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A Call for Reform of Arkansas Municipal Law

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TABLE OF CONTENTS

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I. INTRODUCTION

You may ask: why an article proposing structural reform of municipal law in Arkansas? After all, in the past twenty years Arkansas voters rejected two attempts to restructure municipal law;[1] each attempt proposed restructuring the basic relationship between the state and its municipal corporations within the framework of proposed constitutions.[2]

Changing the structural relationship between a state and its municipal corporations changes the relationship between the citizen and the state and between the citizen and local government. A reallocation of power between the state and its municipal corporations affects the ability of the state to control local government actions, affects the individual's interaction with the state, and affects the individual's relationship with her local government. Even though voters rejected the two proposed constitutions, those attempted restructurings produced one fundamental change in local government. County governance was substantially restructured in 1974 as a result of work done on the proposed constitution of 1970.[3]

It is now time to examine the relationship between the state and its municipal corporations. The citizens of Arkansas deserve a worka-

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1. Proposed ARK. CONST. of 1970 with Comments (published Feb. 10, 1970, by Seventh Ark. Const. Convention); Proposed ARK. CONST. of 1980 with Comments (published August, 1980, by Eighth Ark. Const. Convention).

2. Proposed ARK. CONST. of 1970, art. VI, §§ 10-14, 16; Proposed ARK. CONST. of 1980, art. VI, §§ 10-16, art. VII, §§ 9-11, 15. *See infra* notes 230-74 and accompanying text.

3. ARK. CONST. amend. LV. Amendment 55 substantially incorporated the proposals for county government made by the Seventh Ark. Const. Convention. *See* Proposed ARK. CONST. of 1970, art. VI, §§ 1-9.

ble, equitable structure — with well-defined, understandable options — for municipal government. This article will (1) review the development of Arkansas municipal law from the time of statehood; (2) consider the implications of the current structure for efficient government action and meaningful citizen control; and (3) conclude with proposed amendments to the Arkansas Constitution of 1874.

To answer the question initially proposed: by writing this article, I hope that the people of Arkansas will have an opportunity to update constitutional provisions relating to municipal corporations. Even though voters have twice rejected new constitutions, they approved the county governance amendment[4] and the constitutional provisions controlling municipal indebtedness.[5] Apparently, the voters are willing to deal with constitutional reform piecemeal.

II. The Development of Arkansas Municipal Law

A. Arkansas Constitutional History

1. *The 1836 Constitution*

The Arkansas Constitution of 1836 had very little to say about municipal government in the newly created state. One section addressed the creation or restructuring of counties within the state.[6] The county court, "holden by the Justices of the Peace," was created and vested with "jurisdiction in all matters relating to county taxes, disbursements of money for county purposes, and in every case that may be necessary to the internal improvements and local concerns of the respective counties."[7] Voters in each township (a unit nowhere created by or defined in the 1836 constitution) elected justices of the peace[8] and one constable;[9] incorporated towns — again, a unit of local government nowhere created or defined in the 1836 constitution — could have a separate constable.[10]

As difficult as it is to believe for anyone familiar with current Arkansas constitutional provisions, the 1836 constitution had even less to say about raising revenues and making expenditures on either the state

4. Ark. Const. amend. LV.
5. *See* Ark. Const. amends. LXII, LXV.
6. Ark. Const. of 1836, art. IV, § 29.
7. *Id.*, art. VI, § 9.
8. *Id.* § 15.
9. *Id.* § 16.
10. *Id.*

level or the municipal level. Article VII, Revenue, section 1 provided simply that "all revenues shall be raised by taxation to be fixed by law."[11] Section 2 provided that "[a]ll property subject to taxation shall be taxed according to its value — that value to be ascertained in such manner as the General Assembly shall direct; making the same equal and uniform throughout the State. . . . [N]o other or greater amount of revenue shall at any time be levied than required for the necessary expenses of the government, unless by a concurrence of two-thirds of both houses of the General Assembly."[12] Section 3 limited poll-taxes to county purposes;[13] section 4 prohibited different or greater taxes "on the productions or labor of the country than may be required for expenses of inspection."[14]

The power of the state or its political subdivisions to incur indebtedness received brief mention. The 1836 constitution authorized the pledging of the faith and credit of the state to raise funds to establish two state banks.[15] The power to borrow was not otherwise mentioned.

Expenditure of funds was given equally short treatment. The 1836 constitution simply required an appropriation by law to withdraw any money from the treasury and required that a "regular statement and account of the receipts and expenditures of all public money . . . be published with the promulgation of the laws."[16]

A state constitution is a limitation on the power of the sovereign rather than a grant of power.[17] Because the 1836 constitution imposed no other limitations, the general assembly remained vested with discretion to address issues such as forms of municipal government, maximum rates and types of taxation, borrowing of funds, and exercise of power in general by municipal corporations.

2. *The 1861 and 1864 Constitutions*

Legislative discretion remained the rule of the day under the Arkansas Constitutions of 1861 and 1864. While there were minor revi-

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11. *Id.*, art. VII, § 1.
12. *Id.* § 2.
13. *Id.* § 3.
14. *Id.* § 4.
15. *Id.*, art. VII, § 1.
16. *Id.*, art. VII, § 4.
17. State v. Ashley, 1 Ark. 513 (1839). "The legislature then can exercise all power that is not expressly or impliedly prohibited by the constitution; for whatever powers are not limited or restricted, they inherently possess as a portion of the sovereignty of the State." *Id.* at 538.

sions related to operation of government and the raising and expenditure of funds,[18] fundamental decisions on allocation of power to municipal corporations remained with the general assembly.

3. *The 1868 Constitution*

The Arkansas Constitution of 1868 marked the beginning of inclusion of more detailed constitutional provisions relating to both state and municipal expenditures, revenue raising, and the relationship between the state and its political subdivisions. Article V, section 20 made explicit that which had been implicit: appropriations were to be made by bill only, never by resolution.[19] But the 1868 constitution went much further. Article V, section 28 authorized the general assembly to "enact laws providing for county, township or precinct governments."[20] Section 40 of article V required that a general law be used to provide for vacating or altering any road or street laid out in any city or village.[21] But the real shift occurred in sections 47 and 49 of article V. Section 47 prohibited the general assembly from passing any law authorizing any municipal corporation to pass any laws contrary to the general laws of the state or to levy any tax on real or personal property to a greater extent than two per centum of its assessed value.[22] Section 49 of the 1868 constitution required the general assembly to provide for the organization of cities and incorporated villages by general law and to "restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power."[23]

The 1868 constitution for the first time contained detailed provisions outlining the responsibilities of the state for free public education. Article IX contained numerous provisions that addressed both the raising of necessary revenues for public education and the application of those revenues.[24] And article X, entitled "Finances, Taxation, Public

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18. ARK. CONST. of 1861, art. VII, § 3 authorized the levy of a poll tax for county or corporation purposes. Section 2 authorized the legislature to approve a county tax for building levees. *Id.* § 2. Both of these provisions were eliminated in the Arkansas Constitution of 1864.

19. ARK. CONST. of 1868, art. V, § 20.

20. *Id.* § 28.

21. *Id.* § 40. *See infra* notes 126-31 and accompanying text.

22. ARK. CONST. of 1868, art. V, § 47.

23. *Id.* § 49.

24. The proceeds from disposition of all lands received from the United States, from property received by escheat, and from undesignated devises to the state were placed in a common fund, with the income thereof, together with the proceeds of a poll tax and so much of the state's

Debt and Expenditures," contained seventeen sections addressing both the raising of revenues and incurring of debt.[25]

4. *The 1874 Constitution*

The 1868 constitution set the tenor for the current Arkansas constitution adopted in 1874. During the period immediately before adoption of the 1868 and 1874 constitutions, municipal corporations were actively involved in enticing transportation facilities to build in their areas by offering not only land, but also the loan of funds.[26] Time proved many of these incentives to be very costly as the ventures failed either to be completed or to produce the expected benefits, leading to a rash of municipal bond defaults.[27] Arkansas adopted its 1874 constitution at a time of active state constitutional revision aimed at limiting the ability of local governments to incur indebtedness or lend credit to private activities. The consequences of the prevailing public mood are evident in the Arkansas Constitution of 1874.

Once again, a specific provision relating to the organization of municipal corporations instructed the general assembly not only to provide for the organization of cities and incorporated towns, but also to restrict the "power of taxation, assessment, borrowing money and contracting debts, so as to prevent the abuse of such power."[28] And, as was typical of constitutional provisions at the time, article XII, section 5 prohibited a county or municipal corporation from becoming a stockholder in a corporation or lending its credit to any association, corporation, or individual.[29] Article XVI, section 1 contained a similar prohibition against a municipal corporation or county lending its credit.[30] With certain minor exceptions, the state could not assume the debt of any county, town, city, or other corporation.[31]

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general revenues as required, dedicated to maintaining free schools. ARK. CONST. of 1868, art. IX, § 4. If those funds were not adequate, the general assembly was directed to levy a tax as deemed proper. *Id.* § 7.

25. A poll tax could only be levied for school purposes. ARK. CONST. of 1868, art. X, § 1. Both tangible and intangible personal property were subject to tax. *Id.* §§ 2-3. Voter approval was required before the state or its counties could lend their credit. *Id.* § 6.

26. *See, e.g.*, M. David Gelfand, *Seeking Local Government Financial Integrity Through Debt Ceilings, Tax Limitations, and Expenditure Limits: The New York City Fiscal Crisis, the Taxpayers' Revolt, and Beyond*, 63 MINN. L. REV. 545, 547-49 (1979).

27. *Id.* at 547.

28. ARK. CONST. art. XII, § 3.

29. *Id.* § 5.

30. *Id.*, art. XVI, § 1.

31. *Id.*, art. XII, § 12.

After 1874 there was no question about types of indebtedness municipal corporations could incur; article XVI, section 1 prohibited "any county, city, town or municipality [from] ever issu[ing] any interest bearing evidences of indebtedness."[32]

But the real limitations on the scope of local action were found in article XII, section 4.[33] As originally enacted, the section limited municipal tax levies on both real and personal property to five mills on the dollar per year and provided that no municipal corporation could be authorized to enact laws contrary to the general laws of the state. In 1924 the citizens of Arkansas appeared to foreclose municipal corporations incurring debt of any type. By adopting Amendment 10 to the constitution, voters amended article XII, section 4 to provide that counties, cities, and incorporated towns could not make any contract or issue any scrip, warrant, or other evidence of indebtedness in excess of revenues for the fiscal year.[34]

Judicial interpretation of the various constitutional provisions, depending on your point of view, either eviscerated or made realistic the language through interpretative devices.[35] We must follow this pattern through 1986 in our effort to understand the current power allocation between the state and its municipal corporations.

B. Application of the 1874 Constitution by the Arkansas Supreme Court and the General Assembly

Only by understanding the changes in constitutional interpretation by the Arkansas Supreme Court, the responses to those changes by the legislature and the people, and the complex structure of overlapping political subdivisions permitted by the current constitution and statutes can one appreciate the need for reform. Because I will argue that local government authority is too limited under the Arkansas structure, we must explore and understand the relationship of the state and its municipal corporations.

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32. *Id.*, art. XVI, § 1 (amended 1918, 1926, 1984).

33. *Id.*, art. XII, § 4.

34. *Id. See id.* publisher's note.

35. Because ARK. CONST. art. XII, § 12 provides that "the state shall never assume or pay the debt or liability of any *county, town, city, or other corporation whatever*" (emphasis added), the Arkansas Supreme Court ruled that the section did not prevent the state from assuming the debt of road districts or school districts. Bush v. Martineau, 174 Ark. 214, 295 S.W. 9 (1927); Ruff v. Womack, 174 Ark. 971, 298 S.W. 222 (1927). For a more significant judicial interpretation of the constitutional debt limitations, see *infra* notes 47-61 and accompanying text.

