

**A Colorado Constitutional Paradox:
Initiatives, Referenda, and the Eclipse of Original Intent in County Governance**

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This article 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 and engage in "direct democracy" – *i.e.*, to exercise the rights and powers of initiative and referendum. As discussed below, these powers have evolved from a noisy reform-driven genesis in 1910 into a prominent and increasingly controversial component of the state's political landscape. The dilemma, however, arises not from the rationale that infused these powers into Colorado's statewide and local legislative affairs, nor from the procedural or practical realities and misgivings surrounding their exercise almost a century later. Rather, it arises from the near total, and completely unexplained, exclusion of these powers from one of the state's principal legislative arenas – county government.

As discussed below, 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 question is why this should have been so.

The thesis of this article is that it was, in fact, not so – and that the common wisdom and judicial imprimatur have gotten it wrong as a matter of historical analysis and original intent.

Having said this, the article goes on to submit that the courts, as a matter of present prudential

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 article was one of the attorneys for the plaintiffs/petitioners in the *Dellinger* case.

discretion, may have gotten it right. There are some legal questions that pose an irresolvable tension between the implications of raw historical accuracy and current realities reflecting an evolved perception of that history. Such a tension permeates the present inquiry. In the end, when we are called upon to sort out and rectify historical disconnects, the dynamics of common understanding matter.

This article will begin by posing the nature of the constitutional dilemma. It will then explore the historical roots of the dilemma from several directions, and pose the author's thesis regarding both the nature and eclipse of the framer's and the people's original design. Finally, the article will submit that the courts, when ultimately and lately confronted with the dilemma, reached a predictable, perhaps even wise, albeit historically flawed result.

The Roots of a Constitutional Dilemma

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

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, sec. 1, in its original form. *See* fn. 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,

acceptance was the referendum, with roots in post-revolution France⁷ 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 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 Party¹¹ in the late 1800s, followed by wider

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.

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.

acceptance within the Progressive movement¹² at the turn of the twentieth century. The initial focus of the Populists was primarily agrarian, rural, somewhat marginalist, 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 799,024¹⁵ – agrarian – 46,170 farms¹⁶ – and far, both geographically and sociologically, from the nation's corporate and industrial epicenters. In July 1908, Denver had hosted the Democratic National Convention that had nominated populist firebrand William Jennings Bryan as its presidential candidate.¹⁷ The same year saw the election of 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" legislation – including adoption of the initiative and referendum – to the state's General Assembly at an Extraordinary Session convened on August 9, 1910.²²

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 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).

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 legislature²⁴), 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 Republicans²⁸ – followed suit on September 1.²⁹ The referred constitutional amendment was adopted by a seventy-five 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

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, September 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.

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.

...

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 1980³² to substitute the words "registered electors" for "legal voters" – otherwise it too, except for minor typographical revisions, 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

³² Senate Concurrent Resolution 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, sec. 1(2), as amended in 1980 (*see* note 32). A similar requirement was imposed for voter-instigated referenda. Colo. Const. art. V, sec. 1(3), as amended in 1980 (*see* note 32). [As Colo. Const. article V, section 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, sec. 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, sec. 1(5.5).

statewide level. Colorado initiative and referendum scholar Dennis Polhill³⁴ 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 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

It is at the local level where the interpretive issue at the heart of the discussion in this article 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? Specifically, were counties – clearly not being cities or towns – intended to fall within the scope of the term "municipality?" And if not, under what conceivable rationale were these modern engines of localized legislative power omitted?

³⁴ Dennis Polhill, *Protecting the People's Voice: Identifying the Obstacles to Colorado's Initiative and Referendum Process* (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.

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. *McKee* at 972-73.

³⁷ Colo. Const. art. V, sec. 1(9) by current designation.

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 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

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, sec. 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 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

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 Assembly under Article V,

conclusion, of course, presupposes the utter inapplicability to counties of the broader grant of initiative rights under Colo. Const. art. V, sec. 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, sec. 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.*

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

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See text accompanying notes 38-42, *supra*.

