

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[138] Dixon v. People, 127 P. 930, 932 (Colo. 1912). The issue here, involving an effort to oust a county court judge in the City and County of Denver, turned upon whether the judge was a "county officer" holding office under a local charter as distinct from the state Constitution; the court held he was not. Denver, however, has always been an somewhat unique creature: established as a "City and County" by constitutional amendment of 1901 (*see* COLO. CONST. art. XX, § 1), implicitly recognized as holding local legislative powers – *see, e.g.*, Hilts v. Markey, 122 P. 394 (Colo. 1912) – and explicitly recognized as holding powers to legislate upon local matters under the home rule constitutional amendments of 1913 (COLO. CONST. art. XX, § 6; 1913 COLO. SESS. LAWS 669-71). In 1998 it was joined in this hybrid category by the new City and County of Broomfield. COLO. CONST. art. XX, § 10.

[139] Coates v. Board of Comm'rs, 221 P. 1090, 1091 (Colo. 1924). The issue was the discretion of the Board, unlike a court, to entertain unsworn testimony.

[140] *See* text accompanying notes 145-69, *infra*.

[141] Modern American zoning is generally recognized as having its genesis with an ordinance passed in New York City in 1916. REYNOLDS, *supra* note 66, at 354-55. It can hardly be said to have gained legitimacy until the United States Supreme Court's validation in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[142] COLO. REV. STAT. Chap. XXXIII, §§ 1177, 1204 (1908). Section 1177 contained a residuary clause providing that counties had the power "to exercise such other and further powers as may be especially conferred by law" – *i.e.*, by the General Assembly – though there is no reason to suspect that powers of a generically different kind were envisioned. At least then.

[143] *See* notes 66, 67, *supra*.

concerning a proposed constitutional reservation to the people of an essentially legislative power directed at curbing existing institutional legislative abuses and excesses.

The irrelevance of counties to the initiative and referendum concept may explain not only the inattention given to them during the Extraordinary Session of 1910, but suggests that—whatever meaning one may wish to accord the term "municipality" in what is now Colo. Const. art. V, sec. 1(9)—it is highly improbable that any meaningful number of legislators or voters at the time would have viewed that term as including counties. One may have as readily included school or irrigation districts. It is not that counties were considered and excluded; it is apparent that there would have been no rationale for their being either considered or included in the context of a constitutional reservation explicitly, functionally, and solely directed to "local, special and municipal *legislation*."

In sum, the Colorado Supreme Court and Court of Appeals got it right in the Archuleta and Teller County cases[144]—at least with regard to the local reservation of Article V, Section 1(9). But that is not quite the end of the analysis. As discussed below, counties have changed. The fact and the manner of that change implicates a slightly different constitutional inquiry, focusing us back to Article V, Section 1(1).

VI. The Functional Evolution of Counties

It is not necessary here to chronicle the evolution, or more appropriately devolution, of county legislative powers. Cronin and Loevy have noted that, as in other states, "counties in Colorado have evolved into something more than 'administrative units of the state.' For the large number of rural Coloradans who do not reside in a city or town, their county government is viewed as 'local government' rather than as a branch of state government."[145] In addition to their traditional functions, counties legislate—the grand example, of course, being in the area of land use planning, regulation and zoning. As explained by Cronin and Loevy:

> In Colorado, the responsibility for determining land use has been given to local government. . . . County governments determine land use in those portions of the county that are not included in a city or town. . . . Almost without exception, each . . . county in Colorado has a planning department, which has the job of proposing general land-use plans for the area and recommending [to the board of county commissioners] specific zones for specific parcels of land.[146]

The functional evolution of county governments has not been lost on Colorado's courts. In 1996, as a preface to a lengthy opinion invalidating "school impact fees" assessed by the commissioners of Boulder and Douglas Counties in connection with the issuance of building permits or certificates of occupancy for new residential dwellings, the Supreme Court noted that "[c]ounties have considerable legislative powers to adopt

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[144] *See* text accompanying notes 38-53, *supra*.