1. *The Effect of Dillon's Rule*

At the beginning of the twentieth century, a vocal minority of commentators argued that citizens of a state enjoyed an inherent right of local self government.[36] Although widely debated, the argument received little favor in the courts.[37] Arkansas was no exception. The Arkansas Supreme Court in 1922 stated that "[m]unicipal corporations are created to aid the state government in the regulation and administration of local affairs;"[38] in 1963 the court reaffirmed that position in *City of Piggott v. Eblen*.[39] In 1935 the court further undercut any notion of an inherent right to local self government in *Kitchens v. City of Paragould*, stating "[w]e regard as axiomatic that cities and towns are creatures of the Legislature, subject to its control, and that they can function only within the limits fixed by law."[40]

The Arkansas Supreme Court did not frame the argument against an inherent right of local self government on its own. The argument started in reaction to a statement made in Judge Dillon's treatise on the law of municipal corporations. In fact, Dillon's Rule has caused no end of mischief. Judge Dillon wrote in his now famous (infamous?) statement:

> It is a general and undisputed proposition of law that *a municipal corporation possesses, and can exercise, the following powers, and no others*: First, those granted in *express words*; second, those *necessarily or fairly implied* in, or *incident* to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation — not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. . . . *These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations.*[41]

The Arkansas Supreme Court embraced Dillon's Rule and continues to apply it.[42] Quoting its opinion in *Yancy v. City of Searcy*,[43] the court

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36. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1113 (1980); 1 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 1.42 (3d ed. rev. vol. 1987).

37. Frug, *supra* note 36, at 114-15.

38. Cumnock v. City of Little Rock, 157 Ark. 471, 243 S.W. 57 (1922).

39. 236 Ark. 390, 393, 366 S.W.2d 192, 194 (1963).

40. 191 Ark. 940, 945, 88 S.W.2d 843, 846 (1935).

41. JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 55, at 101-02 (3d ed. 1881) (first and last emphasis added).

42. *See* City of Little Rock v. Raines, 241 Ark. 1071, 411 S.W.2d 486 (1967); McClendon

stated the governing law of Arkansas in *City of Piggott v. Eblen*:

> It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers and no others:* First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, — not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.[44]

By adopting Dillon's Rule, the court relegated local government to an assisting role in dealing with local affairs: rather than lead, local government is to follow; rather than be innovative in solving local problems, the local government is there to assist the state in implementing the solution formulated in the state legislature and can act only as authorized by the state constitution and statutes.

2. *Municipal Revenue and Debt*

Money is necessary for a municipal corporation to provide any meaningful services, offer protection, or take action. In defining the ability of a municipal corporation to raise money on a current basis, the Arkansas Supreme Court actually went beyond the language of Dillon's Rule:

> Municipal corporations can levy no taxes, general or special, unless the power to do so be plainly and unmistakably conferred. The power must be given either in express words or by necessary or unmistakable implication. It cannot be deduced by doubtful inferences from other powers, or from any consideration of convenience or advantage.[45]

In the absence of constitutional grants of power, the need for a specific delegation of the power to tax, coupled with the general limitation that flows from Dillon's Rule on raising revenues from other sources, leaves the municipal corporation at the mercy of the legislature. Considered

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v. City of Hope, 217 Ark. 367, 230 S.W.2d 57 (1950); Bain v. Fort Smith Light & Traction Co., 116 Ark. 125, 172 S.W. 843 (1915).

43. 213 Ark. 673, 212 S.W.2d 546 (1948).

44. 236 Ark. 390, 392-93, 366 S.W.2d 192, 194 (1963).

45. Fort Smith & V.B. Bridge Co. v. Hawkins, 54 Ark. 509, 513, 16 S.W. 565, 565 (1891).

with the constitutional limitations on the power to borrow money,[46] this problem becomes more acute and obvious. At the same time, a glance out of a window offers convincing proof that municipal corporations are in business in Arkansas.

Municipal corporations are in fact raising and spending money for all types of purposes. While the lack of an inherent right of local self government reflected in the adoption of Dillon's Rule and minimal grants of power in the Arkansas constitution makes the municipal corporation dependent on the legislature, the legislature has responded. The general assembly, with the blessing of the Arkansas courts, has been perfectly willing to give local governments the ability to layer complexity upon complexity, to layer debt over debt — both with and without the requirement of an approving referendum—, and to conceal (or at least obfuscate) the machinations from local residents. The voters of Arkansas must also accept direct responsibility for this Rube Goldberg assemblage, for much of it has been achieved as a result of constitutional amendment. The development of the use of revenue bonds by municipalities in Arkansas demonstrates the current complexity.

3. *Revenue Bonds as Constitutional Indebtedness*

The total prohibition on municipal corporation indebtedness ended in 1926 when the voters adopted Amendment 13 to the constitution.[47] Cities of the first and second class gained the authority to issue bonds for specific enumerated purposes if approved by

> a majority of the qualified electors of said municipality voting on the question at an election held for the purpose."[48] Amendment 13 required that "any municipality issuing any bonds shall, before or at the time of doing so, levy a direct tax payable annually not exceeding the amount limited as above, sufficient to pay the interest on such bonds as the same matures, and also sufficient to pay and discharge the principal of all such bonds at their respective maturities.[49]

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46. *See infra* notes 47-61 and accompanying text.

47. *See* 1927 Ark. Acts 1210. Arkansas Constitution amendment XIII amended Arkansas Constitution article XVI, § 1, but amendment XIII was subsequently repealed by Arkansas Constitution amendment LXII, § 11. But see *infra* notes 62-64 and accompanying text discussing districts incurring debt to construct light and water facilities, with the facilities transferred to the city after completion.

48. ARK. CONST. amend. XIII.

49. *Id.*

Among the specific enumerated purposes for which bonds could be issued was the "purchasing, extending, improving, enlarging, building, or construction of . . . light plants, and distributing systems therefor."[50]

Arkansas voters reasonably could have concluded that, pursuant to amendment 10 (which prohibited local governments from incurring debt in excess of annual revenues) and Amendment 13, no municipal indebtedness could be incurred without their approval. The absolute prohibition contained in the constitution as originally adopted was gone, but only as the result of adding language at the end of article XVI, section 1 that started "provided."[51] After the adoption of Amendment 13, article XVI, section 1 stated in its first paragraph that no interest bearing evidence of indebtedness could be issued by municipal corporations, but then the eleven new paragraphs added by Amendment 13 authorized issuance of bonds for specific purposes with voter approval. That approach to drafting the amendment seemed to maintain the absolute prohibition on municipal indebtedness except as specifically modified by the proviso. Remember that article XII, section 4 was amended by adoption of Amendment 10 in 1924 to provide that no city or town could "authorize the issuance of any contract or . . . other evidences of indebtedness in excess of the revenue for such city or town for the current fiscal year."[52] One would conclude that the only indebtedness that could be incurred was voter approved tax supported bonds. The Arkansas Supreme Court, however, interpreted the provisions differently.

Courts around the nation, faced with similar state constitutional restrictions, were distinguishing between bonds payable from taxes and bonds payable from revenues derived from operation of a facility constructed or acquired with the proceeds of the bond issue.[53] In 1932 the Arkansas Supreme Court adopted that distinction, holding that revenue bonds issued to build a light plant were not subject to the prohibition against indebtedness found in article XII, section 4.[54] The court further held that the article XVI, section 1 requirement of an election did not apply as the city did not own or seek to acquire a power plant, but rather had entered into a contract with respect to a power plant that

50. *Id.*

51. *Id.*

52. ARK. CONST. amend. X.

53. 15 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 41.31 (3d ed. rev. vol. 1985).

54. McCutchen v. City of Siloam Springs, 185 Ark. 846, 49 S.W.2d 1037 (1932).

the city had "taken over for the purposes of operation and maintenance only in trust for an improvement district."[55]

Two years later in *Snodgrass v. City of Pocahontas*, the court expressly held inapplicable the election requirement found in article XVI, section 1 before a municipal corporation could issue bonds payable solely from the revenues generated by the improvement financed by the proceeds of the bond issue.[56] The city, relying on Act 131 of 1933,[57] issued bonds without an election. The court affirmed the trial court's opinion upholding the validity of the bonds, establishing that issuance of revenue bonds (1) could be authorized by statute, notwithstanding the provisions of article XVI, section 1 and article XII, section 4 and (2) did not require voter approval notwithstanding the provisions of article XVI, section 1.[58]

For the next fifty years, the court faced a number of cases testing how far the exception for revenue bonds would stretch.[59] When the court decided in 1986 that it had been wrong in *Snodgrass* and held that revenue bonds required voter approval,[60] Arkansas voters amended the constitution by adoption of Amendment 65, which specifically authorizes the issuance of revenue bonds without voter approval.[61]

This fifty year history of the expansion of power in a municipal corporation to incur debt, capped by a sudden judicial reversal, illustrates the struggle among the people acting through the initiative process to amend the constitution, the people acting through the legislature, and the court to strike the proper balance between the authority of a municipal corporation to deal with local needs and the necessity of the state to protect the interests of the individual citizen and citizens collectively from abuse by the municipal corporation. But those early

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55. *Id.* at 850, 49 S.W.2d at 1038-39.

56. 189 Ark. 819, 75 S.W.2d 223 (1934).

57. ARK. CODE ANN. §§ 14-234-201 to -218 (Michie 1987 & Supp. 1991).

58. 189 Ark. 819, 824, 75 S.W.2d 223, 227.

59. *See, e.g.*, Purvis v. City of Little Rock, 282 Ark. 102, 667 S.W.2d 936 (1984); Purvis v. Hubbell, 273 Ark. 339, 620 S.W.2d 282 (1981); McArthur v. Smallwood, 225 Ark. 328, 281 S.W.2d 428 (1955). For a complete review of the Arkansas cases upholding issuance of revenue bonds, see Mark K. Halter, Note, *Revenue Bonds — the Election Requirement:* City of Hot Springs v. Creviston, 9 U. ARK. LITTLE ROCK L.J. 63 (1986-87).

60. City of Hot Springs v. Creviston, 288 Ark. 286, 705 S.W.2d 415 (1986).

61. ARK. CONST. amend. LXV. An election is required if the proceeds of the bond issue will be used to finance hotels, motels, rental or professional office buildings, or recreation or entertainment facilities. *Id.* § 2(b). The General Assembly and municipal corporations in Arkansas continue the effort to overcome the debt limitations imposed by Ark. Const. art. XVI, § 1. For a recent attempt that failed, see Brown v. City of Stuttgart, No. 92-849 (Ark. Feb. 22, 1993).

cases sanctioning non voter-approved revenue bonds contributed to the current complexity of Arkansas municipal law in another fundamental way.

Two additional "big picture" issues must be addressed before any attempt at restructuring the fundamental balance between the state and its municipal corporations can be undertaken. The structural complexity resulting from legislative authorization of various types of municipal corporations, special districts, and special authorities must be reviewed; then, the traditional limitations on tax rates contained in state constitutions must be considered.

4. *A Multitude of Political Subdivisions*

McCutchen v. City of Siloam Springs and *Snodgrass*, while not addressing the constitutional issue directly, indirectly upheld the creation of improvement districts and recognized them as entities separate from the sponsoring municipal corporation. In *McCutchen*, an improvement district was created to finance and construct a power plant and distribution system. Upon completion, it was put under the total management and control of the city.[62] The same approach was used for the construction of waterworks in *Snodgrass*.[63] In each case the municipality assumed complete management of and responsibility for public improvements owned and financed by an issuer created specifically to finance and construct the improvements. The Arkansas Supreme Court treated the districts as legal entities distinct and separate from the municipal corporation.[64] Doing so created an escape hatch from the restrictive debt limitations imposed on municipal corporations by the 1874 constitution because the constitution imposed no restraints on the creation of districts or on a district's power to incur debt.

