The Right of Revolution: The Development of the People's Right to Reform Government

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THE "RIGHT OF REVOLUTION": THE DEVELOPMENT OF THE PEOPLE'S RIGHT TO REFORM GOVERNMENT

I. RIGHTS RESERVED TO PEOPLE

Government is instituted for the common benefit, protection and security of the people, nation or community. Of all its various forms that is the best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and when any government shall be found inadequate or contrary to these purposes, a majority of the community has an indubitable, inalienable, and indefeasible right to reform, alter or abolish it in such manner as shall be judged most conducive to the public weal.

W.VA. CONST. art. III, § 3.

This passage of West Virginia’s Bill of Rights echoes one of the fundamental tenets of republican democracy. President Lincoln expressed this powerful axiom in an eloquently simple way: "[G]overnment of the people, by the people, and for the people."¹ The American Revolution was rooted in the belief that the people are the ultimate sovereign, that government is, and must be, only an institution of enumerated powers, limited in scope, and instituted and sustained by the public will. Thus, government as envisioned by our forefathers is a means to an end — the preservation and protection of the individual and collective rights of the citizenry. This provision in our constitution protects the people from government, reaffirming the truism that no government can impose its rule on an unwilling people.

A measure of the importance of the concepts embraced by article III, section 3 of the West Virginia Constitution is their wide acceptance in the constitutions of other states. While it has been said that the principles of this section are so self-evident that they need no expression,² the contrary seems to be true. They are, in fact, so

¹ A. Lincoln, The Gettysburg Address (November 19, 1863).
fundamental that 45 of the 50 states have placed similar provisions in their constitutions.  

The West Virginia Supreme Court of Appeals has used the people's reservation of power in unprecedented ways. The West Virginia court is unique in American jurisprudence for the diversity of applications it has found for this expression of the people's sovereignty. This essay attempts to examine and evaluate these applications in the light of the intended meaning of the provision, the history surrounding its drafting, and the interpretations given similar provisions in other jurisdictions.

II. History

In interpreting a constitution, the observation of Justice Holmes that "a page of history is worth a volume of logic" is especially appropriate. A constitution, in its essence, is a contract among the people. It is an agreement dictating how government, and its relations to men, must be conducted. A constitution lays out the rules. It is the law by which all other laws are measured. As in contract, we strive to effectuate, or at least acknowledge, the intent of the drafters when we construe a constitution. Accordingly, the West Virginia court has declared that it is "the duty of courts to administer justice consistent with the organic law created by the people." This canon of construction is especially important when one is examining a provision of a Bill of Rights — the protective shield erected by the people to guard their most sacred rights from government invasion. Consequently, it is paramount that these pro-

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3 The titles of these various provisions are revealing as to their purpose: Ala. Const. art. I, § 2 (People Source of Power); Me. Const. art. I, § 2 (Power Inherent in People); Minn. Const. art. I, § 1 (Object of Government); N. H. Const. pt. I, art. 10 (Right of Revolution); Vt. Const. ch. I, art. 7 (Government for the people; they may change it).


6 The debate concerning the degree of persuasiveness to be accorded the "drafter's intent" rages on. See Simon, The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified? 73 Calif. L. Rev. 1482 (1985). However, there seems to be some agreement that the historical context surrounding the drafting of a constitution is due, at least, some consideration. Consequently, a historical analysis of a provision remains relevant to, and helpful in, its interpretation.


visions be thoroughly understood and correctly applied or their protective value inevitably will be eroded. It is for these reasons that the historical context in which a provision originated and the ideals and principles which motivated its drafters must be considered.

Article III, section 3 of the West Virginia Constitution originated from the Declaration of Rights adopted by the 1776 Virginia Constitutional Convention and in fact is drawn nearly verbatim from article III. The Declaration's author was the relatively unheralded George Mason, whom Thomas Jefferson lauded as a man "of the first order of greatness." One of the most influential documents of revolutionary America, the Declaration, has been said to "sketch the basic outlines of democracy." In it, Mason set out to enumerate the essential rights of man and to use these rights as the parameters within which a democratic republic must operate. The first sections of the Declaration bear the unmistakable imprint of the theories of John Locke. Mason, like most of the prominent political philosophers of colonial Virginia, was a proponent of Locke's notions about the state of nature, the social contract, and the inherent rights of man. Consequently, the underlying basis of the Declaration of Rights is that men, in forming a government, forfeit only a part of their inherent rights. In other words, the people "have certain inherent natural rights, of which they cannot, by any compact deprive or divest their posterity." Further, the Declaration makes clear that all government power is derived from the people, and all government officials at all times are amenable to them. It is in this context of colonial republican democracy that article III, section 3 of the West Virginia Constitution must be read.
An examination of the provision shows that Mason's words are true to their philosophical underpinnings. With them, he lays the cornerstones of representative democracy. Government is instituted for the common benefit and protection of the people. The best government is the one that engenders the greatest happiness and is the most responsible. But most importantly, the people always have the right to change government in any manner that the majority of the community feels is best. Permeating these words is the essence of republican government, that all power is derived from the people, and that government is always beholden to them.