⁵³ 2001 Colo. Lexis 283 (April 9, 2001). The appropriateness of this action is discussed in the final section of this article.

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, Sec. 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, Sec. 1) and City and County of Broomfield (organized specially under Colo. Const. Art. XX, Sec. 10) are directly subject to Colo. Const. Art. V, Sec. 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

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 said of the 1967 statute⁵⁹ specifying initiative and referendum procedures for the adoption of countywide sales (and later use⁶⁰) taxes – the statute that was the focus of the Archuleta County litigation.⁶¹ And again, arguably, of the 1987 legislation subjecting 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

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, sec. 16. See discussion at note 55, *supra*.

⁵⁸ Colo. Rev. Stat. § 30-11-508 (2002). See discussion at note 55, *supra*.

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>.

The present consensus poses, rather than answers, the dilemma which is the focus of this article. 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, we must, of course, journey back to the perspective and realities of 1910.

An Historical Perspective

I. 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 Assembly⁶⁴ 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?"

Unfortunately for our purposes, the textual language by itself doesn't answer the question. Technically, a county is not a "municipality,"⁶⁶ yet it is generally viewed as a "quasi" municipal

⁶⁴ Colo. Const. art. V, sec. 1(1) as presently numbered.

⁶⁵ Colo. Const. art. V, sec. 1(9) as presently numbered.

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" – *Id.* – and "exercise the functions allowed them by [state] law for the

entity⁶⁷ 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 prior 1895 Court of Appeals opinions⁷⁴ had

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.*

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).

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 statute⁷⁹ had indeed bemoaned the "loose and indiscriminate use" of the term "municipal corporations" "in 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 records⁸² and contemporaneous press

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).

coverage⁸³ 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 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% of its legal voters.⁸⁷ Per Helbig, his proposed local initiative amendment would drop the petition requirement to 15% at least in the context of "towns," and presumably "cities" and "municipalities" as well.

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.

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, sec. 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 sec. 4094.

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

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, August 26, 1910, at 2.

⁹³ E.P. Gallagher, *Initiative is Put Through With Votes to Spare*, Rocky Mountain News, September 2, 1910, at 1.

⁹⁴ *Id.*

government were intended to be affected. The matter appears simply not to 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 construction⁹⁵ – 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.

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

II. The Oregon Parallel:

The acknowledged model for the Skinner-Helbig version of the initiative and referendum amendment ultimately adopted in Colorado was 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 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

⁹⁶ Samuel J. Lewis, *Initiative and Referendum Measure Seems Unlikely Ever to Become a Law*, Denver Post, Aug. 25, 1910, at 4.

⁹⁷ Ore. Const. art. IV, sec. 1(5) – initially sec. 1a. as adopted in 1906.

⁹⁸ *Schubel v. Olcott*, 120 P.375, 378 (Ore. 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.

legislation.¹⁰⁰ The same court, in 1907, had, further, 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

¹⁰⁰ *Cook v. Port of Portland*, 27 P.263 (Ore. 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 (Ore. 1907).

¹⁰² *Barber v. Johnson*, 167 P. 800, 801 (Ore. 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.

to imbue them, and their constituents, with a power that explicitly and manifestly involves the capacity to legislate.

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 reservation¹⁰⁹ – 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

¹⁰⁸ *Rose v. Port of Portland*, 162 P.498, 500 (Ore. 1917).

¹⁰⁹ See note 102, *supra*, and accompanying text.

¹¹⁰ *Rose, supra* note 108, at 554.

¹¹¹ Ore. Const. art. XI, sec. 2.

¹¹² *Rose, supra* note 108, at 558.

¹¹³ *Id.* at 556.

¹¹⁴ *Carriker v. Lake County*, 171 P. 407 (Ore. 1918).

¹¹⁵ William S. U'Ren. See Broder, *supra* note 6, at 35-38.