Recognition of a district or authority as a separate issuer reached its zenith in 1955 when the court decided *McArthur v. Smallwood*.[65] The legislature created the Arkansas Justice Building Commission[66] and authorized it to issue bonds payable from sources designated in the act: rental payments to be received from the Workmen's Compensation Commission and the Public Service Commission and direct costs col-

62. 185 Ark. 846, 848, 49 S.W.2d 1037, 1038 (1932).

63. 189 Ark. 819, 821, 75 S.W.2d 223, 224 (1934).

64. *McCutchen*, 185 Ark. at 850, 49 S.W.2d at 1038-39; *Snodgrass*, 189 Ark. at 824, 75 S.W.2d at 225.

65. 225 Ark. 528, 281 S.W.2d 428 (1955).

66. *Id.* at 330, 281 S.W.2d at 430.

lected by counties.[67] None of the funds were to be paid into the state treasury; rather, the two commissions and the counties were required to remit the funds directly to the Justice Building Commission by deposit in the Justice Building Fund.[68] The court held that the bonds were not issued by or obligations of the state and thus, violated no constitutional provisions regarding the State of Arkansas incurring debt.[69] *McCutchen*, *Snodgrass*, and *Smallwood* leave no doubt. The citizen who believes that debt limitations in the 1874 constitution severely limit either the state or a political subdivision in incurring debt has been fooled — albeit understandably so.

The general assembly has exploited this escape hatch by enacting legislation authorizing the creation of numerous entities described as "districts." The powers of each, the method of creation of each, and the governance of each is subject to statutory provisions for that particular district. A few examples demonstrate the problems facing an Arkansas resident who wants to know what is being done.

Start with consideration of drainage improvement districts. These districts are ones "the main object of which is the construction of levees."[70] Once created, the district is governed by a board of commissioners appointed by the county court.[71] The district may issue bonds payable from the assessment of benefits in the district.[72]

First class cities with a mayor-council form of government are not ignored; they may create municipal drainage improvement districts encompassing all or part of the city's territory.[73] The district is governed by an appointed board of commissioners;[74] the district may issue bonds[75] payable from the assessments levied against real property within the district.[76]

Property owners can petition for the creation of districts. A suburban improvement district, which can encompass territory within a municipal corporation, may be created by the county court upon petition

67. *Id.* at 330-31, 281 S.W.2d at 430.
68. *Id.* at 331, 281 S.W.2d at 430.
69. *Id.* at 335, 281 S.W.2d at 433.
70. ARK. CODE ANN. § 14-121-102 (Michie 1987).
71. *Id.* §§ 14-121-301, -305 (Michie 1987 & Supp. 1991).
72. *Id.* § 14-121-308 (Michie 1987).
73. *Id.* § 14-122-102 (Michie Supp. 1991).
74. *Id.* § 14-122-106 (Michie 1987).
75. *Id.* § 14-122-201.
76. *Id.* § 14-122-208.

of a majority of the realty owners in the proposed district.[77] Once created, the district is governed by a board of commissioners[78] which may issue bonds[79] payable from a tax levy apportioned on the basis of assessed benefits on real property in the district.[80]

Municipal corporations are *required* to create a district if requested to under the Municipal Property Owner's Improvement District Law.[81] If land is owned by twenty-five or fewer persons and all owners petition for creation of a district covering their land, the municipal corporation is required to create the district and appoint as a board of commissioners the three individuals whose names are in the petition.[82] The district may issue bonds payable from a tax levy[83] apportioned on the basis of assessed benefits on real property in the district.[84] It is difficult to think of a more intrusive direct control by the legislature. The statute requires the municipality to create the district, even though the district will be making significant utility improvements on areas within the municipal corporation and burdening that property with an additional tax.

Volumes 10, 11, and 12 of the *Arkansas Code Annotated* are filled with variations of the types of districts that can be created, each having its own governing body, and each having the ability to incur indebtedness and either levy taxes or assess benefits to repay that indebtedness. One must assume that the general assembly rarely meets a special purpose district that it does not like.

5. *Municipal Corporations and the Power to Tax*

The 1874 constitution has been the principal limitation on the amount that municipal corporations and counties may raise from the property tax; the general assembly has limited the amounts that may be raised from sales and use taxes. Close control on the amount of taxes levied for very specific purposes tilts the balance away from local power in favor of state power over municipal corporations. Moreover, the use of constitutional limitations on rates of taxation requires

77. *Id.* § 14-92-205.
78. *Id.* § 14-92-210.
79. *Id.* § 14-92-234.
80. *Id.* §§ 14-92-228, -235 (Michie 1987 & Supp. 1991).
81. *Id.* §§ 14-94-101 to -128 (Michie Supp. 1991).
82. *Id.* § 14-94-106.
83. *Id.* § 14-94-123.
84. *Id.* § 14-94-118.

amendment of the constitution to respond to changing conditions. The history of amendments to article XIV, section 3 of the Arkansas Constitution of 1874 demonstrates the problem with specific limitations. As originally enacted, article XIV, section 3 provided (1) that the general assembly could levy a tax not to exceed two mills per dollar on taxable property for the support of the common schools and (2) that the general assembly could authorize school districts to levy, subject to voter approval, a tax not to exceed five mills per dollar for school purposes.[85] In 1906, the section was amended to authorize a state tax not exceeding three mills and a district tax not exceeding seven mills.[86] Ten years later the section was once again amended, raising the maximum authorized district tax to twelve mills.[87] Amendment 11, adopted in 1926, authorized a maximum district tax of eighteen mills.[88] In the twenty year period from 1906 to 1926, this one constitutional provision was amended three times. But that was not the last amendment. Amendment 40, adopted in 1948, deleted authority for a state property tax for school purposes and deleted the maximum rate that a district could levy.[89] Article XIV, section 3 now provides that the maximum rate of tax a school district may levy is that approved by the voters in the district.[90] Including the original version of article XIV, section 3, it took five different provisions in a period of seventy-four years to enact a limitation that allows a local decision on what rate of property taxes will be imposed to support public schools in the area.

The situation for municipal corporations is more complicated. Not only are there maximum rates of tax; there are different rates depending on the purpose for which the levy is made. Once again, the starting point is article XII, section 4 of the 1874 constitution, which limits property taxes levied by municipal corporations to five mills on the dollar of assessed value.[91] That levy is for any lawful purpose; there are additional specific levies authorized. Arkansas Constitution Amendment 18 authorizes certain cities of the first class to levy, upon voter approval, an additional five mills for the purpose of "securing the location of factories, industries, river transportation and facilities therefor

85. *See* ARK. CONST. art. XIV, § 3 publisher's note.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. ARK. CONST. art. XIV, § 3.
91. *Id.* art. XII, § 4.

within and adjacent to such cities . . . ."[92] Arkansas Constitution Amendment 30 authorizes a city, with voter approval, to levy an additional one mill for the purpose of maintaining a public library.[93] The amendment was adopted in 1940; fifty-two years later, the people of Arkansas determined it was necessary to increase the maximum rate and approved an amendment on November 3, 1992, raising the maximum rate to five mills on the dollar.[94] Arkansas Constitution Amendment 31 authorizes a city, with voter approval, to levy an additional two mills to fund a retirement account for policemen and firemen.[95] Arkansas Constitution Amendment 62, section 1 authorizes municipal corporations, with voter approval, to issue capital improvement bonds payable from a tax on real or personal property. Rather than stating a maximum tax rate, the provision limits the total amount of bonds that can be issued and outstanding at any one time to twenty percent of the total assessed value of real and personal property in the issuing municipality.[96]

The general assembly has followed a similar pattern when authorizing municipal corporations to impose sales and use taxes. Legislation authorizes multiple taxes for particular uses. A municipal corporation, with voter approval, may levy a sales and use tax of 0.25%, 0.5%, 0.75%, or 1%.[97] The tax revenues raised may be used "for any purpose for which the city's general funds may be used."[98] Municipal corporations may also levy, with voter approval, a sales and use tax for not more than a two year period at a rate of either 0.5% or 1% to provide "funds for the acquisition, construction, or improvement of parks and recreation facilities within the city or town."[99]

The general assembly has shown itself more than willing to fine tune a tax authorization:

> Any city of the first or second class having a population of not more than forty thousand (40,000) persons according to the most recent federal census and which has been or may hereafter be designated as a model city under the Demonstration Cities and Metropoli-

92. *Id.* amend. XVIII.
93. *Id.* amend. XXX.
94. Kevin Walker, *Voters Approve Amendment to let Libraries Ask for up to 8 Mills*, ARK. DEMOCRAT GAZETTE, Nov. 4, 1992, at D1.
95. ARK. CONST. amend. XXXI.
96. *Id.* amend. LXII, § 1.
97. ARK. CODE ANN. § 26-75-207 (Michie Supp. 1991).
98. *Id.* § 26-75-217 (Michie 1987).
99. *Id.* § 26-75-403.

> tan Development Act of 1966 may . . . levy for the benefit of the city a tax of not to exceed one percent (1%) on gross proceeds or gross receipts derived from sales within the city . . . .[100]
>
> Any city of the first class may . . . levy a tax of one percent (1%) upon the gross receipts or gross proceeds from the renting . . . of hotel or motel accommodations . . . or upon the gross receipts or gross proceeds of . . . establishments . . . engaged in the business of selling prepared food . . . .[101]

If the city happens to have a national park located in it, the tax may equal three percent;[102] if the city happens to have a designated historic district and is included in the National Register of Historic Places, the tax may equal two percent.[103] Each tax levy requires voter approval.[104]

There are other examples of specific taxes authorizing levies by both municipal corporations and counties. The above are illustrative only; they are pointed out because they so graphically illustrate the need to reform the approach to tax authorization in the State of Arkansas.[105]

6. *Summary*

Perhaps none of this maneuvering would matter if it came at no cost — but there are costs. To the extent that debt limitations are meant to control the financial burden that a municipal corporation can impose on its residents, they fail. To the extent we rely on citizen knowledge of the abilities of and limitations on a municipal corporation to address problems, the complexity forced on the local government to comply creatively with constitutional strictures frustrates the ability of a citizen to be informed and involved. To the extent that financial transactions are structured based on the necessity of complying with the state constitutional limitations rather than on the most efficient (read that least expensive) method of raising the necessary capital, the debt limitations actually harm the citizen rather than protect her.[106]

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100. *Id.* § 26-75-502.
101. *Id.* § 26-75-602(a)(1)(A) (Michie Supp. 1991).
102. *Id.* § 26-75-602(a)(1)(B).
103. *Id.* § 26-75-602(a)(1)(C).
104. *Id.* § 26-75-602(a)(2).
105. *See infra* notes 263-69 and accompanying text.
106. *See, e.g.*, Kenneth W. Hollman & Walter J. Primeaux, Jr., *An Examination of Debt Ceilings as Barriers to Efficient Debt Management*, 25 ALA. L. REV. 417 (1973); Harold Wolman & George Peterson, *State and Local Government Strategies for Responding to Fiscal Pressure*, 55 TUL. L. REV. 773 (1981).