Mason developed this philosophy over the course of years preceding the Virginia Constitutional Convention. During this period, in 1774, he wrote the Fairfax Resolves. In the Resolves, the "most important pre-revolutionary document prepared in Virginia," Mason articulated what must be the relationship of the people (the Virginia colonists) to their government (the British Crown):

The most important and valuable part of the British constitution, upon which its very existence depends, is, the fundamental principle of the people's being governed by no laws to which they have not given their consent by Representatives freely chosen by themselves, who are affected by the laws they enact equally with their constituents, to whom they are accountable, and whose burdens they share, in which consists the safety and happiness of the community; for if this part of the Constitution was taken away or materially altered the government must degenerate either into an absolute and despotic monarchy, or a tyrannical aristocracy, and the freedom of the people be annihilated.

As can be discerned from this passage, taxation without representation, the banner call of the Revolution, is at the heart of Mason's thoughts. More important to this discussion is his recognition that government must be representative of and responsive to the citizenry. If not, it is no longer government, but tyranny.

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the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and when any government shall be found inadequate or contrary to these purposes, a majority of the community has an indubitable, inalienable, and indefeasible right to reform, alter or abolish it in such manner as shall be judged most conducive to the public weal.

17 V. DABNEY, supra note 10, at 136.
18 H. HILL, supra note 11, at 113, (quoting the FAIRFAX RESOLVES).
A year later, Mason addressed the Fairfax militia concerning the rotation of officers within the company. In this speech, he expressed some of the very principles he would later incorporate in that portion of the Declaration of Rights which was later to become article III, section 3 of the West Virginia Constitution:

When men entered into compacts to give up some of their natural rights, that by union and mutual assistance they might secure the rest; but they gave up no more than the nature of the thing required. Every society, all government, and every kind of civil compact therefore is or ought to be, calculated for the general good and safety of the community. Every power, every authority vested in particular men, is, or ought to be, ultimately directed to this sole end; and whenever any power or authority whatever extends further, or is of longer duration than is in its nature necessary for these purposes, it may be called government, but it is in fact oppression . . . . In all our associations, in all our agreements, let us never lose sight of this fundamental maxim that all power was originally lodged in, and consequently is derived from, the people.19

Mason’s speech illuminates the meaning of article III, section 3. The closely parallel language of this passage clearly shows the origins of the Declaration of Rights.20 In particular, Mason’s monologue explains the “common benefit” clause of article III, section 3. The “Common benefit” clause was intended to express the democratic ideal that government exists to help the people as a whole. Comparatively, in the words of the West Virginia court, “‘State’ as contemplated by the constitution represents the ideal; it is people united together for their common benefits.”21 Whenever a government official takes more authority than necessary to achieve these goals, government has gone too far. Consequently, the true import of article III, section 3 is that when government is being used to exploit the people, they have the right to change it.

A similar interpretation of Article III of the Virginia Declaration of Rights was made by A. E. Howard in his comprehensive work, Commentaries on the Constitution of Virginia.22 Howard discerns two separate propositions encompassed by Article III. The first is that government’s primary objective should be to give the greatest

19 Id. at 119.
20 Id. at 118.
21 Pittsburgh Elevator, 310 S.E.2d at 684.
happiness to the greatest number of people. The second is that since government is formed by the consent of the governed, whenever the people become dissatisfied with it, they always have the right to change or dissolve it.

While Howard chooses to separate these ideas, a simpler interpretation may be that this provision has a single aim: to establish the citizenry's ultimate control over government and to express a justification for its reformation. Under either interpretation the result is the same, the provision is essentially a statement of basic political philosophy. Mason's references to "happiness" and the "common benefit" express his vision of the purpose of government and serve as the contextual preface from which the people's right to reform their government is introduced.