[145] CRONIN AND LOEVY, *supra* note 134, at 270. *Accord* REYNOLDS, *supra* note 66, at 18: "As the natures and functions of many public quasi-corporations [read counties] have become more similar to those of cities over recent decades, the distinction between public or municipal corporations, on the one hand, and public quasi-corporations on the other, has become increasingly blurred."

[146] CRONIN AND LOEVY, *supra* note 134, at 281.

zoning and subdivision regulations."[147] As McQuillin states, "Zoning is a legislative function . . . ."[148] In 1978, in the context of a budgetary dispute between the commissioners and sheriff of Pueblo County, the Court opined that "the Board's adoption of a budget . . . is commonly considered to be a legislative and administrative function,"[149] followed by the more direct characterization of "the budgeting and taxing actions of a board of county commissioners" as "clearly legislative."[150] The Court reiterated the point in 1983 in the context of a budget dispute between Adams County's commissioners and the local district attorney: "The budgetary responsibility of the county commissioners is a legislative function."[151] In the Teller County initiative case itself,[152] the Court of Appeals did not quarrel with the *Dellinger* plaintiffs' assertion that "county governments today are exercising a legislative function."[153]

If counties have indeed assumed a local legislative function, the next critical question is from whence they have assumed it. As discussed above,[154] counties—unlike true municipalities—do not derive their powers by conferral from local constituencies subject to constraints imposed by the State. Rather, the powers that counties exercise come directly and affirmatively by devolution from the State itself.

This point—the *source* of county power, whatever the parameters of that power may be—has never been a point of much doubt in the courts. In 1912, the Colorado Supreme Court described counties as "involuntary political and civil divisions of the territory constituting the state created to aid in the administration of governmental affairs . . . ."[155] In 1928, while cloaking counties with the state's sovereign immunity, the court noted explicitly that counties were "subdivisions of the state . . . created for the purpose of exercising a part of the political power of the state."[156] In 1959, the court held counties not to have the power to acquire real property for speculation, emphasizing that "[c]ounties have only such powers as are delegated to them."[157] The power of county treasurers to maintain personal suits to collect real property taxes was constrained by the court in 1963 as absent from their delegated powers, such powers being delegable only by the State.[158] In 1970, as a predicate for denying the Board of County Commissioners of Dolores County standing to sue the Governor and the State Board of Equalization, the court stated, "[a]s a political subdivision, a county, and its commissioners, possess only

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[147] Bd. of County Comm'rs v. Bainbridge, Inc., 929 P.2d 691, 698 (Colo. 1996). The impact fees were invalidated not as a legislative exercise beyond the functional capacities of the counties, but as an exercise beyond the scope of the legislative powers both explicitly and implicitly conferred upon the counties by the state. *Id*. at 698-710. In the end, as discussed below at text accompanying notes 155-65, counties still derive what powers they have, legislative or otherwise, from the state and the state alone.

[148] EUGENE MCQUILLIN, 8A THE LAW OF MUNICIPAL CORPORATIONS 425 (3d ed. 1987; 1994 Rev. Vol.). *Accord* Margolis v. District Court, 638 P.2d 297, 298 (Colo. 1981), explicitly subjecting such functions, when exercised by municipalities, to the reserved initiative and referendum powers.

[149] Tihonovich v. Williams, 582 P.2d 1051, 1053-54 (Colo. 1978).

[150] *Id*. at 1054.

[151] Beacom v. Bd. of County Comm'rs, 657 P.2d 440, 445-46 (Colo. 1983).

[152] *See* text accompanying notes 43-53, *supra*.

[153] *Dellinger, supra* note 43, at 1237.

[154] *See* text accompanying note 132-35, *supra*.

[155] Dixon v. People, 127 P.930, 932 (Colo. 1912). The court found Denver county judges to hold their seats not as county officers but directly under state constitutional mandate. *See* note 138, *supra*.

[156] Colorado Investment & Realty Co. v Riverview Drainage Dist., 266 P. 501, 502 (Colo. 1928).