Should the reader have any doubt that the possibilities of incurring constitutional indebtedness, both with and without voter approval, are myriad and complex, consider the following list which is illustrative only, not exhaustive:

1. special assessment to pay for street improvements;[107]
2. the Recreation Facilities Bond Act;[108]
3. issuance of revenue bonds for solid waste facilities;[109]
4. bonds for construction of pollution control facilities;[110]
5. bonds issued by sanitation authorities pursuant to the Joint County and Municipal Solid Waste Disposal Act;[111]
6. bonds for airports;[112]
7. bonds for municipal or county jails;[113]
8. bonds for electric power generation;[114]
9. bonds for waterworks;[115]
10. bonds for sewer systems;[116]
11. bonds for natural gas systems;[117]
12. capital improvement bonds authorized by Amendment 62 and bonds issued pursuant to the Local Government Bond Act of 1985 (adopted under Amendment 62);[118]
13. public corporation for public facility bonds;[119]
14. bonds issued pursuant to the Public Facilities Boards Act;[120]
15. bonds issued under the Municipalities and Counties Industrial Development Revenue Bond Law;[121]
16. bonds issued under the Municipal Street and Parking Revenue Bond Act;[122] and
17. bonds issued under the Public Transit System Act.[123]

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107. ARK. CODE ANN. § 14-301-204 (Michie 1987).
108. *Id.* § 14-269-105.
109. *Id.* § 14-232-104.
110. *Id.* § 14-267-106.
111. *Id.* § 14-233-109.
112. *Id.* § 14-360-306.
113. *Id.* § 12-41-705.
114. *Id.* § 14-202-108.
115. *Id.* § 14-234-205.
116. *Id.* § 14-235-215 (Michie Supp. 1991).
117. *Id.* § 14-205-102 (Michie 1987).
118. *Id.* § 14-164-308.
119. *Id.* § 14-138-114.
120. *Id.* § 14-137-116 (Michie Supp. 1991).
121. *Id.* § 14-164-206 (Michie 1987).
122. *Id.* § 14-302-106.
123. *Id.* § 14-334-109.

The variations possible illustrate the dual nature of the problem. The state is managing municipal indebtedness rather than providing general authority subject to generally applicable limitations; the citizen of the municipal corporation faces a daunting task in acting in an informed way.

III. Protecting Local Power

We now must consider the role of the constitution in protecting local power. To say that the municipal corporation is subject to the legislature proves too much. The legislative control of municipal corporations is limited by the provisions of the state constitution. As previously noted, a state constitution is not a grant of power, it is a limitation on the power the sovereign may exercise over its citizens.[124] By adopting a state constitution and by amending an existing state constitution, the citizens of the state have the ability to direct the legislature how to act with respect to questions of municipal corporations. That ability includes prohibiting the legislature from interfering with municipal corporations. Constitutional provisions can even directly authorize and empower municipal corporations.[125]

A. Local and Special Laws

Amendment 14 of the 1874 constitution contains a direct limitation on the power of the legislature to control municipal corporations: "The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special acts."[126] A legislature, unless prohibited by a constitutional limitation, has the authority to enact legislation that deals specifically with the internal affairs of a particular municipal corporation.[127] Voters in Arkansas denied the legislature that power by enacting Amendment 14. But as is often the case, what appears as an absolute prohibition to any local "meddling" is not. In interpreting the phrase "local or special act," the court has held that

> [a] law is special in a constitutional sense when by force of an inherent limitation it arbitrarily separates some person, place or thing from those upon which, but for such separation it would operate and a local

124. *See supra* note 17 and accompanying text.
125. *See, e.g.*, ARK. CONST. amend. LXII, § 7.
126. ARK. CONST. amend. XIV.
127. *See* 1 CHESTER J. ANTIEAU, MUNICIPAL CORPORATION LAW § 2.00 (1992).

> law is one that applies to any subdivision or division of the state less than the whole.[128]

Acts that apply only to certain classifications of municipal corporations[129] or to municipal corporations based on the population of the entity[130] have been upheld as having a rational basis rather than being based on an arbitrary separation.[131]

Protection from direct interference afforded by Amendment 14 does strengthen the power enjoyed by a municipal corporation. But a more effective protection for local government can be found in a grant of home rule authority.

B. Home Rule Authority

Municipal home rule does not exist as a matter of right; to argue that it does would require adopting the theory of an inherent right to local self-government. Rather, home rule authority is granted to a municipal corporation by one of two sources. For a municipal corporation to exercise powers denominated as "home rule," there must be either a constitutional grant of home rule authority ("constitutional") or a statutory grant of home rule authority ("statutory"). The state constitution acts as a limitation on the sovereign power;[132] thus, a direct grant of home rule authority to municipal corporations in a state constitution prevents the legislature from denying its exercise. The absence of a constitutional grant, coupled with the right of the legislature to control the powers that may be exercised by a municipal corporation, leaves a statutory authorization of home rule as the other source of the right.

Missouri is credited as the first state to give its municipal corporations home rule authority by adoption of an amendment to its constitution in 1875.[133] From that start, variations on the extent of home rule authority and the exercise of that authority have multiplied.[134] The source of the home rule authority grant — constitutional or statutory — has not proved to be significant in determining the scope of the power granted.[135] Of course, if the grant is statutory, it may be re-

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128. Laman v. Harrill, 233 Ark. 967, 970, 349 S.W.2d 814, 816 (1961).
129. Whittaker v. Carter, 238 Ark. 1074, 386 S.W.2d 498 (1965).
130. Murphy v. Cook, 202 Ark. 1069, 155 S.W.2d 330 (1941).
131. *Whittaker*, 238 Ark. 1074, 386 S.W.2d 498; *Murphy*, 202 Ark. 1069, 155 S.W.2d 330.
132. *See supra* note 17 and accompanying text.
133. 1 ANTIEAU, *supra* note 127, § 3.00.
134. *See, e.g.*, 1 ANTIEAU, *supra* note 127, §§ 3.01, 3.03, 3.08, 3.10.
135. *See* Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM.

pealed by the legislature. The nature or type of the grant has proved to be the more significant factor in the importance of home rule to a municipal corporation.

Home rule is a means of allocating power between the state and a municipal corporation. Two types of home rule authority have developed. If the home rule unit is given power over local matters to the exclusion of the state, the authority is described as "*imperium in imperio*" — a state within a state.[136] The municipal corporation, as to local matters, can act notwithstanding the provisions of state law (other than the state constitution). But if the municipal corporation only has authority to act to the extent not limited by state law, it is said that the corporation enjoys legislative home rule.[137] Under *imperio* home rule, arguments about the exercise of power by a municipal corporation focus on the question of what constitutes a local matter or affair because the *imperio* home rule power of the municipal corporation prevents state intervention if the exercise of authority is with respect to a local matter.[138] Under legislative home rule, the question to be answered when exercise of authority by a municipal corporation is challenged is whether any state law directly or indirectly prohibits the exercise of power with respect to the subject matter by the municipal corporation.[139]

C. Home Rule in Arkansas

The Arkansas constitution contains no provision granting home rule authority to municipal corporations. Home rule in Arkansas is therefor necessarily a statutory grant of power. Not only is there no constitutional provision making a direct grant of home rule power to municipal corporations, the first clause of article XII, section 4 of the Arkansas Constitution of 1874 provides that "[n]o municipal corporation shall be authorized to pass any law contrary to the general laws of the state."[140] Home rule in Arkansas is, therefore, necessarily legislative.

An Arkansas city of the second class may exercise legislative home

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& MARY L. REV. 269, 277, 282-83, 294-96 (1968).

136. *See* City of St. Louis v. Western Union Tel. Co., 149 U.S. 465, 468 (1893); C. DALLAS SANDS & MICHAEL E. LIBONATI, 1 LOCAL GOVERNMENT LAW § 4.01 (1992).

137. SANDS & LIBONATI, *supra* note 136, § 4.05.

138. SANDS & LIBONATI, *supra* note 136, § 4.06.

139. SANDS & LIBONATI, *supra* note 136, § 4.06.

140. Ark. Const. art. XII, § 4.

rule if it has adopted a charter.[141] Arkansas cities of the first class have legislative home rule even without the adoption of a city charter,[142] but also have a cumulative grant of authority to exercise legislative home rule if a charter has been adopted.[143]

The grant of authority to first class cities is stated very broadly: "Any city of the first class is authorized to perform any function and exercise full legislative power in any and all matters of whatsoever nature pertaining to its municipal affairs including, but not limited to, the power to tax."[144] But what the legislature gives, the legislature may take away — and it did. " 'Municipal affairs' means all matters and affairs of government germane to, affecting, or concerning the municipality or its government, *except the following, which are state affairs and subject to the general laws of the State of Arkansas*";[145] a list of fifteen exclusions from "municipal affairs" follows. Some of the exclusions from municipal affairs are readily justified. State control of "the construction and maintenance of state highways,"[146] "incorporation . . . of municipalities and annexation of territory thereto,"[147] and "matters coming within the police power of the state including minimum public health, pollution, and safety standards"[148] all relate more to exercise of state sovereignty than to a question of local concern.[149] But other exceptions are not so easily justified as being a state concern rather than a municipal affair. Questions regarding control of traffic on state highways within municipal boundaries,[150] merger of municipal corporations,[151] collective bargaining,[152] pension and civil service systems,[153] and hours and vacations, holidays, and other fringe benefits of employees[154] are all removed from the scope of municipal affairs. Even though the municipal corporation "may exercise any function or legislative power upon [the enumerated] state affairs not in conflict with state

141. ARK. CODE. ANN. §§ 14-42-302, -307 (Michie 1987).
142. *Id.* §§ 14-43-601, -602.
143. *Id.* §§ 14-42-302, -307.
144. *Id.* § 14-43-602.
145. *Id.* § 14-43-601(a)(1) (emphasis added).
146. *Id.* § 14-43-601(a)(1)(L).
147. *Id.* § 14-43-601(a)(1)(N).
148. *Id.* § 14-43-601(a)(1)(J).
149. *See infra* notes 230-48 and accompanying text.
150. ARK. CODE ANN. § 14-43-601(a)(1)(L) (Michie 1987).
151. *Id.* § 14-43-601(a)(1)(N).
152. *Id.* § 14-43-601(a)(1)(E).
153. *Id.* § 14-43-601(a)(1)(F).
154. *Id.* § 14-43-601(a)(1)(G).

law,"[155] the reservation of state control on these matters limits the ability of the municipal corporation to make meaningful decisions for the welfare of its residents.

The inclusion of the power to tax within the ambit of municipal affairs[156] also appears to be a generous grant of power by the legislature. Once again, the appearance is deceptive. Only sales, gross receipts, gross proceeds, use, payroll, and income taxes authorized by law may be levied by the municipal corporation;[157] only taxes authorized by law may be levied on alcoholic beverages.[158]

The search for home rule authority with respect to taxes is not over, however. The legislature has granted any county or municipality authority to "levy any tax not otherwise prohibited by law."[159] Once again, this broad grant is immediately restricted. Only taxes authorized by law may be imposed on fuel, tobacco, or alcoholic beverages;[160] no new sales or use taxes may be levied until authorized by the general assembly;[161] and any new levy, including of any income tax, must be approved by the voters of the political subdivision.[162] The most obvious and lucrative forms of taxation are removed from control of the municipal corporation and county.

The home rule powers of counties must be considered, particularly since much of Arkansas is rural in nature and lacks urban areas which are most likely to exercise home rule authority over an extensive geographic area. Counties enjoy legislative home rule authority as the result of a constitutional grant. The source of the right to exercise home rule authority is Amendment 55 to the Arkansas Constitution of 1874: "A county acting through its Quorum Court may exercise local legislative authority not denied by the Constitution *or by law*."[163] Because the county may only exercise local legislative authority not denied by law, its powers are subject to control by the general assembly. Thus, counties possess legislative home rule authority with a constitutional source. Numerous restrictions on the exercise of local legislative authority have

155. *Id.* § 14-43-601(a)(2).
156. *Id.* § 14-43-602.
157. *Id.* § 14-43-606(a).
158. *Id.* § 14-43-606(b).
159. *Id.* § 26-73-103(a).
160. *Id.* § 26-73-103(b).
161. *Id.* § 26-73-103(g).
162. *Id.* § 26-73-103(a).
163. ARK. CONST. amend. LV, § 1(a) (emphasis added).

been enacted.[164] Coupled with the limitation on the power to tax found in *Arkansas Code Annotated* section 26-73-103, these limitations reduce the significance of the home rule grant.