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 concomitantly, as developed much later, the reservation of the initiative and referendum power applied only to municipal "legislation" – *i.e.*, "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

III. 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

¹¹⁶ *Carriker v. Lake County*, 89 Ore. 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 (Ore.App. 1976), quoting repealed Ore. Rev. Stat. 254.310. This was replaced in 1957 by current Ore. Const. art. VI, sec. 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 (Ore. 1963) (regarding school districts); *Bd. of Directors v. Kelly*, 137 P.2d 295, 298-99 (Ore. 1943) (regarding utility districts); *Smith v. Hurlburt*, 217 P. 1093, 1096 (Ore. 1923) (regarding water districts).

¹²⁰ *Lane Transit District v. Lane County*, 957 P.2d 1217, 1220 (Ore. 1998), quoting *Foster v. Clark*, 790 P.2d 1, 6 (Ore. 1990).

¹²¹ *Id.*

¹²² *Id.*

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

¹²³ H.B. 13-1, 1913 Colo. Sess. Laws 310-18.

¹²⁴ *Id.* at 310.

¹²⁵ *Id.* at 315 (sec. 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 (sec. 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 (sec. 12).

¹²⁹ *Id.* at 315 (sec. 9). See discussion of voter-instigated referenda at the state level, under present Colo. Const. art. V, sec. 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, sec. 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.

"legislative body" for consideration prior to submission to 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.

IV. 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

¹³⁰ H.B. 13-1, 1913 Colo. Sess. Laws 316 (sec. 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 at 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 Colo. Rev. Stat. §31-1-101(6) (2002).

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.

...
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 own historians have commented similarly. Cronin and 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 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.

¹³² Reynolds, *supra* note 66, at 17 (emphasis in the original).

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.

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

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

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.

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, sec. 1), implicitly recognized as holding local legislative powers – *see, e.g., Hiltz 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, sec. 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, sec. 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*.

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, this was not just a matter of structural academics – it was manifestly a matter of contemporaneous practical public understanding and perception. Counties were simply irrelevant in the context of a debate concerning a proposed constitutional reservation to the people of an essentially legislative power directed at curbing existing institutional legislative abuses and excesses.

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 Rev. Stat. of Colo., 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*.

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 cases¹⁴⁴ – 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, and as we all know, 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).

V. 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

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."

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 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

¹⁴⁶ Cronin and Loevy, *supra* note 134, at 281.

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.

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

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 Comm'r's*, 341 P.2d 467, 473 (Colo. 1959).

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

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 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

Accepting the exclusively delegated nature of county power – and county legislative power in particular – one will scour Article XIV of the Colorado Constitution in vain for any explicit, or even implicit, affirmative delegations outside the limited context of home rule

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, C.R.S. §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).

counties.¹⁶⁵ The delegations have indeed come, however, and their source indisputably has been the General Assembly. From taxing authority¹⁶⁶ to budgeting authority¹⁶⁷ 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 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 article. 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.

¹⁶⁵ Colo. Const. art. XIV, sec. 16. See discussion at text accompanying notes 57-58, *supra*.

¹⁶⁶ See, e.g., H.B. 67-1141, sec. 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).

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).

VI. 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, counties 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 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 article 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.

The question that follows, then, is whether and how we should go about making it right.

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

The Jurisprudential Implications of a Fix

It would not be difficult for a group of energetic activists with a local land use issue to attempt to float a county initiative, be rejected at the door of the local Clerk and Recorder's office, go to court, suffer through the inevitable lower court defeats dictated by current precedent, and try to pose the question anew to the Colorado Supreme Court. The Supreme Court could duck the issue again, or not. Perhaps surprisingly, the conclusion of this article – notwithstanding all that has been said above – is that the prudential course may well be for the Supreme Court to duck – again – for all it's worth.

This conclusion turns to a considerable degree upon the author's prejudices about the role the courts are most suited to play when confronted with historically generated political disconnects. What has given rise to the issue discussed in this article is not just a bad statute or an errant judicial opinion. Rather, as discussed above,¹⁷¹ the entirety of public perception, as reflected in all branches of the state government and apparently in the populace at large, has evolved away from the original understanding of the 1910 amendments as assuredly as the functional role of county governments has evolved beyond their purely administrative functional parameters of the same period. This could be fixed with a rough judicial jerk, prompted by lawyers crawling about in dusty historical texts. The question is, should it be.