A measure of the vision of Mason's thoughts is the acceptance which they received at the Virginia Convention. Amazingly, after a lengthy and lively debate over these most important principles, Mason's Declaration was adopted essentially unchanged.

Further testament to Mason's work was the wide influence it had beyond Virginia's boundaries. Pennsylvania was the next state to adopt a constitution and its Declaration of Rights "was taken almost verbatim from that of Virginia." These principles would later provide the framework of debate from which the first ten amendments of the United States Constitution would be derived, and the Declaration was the foundation for the French Declaration of Rights as well. Condorcet, the great French statesman, acknowledged the greatness of Mason and his work when he said "the first Declaration of Rights that is entitled to be called such is that of Virginia" and "its author is entitled to the eternal gratitude of mankind."

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23 Id. at 73.
24 Id.
25 H. Hill, supra note 11, at 138-39. The changes were mostly in wording with the exception of the addition of two articles, one prohibiting the issuance of general warrants and the other prohibiting the formation of any government separate from Virginia within the commonwealth boundaries.
27 Id. at 833.
28 Id. at 834.
In particular, Article III of the Declaration has likewise met with widespread approval. No fewer than 45 of the 50 states have seen fit to embody in their constitutions the right of the people to reform their government. However, the influence of Article III has not been limited to the realm of state constitutional thought. In probably the most famous document in United States history, The Declaration of Independence, Thomas Jefferson drew heavily from Mason’s Declaration when he wrote:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by the Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

More than likely, it is Jefferson’s use of Mason’s principles, as well as their historical context, that has led legal commentators to characterize Mason’s Article III as the “right of revolution.” However dramatic a characterization this may be, it accurately captures the spirit of the provision. But, as we shall see, this provision has come to mean much more in West Virginia.

The history of the incorporation of this section into the West Virginia Constitution, like the history of the formation of West Virginia itself, is fascinating and helpful in fully understanding the provision. The creation of West Virginia has been called one of the “few unambiguous results of the civil war.” However, the constitutionality of the methods used to form the state were at best

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27 H. Hill, supra note 11, at 144 n.8.  
29 J. Williams, supra note 31, at 75.
ambiguous. Nonetheless, on November 26, 1861, the first Constitutional Convention of West Virginia convened. When it recessed on February 18, 1862, the break from the traditions of old Virginia was distinctly apparent in the Constitution that had been adopted.

Among the dramatic and widespread changes effected by the convention were the discontinuation of viva voce voting, the establishment of a free school system, and the complete restructuring of local government from the county court to the township system. Nowhere, however, was the break from the Virginia tradition more clear than in the Bill of Rights adopted by the convention.

Unlike the Virginians in 1776, who made the drafting of a Declaration of Rights their highest priority, the West Virginians did not adopt a Bill of Rights until late in their deliberations. The Bill which was ultimately approved differed greatly from the Virginia Declaration. Notably absent were the first four articles of the Declaration which outlined Mason's principles of democracy in grand terms. Consequently, West Virginia's first Constitution nowhere declared that men are created equal, that power is vested in the people, or that men have an unalienable right to reform their government. In fact, the original constitution had provisions condemning treason against the state, and restricting speech advocating armed revo-

33 See T. RODD, TRACING WEST VIRGINIA'S CONSTITUTION 20 (1982) (unpublished manuscript available in THE WEST VIRGINIA LAW REVIEW OFFICE). Aspects of the constitutionality of the state's formation were tested in several United States Supreme Court cases including: Virginia v. West Virginia, 78 U.S. 39 (1869) and Virginia v. West Virginia, 209 U.S. 514 (1907).
34 In Virginia, voting had been oral. Traditionally the voter stepped up to a table set up by the sheriff in front of the court house, called out his name and his vote in a clear voice, then accepted the congratulations of the candidate or his representative, who was usually standing nearby ready to dispense a large amount of liquor. J. WILLIAMS supra note 31, at 28. To the chagrin of many, this "spirited" system of voting was replaced by ballot voting.
35 None had existed in Virginia.
36 Criticism had mounted against the county court system in which centralized power in the county court and political patronage had led to significant abuses.
38 W. VA. CONST. of 1863, art. II § 10. While the existence of a treason provision in a state constitution may seem unusual, in fact over 20 states have such provisions, most of which exist in constitutional harmony with provisions similar to W. VA. CONST. art. III, § 3.
Apparently, the Civil War had made the delegates leery of legitimizing the right to abolish a state government (an act they, themselves had just completed), and prompted them to constitutionally discourage anyone so inclined. Other commentators have speculated that the abbreviated Bill of Rights was the result of the no-nonsense philosophical stance of the Republican-partisan convention and its belief that such clauses were simply not needed. For whatever the reasons, the absence of these fundamental rights probably was not unintentional. The Constitution of 1863, however, was not the final chapter of West Virginia's constitutional story.