IV. Determining the Proper Power Allocation Between a State and its Municipal Corporations

A review of the structural protection afforded to a municipal corporation by the federal and state constitutions is necessary before considering whether municipal corporations should be strengthened *vis 'a vis* the state. The Federal Constitution offers a municipal corporation very little protection from its state, as the United States Supreme Court made clear in 1907 in *Hunter v. City of Pittsburgh*:[165]

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . . Neither their charters, nor any law conferring governmental powers . . . constitutes a contract within the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, . . . expand or contract the territorial area, . . . repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, *conforming its action to the state constitution*, may do as it will, unrestrained by the Constitution of the United States. . . . [The inhabitants] have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers. . . . The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.[166]

One can quite reasonably conclude, after reading the decision in *Hunter*, that a municipal corporation is subject to the whims of the state. But in *Hunter*, the Court indicated that its unrestricted pronouncement of the absolute nature of state power over the state's municipal corporations might not apply to property held in the corporation's proprietary capacity rather than in its governmental capacity.[167] Furthermore, the Court was addressing what the state can do without

164. *See* ARK. CODE ANN. §§ 14-14-801, -805 to -809 (Michie 1987).
165. 207 U.S. 161 (1907).
166. *Id.* at 178-79.
167. *Id.*

violating the United States Constitution, and specifically recognized that the state's own constitution can in fact limit the seemingly absolute state control over its municipal corporations. Two state constitutional protections of municipal corporate power have already been identified: prohibitions against local legislation[168] and constitutional grants of home rule authority.[169] The Arkansas constitutional provision against local legislation, when read in conjunction with the provisions relating to organization of municipal corporations, provides a modicum of protection for an existing municipal corporation.

Amendment 14 denies the general assembly the power to enact local or special acts.[170] "[A] local law is one that applies to any subdivision or division of the state less than the whole."[171] Article XII, section 2 of the 1874 constitution denies the general assembly the power to "pass [a] special act conferring corporate powers . . . where the corporations created are to be and remain under the patronage and control of the state."[172] So how is the general assembly to provide for municipal corporations? Article XII, section 3 mandates that the "General Assembly shall provide, by general laws, for the organization of cities (which may be classified) and incorporated towns, and restrict their power of taxation, assessment, borrowing money and contracting debts, so as to prevent the abuse of such power."[173] When read together, the three provisions of the 1874 constitution offer some protection against a particular municipality being singled out by the legislature. The Arkansas Supreme Court very early held that an attempt by the legislature to vary the territory of a city by direct action was unconstitutional.[174] Likewise, the court voided as unconstitutional legislation that attempted to change Benton, Arkansas, from an incorporated town to a city of the second class.[175] Do not make too much of the protection offered, however. Given that under Arkansas law a special act is one that arbitrarily separates municipal corporations,[176] and considering that legislation based on population brackets has been held constitu-

168. ARK. CONST. amend. XIV. See *supra* notes 126-31 and accompanying text.
169. See *supra* notes 132-39 and accompanying text.
170. *See* ARK. CONST. amend. XIV; *see supra* notes 126-31 and accompanying text.
171. Laman v. Harrill, 233 Ark. 967, 970, 349 S.W.2d 814, 816 (1961).
172. ARK. CONST. art. XII, § 2.
173. *Id.* § 3.
174. City of Little Rock v. Parish, 36 Ark. 166 (1880).
175. Cotten v. City of Benton, 117 Ark. 190, 174 S.W. 231 (1915).
176. Laman v. Harrill, 233 Ark. 967, 349 S.W.2d 814 (1961).

tional,[177] the legislature certainly can target particular municipalities if it desires. Constitutional home rule that incorporates legislative home rule authority with limitations on legislative discretion offers the best hope of strengthening municipal corporations in Arkansas, if in fact that is desired.[178] That issue must now be resolved.

A. Theories of Localism

The challenge to reconsider the role of the municipal corporation in American society was made eloquently by Gerald Frug in his 1980 article, *The City as a Legal Concept*.[179] Frug challenged us to rethink radically the role of the city in modern society.[180] Frug argues that American cities are powerless;[181] that they are powerless because of legal doctrine;[182] and that because the city is powerless, individuals choose not to participate in the political life of the city because it makes no difference:[183]

> Cities as they currently exist should not simply be made more powerful. Rather, the argument for city power rests on what cities have

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177. *See, e.g.*, Lovell v. Democratic Cent. Comm., 230 Ark. 811, 327 S.W.2d 387 (1959) (holding that an act relating to the election of municipal officials in cities of the first class which are organized under the mayor-council form of government and have a population of more than 50,000 is not a special or local act, notwithstanding that at the time of adoption it applied to only one city); Whittaker v. Carter, 238 Ark. 1074, 386 S.W.2d 498 (1965) (holding that an act applicable to all cities which now or in the future operate under the commission form of government is not a special or local act); *cf.* Laman v. Harrill, 233 Ark. 967, 349 S.W.2d 814 (1961) (finding statute, which applies to cities which have a population of 20,000 or more and are located in counties wih a population of 100,000 or more, is void as special or local act); Burrow v. Jolly, 207 Ark. 515, 181 S.W.2d 479 (Ark. 1944) (finding statute, which applies only to counties which have a population between 18,300 and 18,350, is void as special or local act).

178. *See infra* notes 237-48 and accompanying text.

179. Frug, *supra* note 36.

180. Frug's use of the term "city" is very inclusive. Acknowledging that for some neighborhood power is the touchstone, while for others regional government is the touchstone, he includes both or either as the reader pleases. Frug, *supra* note 36, at 1061-62. Because Frug does not worry about whether the "city" to which he refers is a neighborhood of 100 people or a regional government including 8,000,000 people, his argument for increasing municipal power as a means of enhancing the role of the individual in a participatory democracy is difficult to accept. *See infra* notes 206-10 and accompanying text.

181. Frug, *supra* note 36, at 1059.

182. Frug, *supra* note 36, at 1060.

183. "No one is likely to participate in the decisionmaking of an entity of any size unless that participation will make a difference in his life. Power and participation are inextricably linked: a sense of powerlessness tends to produce apathy rather than participation, while the existence of power encourages those able to participate in its exercise to do so." Frug, *supra* note 36, at 1070.

> been and what they could become. Cities have served[184] — and might again serve — as vehicles to achieve purposes which have been frustrated in modern American life. They could respond to . . . the need . . . [and] ability to participate actively in the basic societal decisions that affect one's life. This conception of freedom — a positive activity designed to create one's way of life — differs markedly from the currently popular idea of freedom as merely "an inner realm into which men might escape at will from the pressures of the world."[185]

Frug argues that if all that is wanted is a resolution of the current problems faced by cities — improvement of the quality of life of those in our major cities, encouragement of urbanization for protection of the environment, continuation of cities as trade or cultural centers — rather than increasing city power, local autonomy should be limited or even prohibited all together.[186] Cities "administered by federal officials authorized to implement a national urban policy" might more quickly and efficiently solve such problems.[187]

While Frug argues for a rethinking and restructuring of state and local power as a method for increasing participation in public life by all citizens, economic efficiency arguments for shifting the balance toward the municipal corporation have also been made. Perhaps the best economic analysis for increased local power was made by Charles Tiebout in his 1956 article, *A Pure Theory of Local Expenditures*.[188] Tiebout viewed citizens as consumers. The consumer will look for value — the mix between services desired and the price she is willing to pay that comes closest to meeting the consumer's desires.[189] The citizen has two options in searching for that mix which is most satisfactory. She may exercise the power to vote (referred to as her "voice"); if that does not achieve what she wants, she can move to a municipality that more closely maximizes value from her perspective (referred to as "exit").[190] Each of these options has ramifications for a municipal corporation and its residents. For voice to be effective, the political unit must be a size

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184. Frug is referring to the medieval town when he talks of cities at one time serving as an intermediary between the state and the individual. Frug, *supra* note 36, at 1083-90.

185. Frug, *supra* note 36, at 1068.

186. Frug, *supra* note 36, at 1067.

187. Frug, *supra* note 36, at 1067.

188. Charles Tiebout, *Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

189. *Id.* at 418.

190. GORDON L. CLARK, JUDGES AND THE CITIES 75-77 (1985); Tiebout, *supra* note 188, at 418.

that makes participation in the political process meaningful.[191] Thus, while many decry the multitude of political subdivisions as inefficient,[192] the economic efficiency argument requires that municipal corporations be small enough to encourage an effective voice for its residents. And for exit to be a viable choice for the unsatisfied citizen/consumer, there must be a number of nearby municipal corporations that can compete for the loyalty of the resident desiring to exit.[193]

This ability of an unsatisfied consumer of municipal services to exit underscores the need for municipal power. To avoid losing residents and tax base, the municipal corporation must have the ability to respond to the demands of its citizens with respect to their desired mix of cost and service.[194] Only by having local autonomy on questions of what services should be offered and how those services would be funded can the municipality protect itself from a loss of citizens, businesses, and inevitably tax base to fund the choices of those who have remained.[195]

Troubling aspects of both Frug's and the economists' arguments for enhanced local power at the expense of the state have been noted, particularly by Richard Briffault in his 1990 article, *Our Localism: Part II — Localism and Legal Theory*.[196] Briffault does not defend the status quo; rather, he criticizes "the dominant contemporary theories of localism . . . as a first step in moving local government law beyond localism and toward a less abstract attention to particular substantive problems and policies."[197]

The starting point for Frug is the powerlessness of our modern cities.[198] Briffault points out — quite correctly — that in fact our modern cities are not powerless in the ways that Frug suggests.[199] Special acts and local legislation are prohibited.[200] Day-to-day decisions are made at the local level because of practical necessity. Legislatures have delegated broad powers to municipal governments.[201] It simply is not

191. Frug, *supra* note 36, at 1068; *cf.* Tiebout, *supra* note 188, at 417.
192. *See* OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW § 17 (1982).
193. Tiebout, *supra* note 188, at 419.
194. Richard Briffault, *Our Localism: Part II — Localism and Legal Theory*, 90 COLUM. L. REV. 346, 401 (1990).
195. *Id.* at 400-01.
196. Briffault, *supra* note 194.
197. Briffault, *supra* note 194, at 454.
198. Frug, *supra* note 36, at 1059.
199. Briffault, *supra* note 194, at 405-06.
200. *See supra* notes 126-31 and accompanying text.
201. *See* 1 ANTIEAU, *supra* note 127, at §§ 5.02-.03.

correct that our cities are powerless. Questions of actual services that will be provided, the level of funding for those services, and, to a lesser extent, the source of revenues for that funding, are left to the discretion of the municipal corporation within state constitutional constraints.[202]

Briffault suggests that Frug actually favors reshaping the municipal corporation to include powers currently exercised by private corporations as a means of achieving social justice in addition to providing citizens a meaningful voice.[203] It requires reading *City as Legal Concept* to fully understand the accuracy of Briffault's assessment of Frug's implicit goal. But Briffault makes a strong summary argument for his interpretation of Frug:

> Although Frug puts the case for participation primarily in terms of the psychological and emotional benefits of individual involvement in political life, latent in his theory is the assumption that city power will somehow transform local politics in the direction of greater social justice. His specific proposals — that cities operate banks, insurance companies and other financial institutions, provide housing, create food cooperatives and run profit-making businesses [citation omitted] — reflect the idea that such municipal activity would radically transform local political life and provide a basis for empowering workers, the poor and consumers . . . . In short, Frug suggests, greater individual participation in urban government would lead to more redistributive local governments.[204]

Briffault then turns to economic theory. He uses Tiebout's model to demonstrate that cities avoid redistributive policies not because the cities are powerless, but rather because shifting wealth might cause wealthy citizens to exit.[205] Any reader who has relocated knows that mobility requires money. Consideration must be given to the availability of transportation, to the question of closeness of schools if there are children, and to the affordability of housing in the particular municipal corporation. The renter must have time free from work to locate a new residence. The home owner must have a market for her existing home and be able to cover the costs of selling one house (close to ten percent of the selling price) and purchasing another (typically, a down payment of a percentage of the purchase price plus an additional two to three percent of the purchase price to cover closing costs). After finding a

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202. *See supra* notes 47-123 and accompanying text.
203. Briffault, *supra* note 194, at 407.
204. Briffault, *supra* note 194, at 407.
205. Briffault, *supra* note 194, at 408.

suitable place, the mover must have money to cover security deposits, utility connections and deposits, and the move of personal possessions. Time free from work must be available for the actual move. Who is more likely to actually have the option of exit? The wealthier individual or family does, as many of the requirements for exit are financial. It is to that citizen that a municipal corporation must provide value, for it is that citizen (whether an individual or business) who enjoys the option of exit.