Three practical considerations bear on this question. First, the consequences of imposing the initiative and referendum rights on today's non-home-rule counties in Colorado may not be trivial. There are 62 of these governmental entities packed into the state, with populations ranging from almost 530,000 (*e.g.*, Jefferson) to as little as 790

¹⁷¹ See text accompanying notes 38 through 63, *supra*.

(Hinsdale) and 570 (San Juan).¹⁷² If one takes the petitioning requirements of Colo. Const. art. V, sec. 1(9), as a template – arguably the only reasonable course¹⁷³ – fewer than 100 registered electors could saddle a sparsely populated, and quite likely sparsely funded, county with the expense of processing, administering, and conducting an initiative election at their whim, and repeatedly. For that matter, there could be multiple initiatives and referenda on deck at a time, in counties large and small, turning land use and any number of other matters within a county's legislative purview into an ongoing plebiscite. In a day when the wisdom of the processes of direct democracy are themselves a matter of some public disagreement,¹⁷⁴ this may not be the optimal direction to travel. One may counter, of course, that our experience has not been the opening of the initiative and referendum floodgates in the context of cities and home rule counties already blessed (or saddled) with these rights.

Second, if we are disposed to invoke the sanctity of original intent, we should make some effort out of the blocks to assure that we are roughly accurate about what it was. This article has presented an historical thesis. The author is unaware of any other real discussion on the point, dicta aside, other than in the opinions and briefs in the *Dellinger* and *Palisade Fruitlands* litigation – and the latter was primarily a federal constitutional foray. Further discussion and counterpoints would be welcome.

¹⁷² For the populations of Colorado's counties, see the website for Colorado Counties, Inc. at http://www.ccionline.org/counties_map.htm.

¹⁷³ An argument was proffered in the Teller County litigation, *supra* note 1, to the effect that the petition requirements for a county initiative, not falling within the ambit of Colo. Const. art. V, sec. 1(9), would have to be those established by Colo. Const. art. V, sec. 1(2) – *i.e.*, at least 5% of the total number of votes cast for the office of Secretary of State in the last election for that office statewide. The argument disregarded the directly contrary provisions of Colo. Rev. Stat. §30-11-103.5 (2002) paralleling the petition requirements of Colo. Const. art. V, sec. 1(9), when ballot issues are presented at the county level pursuant to constitutional or statutory mandate. As importantly, the argument – suggesting that 50-80,000 petition signatures would be required to float a legitimate initiative in a county populated by fewer than a thousand people, was, in this author's view, completely absurd.

¹⁷⁴ See *e.g.*, Broder, *supra* note 6; Steve C. Briggs, *Colorado's Constitutional Contradictions: Initiative Process Runs Amok*, Denver Post, April 6, 2003, at E-01.

The third, and perhaps most important, practical consideration is how easy it would be for the political branches of the government to work the fix if it is really desired. Even short of amending the constitution to comport with this author's thesis regarding original intent, a simple statute would suffice to confer anew the initiative and referendum rights on the residents of the state's counties with regard to county legislation. As noted above, this has been tried.¹⁷⁵ Absent the willing cooperation of the General Assembly toward this end, the statewide initiative power remains readily available to the people as a vehicle to accomplish the same result. If the people really want this, they can have it quite easily through our political processes, without the assistance of the courts.

Having said this, one may counter with the proposition that it is at base the job of the courts to hold us true to the uncompromising dictates of original intent. That would certainly be a principled course. And courts high and low take this course not infrequently, though perhaps not always with the highest assurance of historical accuracy. A resonant recent example would be the Supreme Court of the United States' journey back to our federal constitutional roots in *Alden v. Maine*,¹⁷⁶ commencing an as yet unfinished odyssey of overturning theretofore well-settled popular and legislative understandings of state sovereign immunity,¹⁷⁷ and undertaken in the face of a vigorous

¹⁷⁵ See text accompanying note 63, *supra*.

¹⁷⁶ 527 U.S. 706 (1999).