[157] Farnik v. Bd. of County Commr's, 341 P.2d 467, 473 (Colo. 1959).

[158] Skidmore v. O'Rourke, 383 P.2d 473, 475-76 (Colo. 1963).

such powers as are expressly conferred upon them by the constitution and statutes, and such incidental implied powers as are reasonably necessary to carry out such express powers."[159] The point was reiterated in 1974 when the court denied Otero County's commissioners standing to sue the State Board of Social Services.[160] Binding Pitkin County's subdivision regulation power to that conferred by state statute, the court again emphasized in 1982 that a county "possesses only those powers expressly granted by the constitution or delegated to it by statute."[161] The "conferred," rather than "inherent" (as with municipalities), nature of a county's powers was noted again in 1992 in the context of upholding a La Plata County land use regulation against an argument of preemption.[162] A county's "delegated," and thereby limited, zoning power was contrasted by the court with the broader constitutional ambit of home rule cities in 2000.[163] In 2001, the Colorado Court of Appeals followed suit and held a county's powers to regulate annexations to be constrained to those "expressly granted to them by the Colorado Constitution or by the General Assembly."[164]

Rememberingng that county power (and especially county legislative power) exists only to the extent that such power is delegated from the powers of the state legislature, one will scour Article XIV of the Colorado Constitution in vain for any explicit (or even implicit) affirmative delegations—other than in the limited context of home rule counties.[165] The delegations have indeed come, however, and their source indisputably has been the General Assembly. From taxing authority[166] to budgeting authority[167] to the power to formulate and assess development impact fees,[168] the General Assembly over time has conferred an ever-increasing number of localized legislative functions upon county governments—functions that, were it not for the conferral, would remain in practice and theory with the General Assembly itself. The grandest and most clearly "legislative" of the delegations came in 1939 with the adoption by the General Assembly of its initial "county planning" legislation providing:

> That the boards of county commissioners of the respective counties within the state are authorized and empowered to provide for the physical development of

[159] Bd. of County Commr's v. Love, 470 P.2d 861, 862 (Colo. 1970).
[160] Bd. of County Commr's v. State Bd. of Social Services, 528 P.2d 244, 245-46 (Colo. 1974).
[161] Pennobscot, Inc. v. Bd. of County Commr's, 642 P.2d 915, 918 (Colo. 1982). Without quarreling with the proposition quoted, Justice Quinn, in dissent, finds the powers the county sought to exercise to have been conferred by the state under the Local Government Land Use Control Enabling Act, COLO. REV. STAT. § 29-20-101, *et seq.*, and not prohibited, as the majority had concluded, by the County Planning and Building Codes statute. COLO. REV. STAT. § 30-28-101, *et seq*. (2002), and particularly COLO. REV. STAT. § 30-28-133 (2002).
[162] Board of County Commr's v. Bowen/Edwards Assocs., Inc., 830 P.2d 1045, 1055 (Colo. 1992).
[163] City of Colorado Springs v. Securcare Self Storage, Inc., 10 P.3d 1244, 1253 (Colo. 2000).
[164] Board of County Commr's v. Gartrell Investment Co., LLC, 33 P.3d 1244, 1247 (Colo. App. 2001).
[165] COLO. CONST. art. XIV, § 16. *See* discussion at text accompanying notes 57-58, *supra*.
[166] *See, e.g.*, H.B. 67-1141, § 3, 1967 COLO. SESS. LAWS 660. The county sales and use tax authority, supplementing property tax authority, appears at current COLO. REV. STAT. § 29-2-103 (2002).
[167] S.B. 33-407, 1933 COLO. SESS. LAWS 666. The budgeting power appears at current COLO. REV. STAT. § 29-1-103 (2002).
[168] H.B. 74-1034, 1974 COLO. SESS. LAWS 353. The Local Government Land Use Control Enabling Act of 1974 now appears at COLO. REV. STAT. § 29-20-101, et seq. (2002).

> the unincorporated territory within the county and for the zoning of all or any part of such unincorporated territory in the manner hereinafter provided.[169]

This was the formal beginning of county zoning and land use regulation in Colorado, a power theretofore held in real or nascent form exclusively by the General Assembly itself.