Briffault's concern with multiple powerful municipal corporations does not rely solely on the lack of a true choice for exit by most citizens. As noted, Frug seeks to increase individual voice through meaningful participation.[206] Relying on Madisonian arguments, Briffault suggests that the opposite result is as, or even more, probable. As local governments are reduced in population and granted greater autonomy from state control, a majority will be more easily formed. That majority will be able to impose its desires for the exercise of power to the detriment of the minority of the community.[207] Madison, in *The Federalist No. 10*, expressed his concern of majority oppression as the possibility of faction:

> By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community . . . . The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority . . . the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.[208]

Provisions of the Arkansas Constitution reflect this Madisonian fear. It is present in (1) the requirement that the legislature restrict municipal corporations' "power of taxation, assessment, borrowing money and

206. *See supra* notes 183-85 and accompanying text.
207. Briffault, *supra* note 194, at 404.
208. THE FEDERALIST NO. 10, at 63-64 (James Madison) (Jacob E. Cooke ed., 1961).

contracting debts"[209] and (2) the denial to the legislature of authority to authorize any municipal corporation "to pass any law contrary to the general laws of the state."[210] It is of course true that each of these provisions serves other purposes at the same time. For instance, fiscally irresponsible actions by one municipal corporation can harm other Arkansas municipalities in the capital-raising markets. The state thus has a legitimate interest in protecting itself and its political subdivisions from the folly of a particular municipal corporation. These provisions do, however, leave no doubt that the larger body politic — the state — is to protect individuals from oppressive decisions of a much smaller body politic. In Madisonian terms, the state will protect the minority from a majority faction in a small segment of society.

Briffault identified another danger in a major shift of power to municipalities. The non-Madisonian concern that justifies the legislative control over municipal corporations specified in article XII, section 3 is one example.[211] Namely, cities and towns both act and fail to act in ways that have an impact outside of their municipal boundaries.[212] Putting this phenomenon in economic terms, some costs of a municipality's decisions are externalized. The costs associated with the benefits of a particular course of action may not fall on the ones who are the principal beneficiaries of the benefits.[213] The more numerous the units autonomously exercising local power, the greater are the opportunities for externalizing costs and the more likely externalization will occur as a result of the smaller territorial area of the municipal corporation. In fact Tiebout recognized this problem. Briffault notes that, according to Tiebout, a municipality will have achieved an efficient structure "only when locally supplied public services 'exhibit no external economies or diseconomies between communities.' "[214] Returning to his position that Frug's underlying thesis is based on participatory democracy, Briffault argues that the impact of municipal action on those outside of the municipal corporation should trouble those arguing for such expansive local autonomy. Non-residents, who have neither voice nor an option of exit because they are not residents of the municipal corporation, have

209. ARK. CONST. art. XII, § 3.

210. *Id.* § 4.

211. *See supra* note 209 and accompanying text.

212. Briffault, *supra* note 194, at 426.

213. ROBIN P. MALLOY. LAW AND ECONOMICS — A COMPARATIVE APPROACH TO THEORY AND PRACTICE 34 (1990).

214. Briffault, *supra* note 194, at 426 (citing Tiebout, *supra* note 188, at 419).

no say in decisions that affect their daily lives.[215]

Briffault concludes that "[r]ather than seeking a state-local relationship characterized by either complete state dominance or one of complete local autonomy, elements of both perspectives should be combined."[216] A structure that "combine[s] local initiative, participation and voice with state financial support, state oversight and statewide perspectives for evaluating local action" should be the goal.[217]

One must only observe her own community to realize that Briffault is correct in calling for local initiative combined with state oversight and financial support. Should we allow the City of Jacksonville to determine whether hazardous wastes within its city limits will be destroyed on site or simply moved outside its municipal boundary? Imagine a system in which any political subdivision of the state could, through exercise of its zoning and planning powers, exclude state penal facilities, low and moderate income housing, landfills, or any other use that the NIMBYs[218] found objectionable. When one realizes that counties in Arkansas cover 100% of the area of the state and can have zoning and planning powers, one sees that the local government cannot be paramount in all respects.

Frug was not arguing for such absolute supremacy, however. His challenge to rethink the value of municipal corporations as a means of liberty and freedom for the individual and society is useful. It never hurts to be reminded that the status quo is not the only possible vision, but that in fact improvements are usually possible.

B. Achieving Local Initiative with State Oversight

How are we to derive our structure for allocating power between a state and its municipal corporations? In his book *Judges and the Cities*,[219] Gordon Clark identifies four types of autonomy for a municipal government:

1. initiative and immunity;
2. initiative and no immunity;
3. no initiative and immunity; and
4. no initiative and no immunity.[220]

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215. Briffault, *supra* note 194, at 426-27.
216. Briffault, *supra* note 194, at 453.
217. Briffault, *supra* note 194, at 453.
218. A person who says "Not in my back yard!"
219. CLARK, *supra* note 190.
220. CLARK, *supra* note 190, at 70.

Initiative is the recognition of the right or power of a municipal corporation to act, including action that fundamentally restructures that municipal corporation in a way that is not identifiable with its previous structure or purpose. Immunity, from the perspective of the municipality, is its right to resist any effort by the state to interfere with the municipality's initiative. The preceding discussion of *City as Legal Concept* and *Our Localism*[221] suggests that while none of these four pairs strikes the proper balance alone, the use of all four approaches is appropriate. In some arenas, municipal action should be protected from state interference — the municipal corporation needs initiative and immunity. In others, while local government will have the right to initiate action, the state will have the power to withdraw that right, even after it has been exercised — initiative and no immunity. In some matters, the municipal corporation should not have any right of initiative, nor any protection from state control or review — no initiative and no immunity. And although it initially appears a meaningless category, there are instances when the municipal corporation should not possess initiative but should enjoy immunity. According to Clark's typology, situations allowing for no initiative but for immunity still allow the exercise of some discretion on the part of the local actor, with that exercise of discretion not subject to review by the state.

The most important task remains. A decision must be made: of the functions and powers that can conceivably be exercised by a municipal government, which should be permitted and which of the four types of local autonomy is appropriate for the exercise of that function or power? The question is complicated because of the significant differences in population between the smallest and largest incorporated towns and cities. The answer with respect to Little Rock is not necessarily the answer with respect to Lake Village. The range of activities two municipal corporations of such significantly differing populations might wish to undertake is not the predominant consideration unless the state will require a certain activity to be undertaken. So long as the municipal corporation has discretion in choosing to undertake the service, there is no need to treat Little Rock differently than Lake Village unless there is a legitimate concern about the external impact of the action and the size of the actor is relevant to that concern. Remembering Madison's concern of factionalism — of a majority imposing its best interest rather than the community's (whether that community

221. *See supra* notes 179-218 and accompanying text.

happens to be citizens of the particular municipal corporation or the citizens of Arkansas) — can also help determine whether there is a need to treat municipalities of different size differently in the allocation of any particular power.

In instances where the decision is made to give the municipal corporation initiative and immunity, it can still be appropriate for the state to enact legislation that serves as a default provision. By choosing not to act, the municipal corporation can effectively legislate with respect to a matter by allowing the state statute to be the governing law in that municipality. This is nothing more than a recognition that the approach to the law of private corporations makes sense with respect to municipal corporations. One goal of a well-drafted business corporation act is to provide a standard agreement that will meet the needs of a substantial number of users of the corporate form.[222] In this way, transaction costs are minimized by allowing the adoption by default of provisions of state law.[223]

A statement of the goals of these allocation decisions will instruct us in making the necessary choices. The allocation choice should:

1. reject any notion that the sole function of the municipal corporation is to serve as a passive agent to enact and implement locally state policy and initiatives. Innovative, constructive local action, designed by those directly affected by both the problem or need and the solution, should be encouraged; the goal should be a state/local partnership rather than a state/local competition; and
2. empower of the local resident by providing her a meaningful opportunity to affect the community in which she lives.

In deciding what provisions are appropriate for inclusion in the Arkansas Constitution, one must decide what areas of the allocation of power should be addressed. In which areas is it important to identify the initiative/immunity mix? The two goals identified above suggest that the matters to be addressed in the sections of the state constitution granting home rule authority or otherwise controlling municipal corporations are:

1. the form of government;
2. the source of funds, including borrowed funds;
3. the use of funds; and

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222. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 368-69 (3rd ed. 1986).
223. *Id.*

4. citizen access to information.

The expansive scope of each of these categories will be illustrated in the discussion of the proper allocation of power between the state and municipal corporation.

C. A Proposal for Arkansas

Fortunately for the people of Arkansas, we need not "start at the beginning" or invent the wheel. Substantial work has already been done. Both the Proposed Arkansas Constitution of 1970 ("1970 Proposal")[224] and the Proposed Arkansas Constitution of 1980 ("1980 Proposal")[225] included provisions that would have fundamentally altered the relationship between the state and its municipal corporations.[226] As previously noted, the provisions of the 1970 Proposal relating to the organization, governmental structure, and powers of counties were substantially adopted and are currently in the 1874 constitution.[227] Because the 1980 Proposal represents the more recent thinking by delegates charged with the responsibility of reforming local government structure, I will analyze the sections directly relevant to municipal corporations and within the scope of coverage suggested by the initiative/immunity typology of local autonomy[228] to see how successfully they would serve the two identified goals of the proposed restructuring.[229]

> Section 10. Incorporation of Municipalities. The General Assembly shall provide for the incorporation, merger, and organization of municipalities, annexation of territory thereto, and uniform procedures for the passage of ordinances by the governing bodies.[230]

This section offers no right of initiative to a municipal corporation and no immunity from state control with respect to the subjects covered. Two of the subjects are appropriate for no initiative/no immu-

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224. Proposed ARK. CONST. of 1970, *supra* note 1.

225. Proposed ARK. CONST. of 1980, *supra* note 1.

226. Art. 6 of the Proposed Ark. Const. of 1970 contained provisions on incorporation of municipalities (§ 10), home rule powers of municipalities (§ 12), limitations on municipal indebtedness (§ 14), and special districts (§ 17), among others. Sections 10-12, Art. 7 of the 1970 Proposed Constitution significantly revised the powers of municipalities. Proposed ARK. CONST. of 1970, *supra* note 1. For a discussion of the Proposed ARK. CONST. of 1980, see *infra* notes 230-74 and accompanying text.

227. *See supra* note 3 and accompanying text.

228. *See supra* text between notes 223-24.

229. *See supra* text between notes 223-24.

230. Proposed ARK. CONST. of 1980 art. VI, § 10, *supra* note 1.

nity; one matter is of such little concern for the municipal corporation as to not be worth any worry. But two subjects are troublesome in their inclusion in the no initiative/no immunity category.

Incorporation and annexation of territory are both subjects appropriately denied to municipal initiative. The state is the sovereign;[231] no argument has been made indicating that a group of citizens has the right to form a municipal corporation against the wishes of the state. In the same vein, inclusion of additional territory by annexation into an existing municipal corporation has the effect of creating a municipal corporation with respect to that territory, making it like the right to control an initial incorporation.