The predominately Republican convention had structured the government of West Virginia in ways that were not favored by the Democratic majority of the state. Before the Civil War, Democrats had dominated state government in western Virginia and were naturally sympathetic to the Virginia cause and to secession. Consequently, most of the political leaders of the day, as well as the Confederate-sympathetic citizenry, did not participate in the actions that split Virginia. In contrast, the Republican party had been a politically impotent, tiny minority confined almost entirely to the state's northern panhandle. After the war, as the thousands of Confederates returned to their homes and resumed their civilian lives, the Republican leadership began to realize their hold on state government was shaky at best. Fearing the loss of power and aware of the possibility that the Democratic majority might try to reunite the Virginias, the Republicans, in 1865 and the years that followed, enacted a series of laws which effectively disfranchised the returning Confederate electorate. These measures generally took the form of test oaths, which made it illegal for Confederates to vote or hold office. Historian John Williams characterized the Republicans' quandary:

39 W. VA. Const. of 1863, art. II § 10. Under this article, which concerned free speech, speech encouraging an insurrection or armed invasion of the state could be punished criminally.
40 Debates, supra note 37, at 1-40.
41 Id.
42 J. Williams, supra note 31, at 81-82, 86-87.
"Their goals were democratic and egalitarian, but they believed that circumstances obliged them to proceed in undemocratic ways. Arbitrary procedures further alienated their marginal supporters and increased the temptation to define 'loyalty' so as to exclude everyone but faithful Republicans."

Discontent with these measures continued to build until 1870 when many laws were struck down as violative of the newly-passed 15th amendment to the United States Constitution. With the Confederates' renewed right to vote, the Democrats took control of the state in 1871. Immediately, they set out to re-write the state's constitution.

The Constitution of 1872 reflected the delegates' indignation toward the partisanship of the preceding decade. Indeed, the avowed purpose of many was to "restore pre-bellum conditions as far as possible." The document which emerged from this convention was true to the delegates' aim. They undid many of the changes made by the first convention, including reinstating the county court system of local government. However, the Bill of Rights adopted by the delegates, as clearly as any other action, reflected their complete dissatisfaction with the government which preceded them.

Article III, section 3 of the West Virginia Constitution was particularly illustrative of this dissatisfaction. In a backlash against the partisanism that had disfranchised the former Confederates, the delegates were determined that the new Constitution must protect the right of the people to reform or abolish their government. Colonel Johnson, a delegate from Tyler County, proposed a provision be included in the new Constitution which declared that all power inhered in the people and recognized their right to reform government. The Colonel was so emphatic on this point that he opposed the first provision of the new Constitution, which declared the Con-

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44 J. Williams, supra note 31, at 89.
45 Id. at 90. Before the laws were invalidated, however, liberal Republicans had proposed the Flick Amendment which would have restored voting privileges to those disfranchised. This amendment was subsequently ratified by the people in 1871 by a majority so sizeable that it appeared many disfranchised must have voted in its favor. M. Callahan, supra note 31, at 28.
46 M. Callahan, supra note 31, at 28.
47 Journal of Constitutional Convention of West Virginia of 1872 at 46.
stitution of the United States as the Supreme Law, because it was contrary to this "heaven born right to revolutionize." On March 14, 1872, the convention sanctioned this right when it adopted the first four articles of Mason's Declaration, including what is now West Virginia's article III, section 3. The convention further supported the right of revolution by removing all restrictive language concerning revolt from the free speech clause and by deliberately excluding the treason clause.

The conclusion to be drawn from the history of this provision is that, both in its original form in Virginia and in its ultimate incorporation into the West Virginia Constitution, those responsible for its adoption were motivated by the injustices of the oppressive governments under which they had lived. Both the 1776 Virginia Convention and the 1872 West Virginia Convention included this provision to declare in the strongest terms that the government they were framing would never impose its rule on an unwilling citizenry. The provision was intended to insure that government would always respect the inherent power of the people. Any contrary interpretation would usurp the very power that the provision is designed to protect.