The fact of this devolution of localized legislative power—a devolution matching perhaps the developing localized powers of true municipalities through conferral by their own constituents—poses the structural issue central to this Issue Paper. Coming by delegation from the General Assembly, it comes as well as a piece of "the legislative power of the State" otherwise vested in and wielded by the General Assembly pursuant to Article V, Section 1(1) of the Colorado Constitution. And therein, as the *Dellinger* petitioners noted, lies the rub.

VII. The Historical Slip

Turning back to 1910, it is manifestly apparent that the legislators sitting in Extraordinary Session in August and September, and the voters who came to the polls in November, intended to—and indeed did—reserve the legislative powers of initiative and referendum from (1) "the legislative power of the State" as otherwise vested in the General Assembly under Article V, section 1(1), as well as from (2) every form of local governmental entity then perceived to be exercising a localized legislative function through Article V, section 1(9). As discussed above, the omission of counties from section 1(9) simply and logically reflects nothing more than the non-legislative character of counties at the time.

The subsequent devolution of localized legislative authority from the General Assembly to county governments has had, and structurally can have had, only one source—"the legislative power of the State" otherwise vested by Article V, section 1(1) in the General Assembly. And that power comes with baggage—the clear, unequivocal, and unqualified *reservation from it* by the people of the rights of initiative and referendum.

If one accepts the reasoning of the Archuleta and Teller County opinions, what has occurred over the years since 1910 is that the General Assembly, albeit perhaps unwittingly, has severed away pieces of its own constitutionally vested legislative power—the whole of this power explicitly being subject to the reservation of the rights of initiative and referendum—and conferred those pieces upon subordinate local governmental entities free of the reservations constitutionally imposed upon itself. It has, in other words, conferred more than it had. It has assumed and devolved a power patently in excess of its own constitutional authority.

Perhaps more accurately, county governments may be viewed as having assumed a power beyond that which they constitutionally could have been given, either from their own constituents or from the State. In so doing, they have

[169] S.B. 39-278, 1939 COLO. SESS. LAWS 294. This statute now appears, much amended and greatly expanded, at COLO. REV. STAT. § 30-28-101, *et seq*. (2002).

created the functional enigma of one form of local governmental entity—municipalities—exercising legislative power admittedly subject to initiative and referendum reservations, while another form of parallel local governmental entity—counties—exercises much the same legislative power totally free of those constitutional reservations. This illogic was the point of the *Palisade Fruitlands* plaintiffs, though the concern is perhaps less one of federal equal protection than one of proper state constitutional interpretation.

As a matter of history, and as a matter of even rough allegiance to the manifest intent of the drafters and adopters of the 1910 constitutional amendments, it is the thesis of this Issue Paper that the courts—with the virtually unanimous concurrence of the rest of us—have gotten it plainly wrong with regard to the reservation of the initiative and referendum powers in the context of Colorado's county governments. In the end, we have let a time warp in our historical perception create and enshrine a structural constitutional deviance. And we have done this, as the Colorado Court of Appeals candidly acknowledged in the Teller County case,[170] despite a nagging concern with the logic of it all.

Conclusion

This Issue Paper has been intended to be descriptive, rather than prescriptive, in nature. Historical disconnects may be rectified by popular or legislative processes, judicial intervention, or not at all. Wisdom would suggest that rectification—or rejection thereof—should be preceded by at least two things. First, we should develop a level of comfort with the accuracy of the underlying historical thesis. On this point, the author earnestly invites critical commentary upon the thesis presented in this Issue Paper. Second, it is prudent to consider the practical implications and consequences of a legislative or judicial "fix" and the systemic changes that would be wrought thereby. Prudence does not, however, justify historical blinders. Whatever we may wish to do with original intent when and where it nibbles at us, we should at least acknowledge it and be honest about it. We do ourselves and our system of government a subtle but real disservice when we simply ignore it.

[170] *Dellinger*, *supra* note 1, at 1237.

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