There is an additional reason to have the state regulate annexation. Without state protection, neither the residents nor the property owners included by annexation within a municipality will have any voice with respect to the inclusion. The action will be taken by a political subdivision in which they have no right to vote. The Madisonian fear of one group acting for its own benefit without regard to the best interest of the minority is justified in the annexation of territory on local initiative.

Denial of initiative is not cost free to the municipal corporation, however. Inability to expand municipal limits has been identified as a major problem facing cities.[232] The "shall provide . . . for the annexation of territory" must be construed as a mandatory obligation of the general assembly; the legislature must enact enabling legislation providing for annexation.[233] This allocation of power illustrates how no initiative/no immunity actually leaves some discretion in the municipal corporation. The municipal corporation will be denied authority to determine the baseline requirements that must be met before an area can be annexed. Those requirements will be enacted by the legislature. But a city does not have to annex territory. It will exercise discretion in deciding whether to expand its area. Once the city makes that decision,

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231. *See supra* notes 17, 36-44 and accompanying text.

232. Laurie Reynolds, *Rethinking Municipal Annexation Powers*, 24 URB. LAW. 247, 250-54 (1992); Patrick G. Cullen & Robert J. Noe, *Stumbling Giants — A Path to Progress Through Metropolitan Annexation*, 39 NOTRE DAME L. REV. 56, 57 (1963-64).

233. Saying that the provision must be construed as mandatory may be meaningless. Courts have generally been unwilling to claim any power to order a legislature to legislate pursuant to a constitutional provision. If the legislature acts, its legislation must comply with the mandatory provision. But if it refuses to enact any legislation with respect to the constitutional provision, a court will not compel it to prepare and enact a bill. *See* Walter F. Dodd, *Judicially Non-Enforcible Provisions of Constitutions*, 80 U. PA. L. REV. 54, 79-81 (1931).

it will not have discretion with respect to the maximum area annexed or the procedure to be followed. It must follow the general law of the state. And the state, through its judicial branch, will have the right to review the annexation to ensure that it satisfied the requirements of the law.

Requiring a uniform procedure for the passage of ordinances by governing bodies of municipalities, while arguably not appropriate for inclusion in a no initiative/no immunity category, is not significant. To the extent that a uniform requirement makes it more likely that a citizen will have information,[234] it enhances the citizen/consumer's voice and is thus compatible with the identified goals. Possession of that information can also help citizens avoid majority exercise of power to the detriment of the community as a whole or the minority.

Merger is not appropriate for denial of initiative. All area in the resulting merged municipal corporation would have been in a municipal corporation prior to the merger. There is no similarity to initial incorporation or annexation. State control of the procedure is not justified by the goals of empowering citizens and protecting citizens from the Madisonian faction. In fact, the drafters of the 1980 Proposal apparently agreed. Article VI, section 11 provides that "[a]ny municipality may consolidate with other *municipalities*, counties . . . or other political subdivisions . . . , upon approval of a majority of those voting on the question in each affected area (emphasis added)."[235] The provisions of section 10 and section 11 with respect to merger conflict. Merger should be removed from the coverage of section 10.

Organization of the municipal corporation is not appropriately placed in the no initiative/no immunity category. The structure of the local government is appropriately decided by those who will be subject to its governance. Although it has been argued that the form selected can have external effects,[236] the potential impact external to the municipality is slight. The importance to those subjecting themselves to the municipal corporation is significant, however. Initiative — local control of organizational structure — for the citizens of the municipality is

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234. Presumably any legislation enacted would require multiple readings of an ordinance. This would increase the likelihood of citizens becoming aware of the proposed action. If any Arkansas resident relocated to a different municipal corporation, she would already know its procedure for enacting ordinances.

235. Proposed ARK. CONST. of 1980, *supra* note 1.

236. *See* Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 710 (1964).

appropriate.

> Section 12. Powers of Municipalities
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> (a) Legislative Power. A municipality may exercise any legislative power pertaining to its local municipal affairs, including but not limited to the power to tax, and may perform any function pertaining to its local municipal affairs, provided that such legislative power or function is not denied to all municipalities by this Constitution or by law without regard to classification by population, area, or otherwise . . . .
>
> (b) Statewide Concern. The General Assembly may enact laws on matters of statewide concern which do not pertain exclusively to local municipal affairs, and such general laws shall take precedence over municipal laws.[237]

Section 12 is the heart of the home rule grant in the 1980 Proposal. By inclusion in the constitution, the source of the home rule is by definition constitutional rather than statutory. Municipal government is important to the citizen/consumer;[238] its broad authority to act with respect to local matters should not be left to legislative whim. Inclusion in the constitution is necessary. Section 12 removes Dillon's Rule as a constraint on local action;[239] it also contains the specific delegation of the power to tax required by the Arkansas Supreme Court.[240]

The grant of home rule is legislative rather than *imperio*. The legislature can deny municipalities the legislative power or function by enacting laws removing it from local control.[241] While there is no clear choice between *imperio* and legislative home rule, cities with legislative home rule powers often enjoy a greater range of discretion than those granted *imperio* status.[242] Section 12(a) actually contains a very important protection that limits the ability of the legislature to remove a function from local control. By requiring that any law limiting the exercise of legislative power apply to all municipalities without classification, the section precludes a legislature taking action aimed at one, or even a substantial group that is less than all, municipalities. This provision does not allow removal of legislative power based on population or classification (city of the first class, city of the second class, or incorpo-

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237. Proposed ARK. CONST. of 1980 art. VI, § 12, *supra* note 1.
238. *See supra* notes 179-218 and accompanying text.
239. *See supra* notes 41-44 and accompanying text.
240. *See supra* note 45 and accompanying text.
241. Proposed ARK. CONST. of 1980 art. VI, § 12(a), *supra* note 1.
242. *See* Vanlandingham, *supra* note 135.

rated town).

The 1874 constitution allows the legislature to treat municipal corporations differently on either basis.[243] The drafters of the 1980 Proposal decided that the legislature would be required to treat Little Rock and Lake Village the same. Concerns of faction and dominance within smaller segments of society, coupled with increased risks of externalization of costs when the territorial area of the actor is smaller, suggest that the legislature needs some flexibility. While careful study will be required to determine the appropriate point to draw any line, two population classifications should be sufficient. The provision should allow differing treatment of municipal corporations in different classifications.

Section 12 suggests a spirit of cooperation rather than antagonism between the state and its municipal corporations, of partnership rather than competition. The broad grant of legislative authority to deal with local municipal affairs allows the innovative, constructive government to be identified as a goal of the power allocation. The municipal corporation is not merely the puppet agent of the state, acting only when the puppeteer pulls the string. Granting real power to the municipal government also makes it worth the citizen's time to participate in the local governmental process — the participation has the possibility of making a difference.[244] And so the second goal identified is met as well.

Potential problems for local authority are inherent in any grant of home rule not based on an inherent right of local self-government; this proposal is no different. The courts must decide what is a "local municipal affair;" the courts must decide what constitutes a matter "of statewide concern which do[es] not pertain exclusively to local municipal affairs."[245] If permitted, section 12(b) can swallow section 12(a). The state is the sovereign, however. The allocation has been made; judicial construction of the provision must be made keeping in mind the effect a ruling for or against characterization as a local municipal affair or as a matter of statewide concern will have on the viability of home rule in Arkansas.

Section 12 needs a subsection (c) to make clear that some matters are in fact matters of statewide concern, so that general laws take precedence over municipal laws. (1) An open meetings act and a freedom

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243. ARK. CONST. art. XII, § 3; see *supra* notes 126-31 and accompanying text discussing Ark. Const. amend. XIV.

244. Frug, *supra* note 36, at 1070.

245. Proposed ARK. CONST. of 1980 art. VI, § 12(b), *supra* note 1.

of information act that control municipal corporations should be enacted at the state level. Courts have held these subject matters to be local municipal affairs.[246] Remember the second goal: the power allocation should encourage meaningful citizen participation in the political life of the municipality. Access to information and meetings of government bodies is a must in achieving that goal.[247] (2) Uniform bid requirements for the purchase of property and acquisition of services should be mandated throughout the state. Bid requirements are designed to protect the public fisc.[248] By making the requirements uniform throughout the state, competition is encouraged as a bidder who knows the process for one municipal corporation knows it for them all.

> Section 13. Municipal Officers
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> (a) The members of the governing body of each municipality shall be elected, and all other municipal officers may be elected or otherwise selected as provided by law.
>
> (b) The governing body of a municipality shall fix the compensation of municipal officers within the limits which may be set by the General Assembly.
>
> (c) Vacancies in any municipal office shall be filled as provided by law.[249]

Section 13(a) denies initiative in the method of selecting municipal officers. State control of the method of selecting the governing body is appropriate, as the right to elect that body is fundamental to our democratic process. The provision should be amended to clearly authorize the legislature to mandate ward representation. The lack of a representative who reflects the views of a minority segment of the community makes voice illusory for those persons.[250] The method of allocating seats in the legislative body should initially be determined by the local citizens. The legislature should be able to restructure that allocation so long as it does so for all municipalities within one of the two population

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246. *See, e.g.*, Hills & Dales, Inc. v. City of Wooster, 448 N.E.2d 163 (Ohio Ct. App. 1982).

247. "The primary purpose of an open meeting law . . . is to protect citizens from secret decisions made without any opportunity for public input." 4 MCQUILLIN, *supra* note 36, § 13.07.10 (3d ed. rev. vol. 1992).

248. "The purpose of advertising is to give publicity to the contract in question and thereby secure the utmost competition among bidders." 10 MCQUILLIN, *supra* note 36, § 29.52 (3d ed. rev. vol. 1990).

249. Proposed ARK. CONST. of 1980 art. VI, § 13, *supra* note 1.

250. *See supra* notes 183-85, 206-08 and accompanying text.

categories permitted for legislative classification.[251] In other words, allocation of seats in the local legislative body should start as initiative, no immunity.

The denial of initiative in the method of selecting other municipal officers is unwarranted for the same reasons that denial of initiative in selecting the form of organization is unreasonable.[252] Section 13(a) should be amended to provide that the city charter determines how all other municipal officers will be selected; in the absence of a city charter provision, provisions of state law will determine the selection process. Because section 13(c) relates to municipal officers as well, it should make the same distinction section 13(a) would if amended as suggested.

Section 13(b) is also inappropriate for a denial of initiative. Compensation to be paid municipal officers is not a matter of statewide concern. While a state law requiring that a municipal corporation have local provisions governing compensation would not be objectionable, state minimums and maximums for compensation are an unwarranted intrusion.

> Section 15. Assessments for Local Improvements. The General Assembly may authorize and regulate assessments on real property for local improvements. Such assessments shall be uniform in relation to the benefits conferred.[253]

The title of this section answers the question of where authority should lie. If the assessment is for local improvements, why is the general assembly given authority to regulate its use? Local assessments should be initiative/no immunity. General standards may be imposed on a statewide basis, but the structure of and right to use local assessments should be treated as a local municipal affair. The discussion *infra* concerning taxation and indebtedness will more completely develop this reasoning.[254]

> Section 16. Limitations on County and Municipal Indebtedness. The governing body of a county or municipality shall not make any payment or authorize any contract, warrant, or other evidence of indebtedness in excess of the revenues of such county or municipality for the current fiscal year, except as authorized in this Constitution. The

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251. *See supra* note 243 and accompanying text.
252. *See supra* note 236 and accompanying text.
253. Proposed ARK. CONST. of 1980 art. VI, § 15, *supra* note 1.
254. *See infra* notes 263-71 and accompanying text.