¹⁷⁷ *Alden* itself involved a suit under the federal Fair Labor Standards Act by state probation officers against their employer, the State of Maine. The Court affirmed a dismissal of the claims on the grounds that Congress did not have the power under either the Supremacy Clause nor the enumerated powers of Article I of the U.S. Constitution to abrogate the state's sovereign immunity against suits in federal court. 527 U.S. at 711-760. The decision's ramifications, however, have already extended into the areas of federal statutory claims based upon age discrimination – *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); unfair competition – *College Sav. Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666 (1999); patents – *Florida Prepaid Postsecondary Education Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999); disabilities – *Board of Trustees v. Garrett*, 531 U.S. 356 (2001); maritime claims – *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002); and arguably bankruptcy – *In re NVR, LP*, 189 F.3d 44 (4th Cir. 1999), *cert. denied* 528 U.S. 1117 (2000).

dissent in its own ranks regarding the accuracy of the underlying historical premise.¹⁷⁸

The wide ranging consequences of a thrust back into the jaws of original intent – even if consensus is reached as to what it was – can be bruising.¹⁷⁹

While faithfulness to the original design of a constitutional process has much to commend it as a matter both of principle and interpretive guidance, application of judicial power to this end should also rest upon considerations of prudence. How truly meaningful is the point to be made? What is the likely collateral disruption of doing so? Who will be benefited, and how? How able are the democratic political processes to address the issue without a judicial nudge? On the question at hand, it may be suggested that the point is less burning than academic, the potential for unintended disruption is real, the benefit will flow primarily to the memory of long departed ancestors and to present activists with ready access to the political processes, and the democratic branches – including if necessary the direct will of the people as may be invoked through a statewide initiative – are quite capable of addressing the issue. And if they choose not to, perhaps that fact in itself is worthy of some deference. The issue does not cry out viscerally for the salvation of judicial intervention. This may indeed be one of those occasions where the exercise of judicial restraint would suggest that we distance ourselves a bit from original intent rather than rush to embrace it.

While it is impossible to know, these considerations may not have been lost on the appellate courts in the Teller County litigation. At the conclusion of briefing before the Court of Appeals, the plaintiffs requested certification of the case directly to the

¹⁷⁸ *Alden*, *supra* note 176, at 760 (Souter, with Stevens, Ginsburg, and Breyer, dissenting).

¹⁷⁹ As argued by Bickel, "The antithesis of principle in an institution that represents decency and reason is not whim or even expediency" – and one may add ruthless historical rigor – "but prudence." Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 133 (1962).

Supreme Court for decision under a Colorado statute providing for such discretionary certification when "the subject matter of the appeal has significant public interest."¹⁸⁰ The Court of Appeals agreed, though the Supreme Court exercised its discretion to decline. Both courts had had a prior glimpse of the issue at hand in the context of emergency injunctive motions some months earlier. Bound to decide the case, and knowing it did not have the last word, the Court of Appeals rendered its conservative -- and one may suggest prudential -- "plain language" decision discussed above.¹⁸¹ Now having been alerted twice to the issue at hand, and presented with a thorough discussion in the plaintiffs' petition for writ of certiorari, the Supreme Court without hesitation declined the case once again.¹⁸² In a principled sense, the case would appear to have been eminently "cert. worthy." In a prudential sense, it may be suggested that the Court took the wiser course.

Conclusion

As suggested at the beginning of this article, the evolution of common understanding matters. It is not an excuse to disregard or misrepresent the facts of our political or constitutional history, though it may be a very legitimate justification for declining to give them full institutional effect a century later. In the courts, recognition of and deference, if not always rigid adherence, to the intentions and understandings of those who framed our laws matters -- but so does contemporary prudence in their application (or perhaps, as here, resurrection). The point of this article has been to suggest that we may have gotten our history a bit wrong. The point is also, however, that

¹⁸⁰ Colo. Rev. Stat. §13-4-109.

¹⁸¹ See text accompanying notes 43-51, *supra*.

¹⁸² See text accompanying note 52, *supra*.

the error has become a meaningful part of our present legal and political reality, and as such is entitled to a degree of deference – and particularly judicial deference – of its own.