> General Assembly may establish procedures permitting counties or municipalities to borrow money from the State or its agencies and to secure the repayment thereof by a pledge of their revenues for succeeding fiscal years.[255]

The denial of initiative for incurring debt is appropriate. The state and all of its political subdivisions are in competition for raising funds, whether raised as current revenues or raised as borrowed funds. Common sense tells us that there is a maximum financial burden that citizens can, should, and will sustain. The state must coordinate and allocate the financial burden. But a danger exists in limiting the initiative the municipal corporation enjoys in raising revenues. The state can deny a municipal corporation the ability to raise adequate resources to meet the service demands that its citizen/consumers are willing to fund. A solution to that risk is proposed in the discussion of the borrowing provisions contained in article VII of the 1980 Proposal.[256]

The comments to article VI, section 16 suggest that the second sentence is meant to allow short term borrowing.[257] It is appropriate for initiative to be denied for short term borrowing; abuse of such borrowing is widely credited with the financial crises suffered by New York City and Cleveland in the 1970's.[258] But this provision is inadequate. That it relates to short term borrowing should be made clear. More important, however, the county or municipal corporation should not be pledging revenues for succeeding fiscal years; it should be pledging revenues anticipated but not yet received for the current fiscal year. As written, the provision undermines the requirement of a balanced budget implicit in the first sentence of the section.

> Section 18. Special Districts. The General Assembly may provide for the creation of special taxation districts with the power to levy ad valorem and/or other taxes.[259]

This section approaches the problem from the wrong direction. The municipal corporation should have initiative with limited immunity as described below. First, to protect our citizen/consumer, we should

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255. Proposed ARK. CONST. of 1980 art. VI, § 16, *supra* note 1.

256. *See infra* notes 263-74 and accompanying text.

257. "The second sentence [of art. 6, § 16] allows the General Assembly to authorize county and municipal short term indebtedness on stated conditions." Proposed ARK. CONST. of 1980 art. VI, § 16, *supra* note 1.

258. *See* Fred Barbask, *Cleveland Fails to Repay by Loan Deadline*, WASH. POST, Dec. 16, 1978, at A1; Gelfand, *supra* note 26.

259. Proposed ARK. CONST. of 1980 art. VI, § 18, *supra* note 1.

eliminate the myriad special districts that current laws authorize.[260] The current provisions are so complex that nobody other than a municipal bond lawyer, a municipal financial adviser, or a real estate developer would have the incentive to puzzle through what is allowed and under what circumstances. Second, these districts are usually local in nature. If not confined to a municipality's limits, the home rule county can exercise authority. The interest of the state lies in controlling the overlapping, and thus the total, tax burden imposed on its citizens. A provision requiring coordination and allocation of special district taxes to the appropriate municipal corporation and county protects the legitimate interest of the state. Section 18 should authorize municipal corporations and counties to create special taxation districts subject to *one* general state law on the organization and operation of such a district and subject to the overall tax rate and debt limitation of that municipal corporation or county.

> Section 19. Mandated Services. If the General Assembly or any State agency shall mandate a local government unit to provide a service which will require the expenditure of additional funds, all necessary additional funding to finance the service shall be provided by the General Assembly.[261]

This section must be described as the parent of all initiative/immunity power allocations. The concept of requiring state funding for newly mandated state programs developed during the taxpayer revolts of the 1970's and 80's.[262] Consider the impact of this provision for home rule. Even if the new service falls within the "local municipal affair" category, it must be paid for on a statewide basis. By limiting the ability of the state to require dedication of locally raised funds to a new purpose, the municipal corporation has truly been immunized from the state limiting municipal initiative. As a practical matter, if the state can mandate services and make the municipal corporation find the funding, it denies the municipality the ability to provide other services with those same funds. While the wisdom of this provision is beyond the scope of this article, remember that all citizens could pay for a service that should be paid for by the beneficiaries of the service. This section

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260. *See supra* notes 62-84 and accompanying text.

261. Proposed ARK. CONST. of 1980 art. VI, § 19, *supra* note 1.

262. *See* Justin J.T. Hughes & Garth B. Rieman, Comment, *A New Generation of State Tax and Expenditure Limitations*, 22 HARV. J. ON LEGIS. 269, 271 (1985); MO. CONST. art. X, § 21.

may contain a two-edged sword for Arkansas residents.

The provisions of article VII (Finance and Taxation) of the 1980 Proposal will be analyzed together.

> Section 9. County and Municipal Ad Valorem Taxes.
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> . . .
>
> (c) The legislative body of a municipality may levy an ad valorem tax on the taxable property within the municipality for its general operations, not to exceed five mills on the assessed value thereof.
>
> (d) Upon approval by a majority of those voting on the question at a general election, the legislative body of a municipality may levy special ad valorem taxes for:
>
> (1) maintaining public libraries;
>
> (2) creating a pension fund for policemen;
>
> (3) creating a pension fund for firemen; and
>
> (4) other public purposes, specified by the legislative body in the question submitted at the election, which may include additional millage for general operations.
>
> (e) The General Assembly shall prescribe uniform procedures for counties and municipalities for the levy and collection of taxes and for submission of tax matters to the voters . . . .[263]
>
> Section 10. County and Municipal Bonded Indebtedness
>
> (a) The legislative body of a county or municipality may authorize the issuance of bonds for capital improvements of a public nature, as defined by the General Assembly, in amounts approved by a majority of those voting on the question . . . . The maximum rate of any special tax to pay bonded indebtedness shall be stated on the ballot . . . . The tax to retire the bonds may be an ad valorem tax on real and personal property. Other taxes may be authorized by the General Assembly to retire the bonds.
>
> (b) The limit of the principal amount of bonded indebtedness of the county or municipality which may be outstanding and unpaid at the time of issuance of any bonds . . . shall be a sum equal to ten percent for a county, and twenty percent for a municipality, of the total assessed value for tax purposes of real and personal property in the county or municipality, as determined by the last tax assessment . . . .[264]
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> . . . .
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> Section 15. Exceptions

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263. Proposed ARK. CONST. of 1980 art. VII, § 9, *supra* note 1.

264. *Id.* § 10.

> (a) Unless otherwise provided by law, this Article does not apply to indebtedness to be paid from a special assessment on the benefitted property. Section 10 does not apply to bonds payable solely from the revenues of a public enterprise or income from any specified sources, nor to bonds payable from tax sources other than ad valorem property taxes.[265]

article VII of the 1980 Proposal has problems far more fundamental than questions of initiative/immunity and the protection of local autonomy.[266] Discussion will be limited to issues related to home rule, however.

Section 9(c) limits the tax levy for general operating expenses to five mills unless a higher limit is approved by the voters as allowed in section 9(d)(4).[267] The initiative given to the municipality to levy a tax without voter approval is both practical and necessary since it takes funds to operate; imposing a maximum amount which can be levied without voter approval is an important limit on immunity. Voice is probably no more important than in the determination of the cost of living in a municipality. As demonstrated, exit is not a viable option for most citizens; nor is the exercise of the option to exit desirable to the municipality.[268] Establishing value is essential. At the same time, the state must be able to influence the competition for funds among political subdivisions and the state. Requiring voter approval for tax levies over a stated rate aids the state in achieving an effective allocation of tax resources. But the general assembly should be granted authority to raise the five mill limit as long as the increase applies to all municipalities. The review of Arkansas constitutional law included the repeated amendment of article XIV, section 3 with respect to taxes for school purposes, culminating in a removal of a specific limit.[269] To avoid re-

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265. *Id.* § 15.

266. A state constitution should direct the legislature to establish debt limitations for each political subdivision of the state. The legislature should consider the effect of overlapping political subdivisions, the functions performed by each political subdivision, and the resulting competition for revenues and total fiscal burden on the residents of the state. The debt limitation must be all-inclusive for the allocation of fiscal resources to be effective. Any commitment to spend funds beyond the current fiscal year should be treated as debt. This means that the traditional approach of defining debt limits will be inappropriate, as it does not reflect the actual fiscal power of a municipal corporation. For a more thorough development of these ideas, *see* Charles W. Goldner, Jr., *State and Local Government Fiscal Responsibility: An Integrated Approach*, 26 WAKE FOREST L. REV. 925, 946-52 (1991).

267. Proposed ARK. CONST. of 1980 art. VII, § 9(c), (d)(4), *supra* note 1.

268. *See supra* notes 205-06 and accompanying text.

269. *See supra* notes 85-90 and accompanying text.

peated amendments to the constitution, the general assembly should be able to increase the tax levy allowed without voter approval. The state has an interest in having viable, functioning municipalities. If over time the five mill limit becomes unworkable, a general legislative grant raising the limit on the tax which can be imposed without voter approval will protect the interests of the state, its municipal corporations, and citizen/consumers.

In section 10(a), the issuer should determine when bonds are funding improvements of a public nature, not the general assembly. The issuer's determination should not be immune from higher review, but should be subject to judicial review under the public purpose analysis.[270] This provision should be written so that the purpose of bond issuance is an initiative/no immunity allocation of power. Creativity and flexibility by the municipal corporation is one of the goals of the structure of power allocation. The inability of the issuer to decide debt is appropriate (as long as total debt is within constitutional limits) will frustrate that goal. The state's interest will be protected by (1) enacting a workable overall debt limitation[271] and (2) allowing judicial review of the local issuer's determination. Finally, the last sentence of section 10(a) vests too much authority in the general assembly. The ability to raise funds in the most efficient way is essential for a viable, competitive municipal corporation. Within the range of permitted taxes, the municipal corporation should decide whether to apply tax revenues to current expenses, repayment of borrowed funds, or both. The state once again can protect its interest by enacting a workable overall debt limitation. An additional protection for the state comes from the ability of the state to reserve certain sources of revenues, including from particular types of taxes, to itself in whole or in part.

Section 15 of the 1980 Proposal is both desirable and undesirable. It is good that the 1980 Proposal deals with the question of revenue bonds. The history of revenue bond financing in Arkansas,[272] while hardly "sordid,"[273] illustrates the importance of having a unified ap-

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270. The public purpose doctrine relates to both the raising and expenditure of revenues by a municipal corporation. By requiring that all revenues, regardless of their source, be raised and spent for a public purpose, the state retains a final check on the actions of its municipal corporations to ensure that they are acting in the interests of their citizens. The public purpose is often determined by answering a question: Does the expenditure promote the public health, safety, morals or general welfare? *See* Goldner, *supra* note 266, at 932-33, 951.

271. *See supra* note 266.

272. *See supra* notes 47-61 and accompanying text.

273. "In order that one may understand the sordid past of Arkansas bond law, a brief

proach to control all forms of indebtedness. That approach must be straightforward in order that citizen/consumers will have the understanding necessary to hold their municipality accountable. That approach must also integrate all indebtedness so that the state can efficiently allocate to itself and its political subdivisions the power to borrow. Totally excluding revenue bond indebtedness from constitutional debt limits permits the tail to wag the dog.[274] The constitutional provisions should encourage cooperation, not competition; accountability, not obfuscation.

V. CONCLUSION

An involved, proactive municipal corporation with a reasonable range of powers and options can be an important part of the lives of the citizens of Arkansas. Home rule granted in the constitution makes that type of municipality a possibility. Legislative home rule with questions of local autonomy decided as suggested in this article makes that possibility more probable. The citizens of Arkansas should be given an opportunity to amend the Arkansas Constitution of 1874 so that both they and their municipalities are empowered.

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history is set forth." Sanford M. Brown, Comment, *Municipal Bonds and Amendment 62: Clearing Up a Serbonian Bog*, 39 ARK. L. REV. 499, 499 (1986).

274. In 1980 state and local government net indebtedness totalled $202,167,000,000. Full faith and credit (general obligation) indebtedness totalled $88,934,000,000 of that net amount, or only 44%. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1982-83, Tables No. 482, 494 (1982). Fifty-six percent of all indebtedness issued cannot be ignored when defining debt limitations for a state and its political subdivisions. *See supra* note 266.