III. ANALYSIS

With the history of article III, section 3 of the West Virginia Constitution in mind, it is appropriate to examine the case law interpreting this provision to determine whether it has remained true to the provision's aim. This examination will be divided into the four broad areas in which article III, section 3 has been applied: 1) Police power, 2) inherent political rights of the people, 3) rights of free political speech and association, and 4) equal protection. To supplement the discussion, case law of other states, interpreting similar provisions, will be considered. The case law of Virginia, where both West Virginia's common law and this provision have their roots, will be noted where relevant.

48 Id. at 34.
A. Police Power

1. Case Law

The only reported interpretation of article III, section 3 prior to 1977 came in the 1896 case of Mapel v. John.49 In Mapel, the petitioner was challenging the constitutionality of a statute which prohibited landowners from mining coal within five feet of the boundaries of their property.50 The challenger contended that the law was an unreasonable infringement on the use of his property and constituted a taking without compensation.51

In sustaining the statute's constitutionality as a reasonable use of the state's police power, the court said: "[R]egulations on all these subjects (mine safety) have long been recognized as wholesome and reasonable, and as fit subjects for the exercise of the police power, as tending to preserve the rights of the citizen and to promote the general welfare of the commonwealth."52 On the question of whether the statute inflicted an undue burden on the petitioner, the court stated that, "[u]pon each one [adjoining property owners] is therefore imposed the correlative duty of so using his own land as not to injure his neighbor's or be hurtful to the commonwealth . . . for government is instituted for the common benefit, protection, and security of the people, nation, or community."53

2. Analysis

The court's reliance on article III, section 3 to justify the use of the legislature's police power in Mapel was anomalous. On no other police power question has the court turned to this provision for direction. On all other occasions, the court has looked either to article III, section 9 (eminent domain clause) or article III, section 10 (due process clause) of the West Virginia Constitution. In Board

51 Mapel, 42 W. Va. at 35, 24 S.E. at 610.
52 Id. at 36, 24 S.E. at 611.
53 Id. at 36, 24 S.E. at 610.
of Education v. Campbells' Creek Railroad,\textsuperscript{54} the West Virginia court held that "[t]his provision of our Constitution [article III, section 9], and the due process clauses of both the State and Federal Constitutions are limitations upon the authority of the sovereignty to take private property for public use."\textsuperscript{55} Furthermore, it is the traditional approach of the United States Supreme Court to resolve taking and equal protection challenges to zoning regulations under the due process clauses of the fifth and fourteenth amendments to the United States Constitution.\textsuperscript{56}

Other state courts have also looked predominantly toward their own due process clauses to measure uses of the police power. Courts have been reluctant to interpret "common benefit" provisions as a limitation on the police power. A. E. Howard has suggested that Article III of the Virginia Declaration provides a workable judicial standard of the "greatest happiness for the greatest number" as a balancing test to apply to zoning and public nuisance questions.\textsuperscript{57} Howard admits the inherent difficulties of such a test, however, when he acknowledges that the "rights to happiness . . . are not as susceptible of judicial enforcement as some other rights."\textsuperscript{58} Demonstrably in accord with this statement is the Virginia court which has not articulated such a test in over 200 years.

However, on rare occasions, some courts have turned toward their version of West Virginia's article III, section 3 to find a constitutional source for police power. An example is the Missouri case of Marsh v. Bartlett.\textsuperscript{59} There the Missouri court relied on article I, section 1 of its own constitution\textsuperscript{60} when it held:

\textsuperscript{55} \textit{Id.} at 476, 76 S.E.2d at 273.
\textsuperscript{57} A. E. Howard, \textit{supra} note 22, at 74-75.
\textsuperscript{58} \textit{Id.} at 74.
\textsuperscript{59} Marsh v Bartlett, 343 Mo. 526, 121 S.W.2d 737 (1938).
\textsuperscript{60} Mo. Const. art. I, § 1 reads: "That all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." While this provision does not contain the "right to reform and abolish" language of W.Va. Const. art. III, § 3, it closely parallels the "common benefit" portion of the clause.
that all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole . . . The fundamental power referred to above includes of course the all-important police power. This latter power finds direct application to the general welfare.61

The reasoning behind the Missouri decision is entirely consistent with the rationale of West Virginia’s article III, section 3. However, the West Virginia court has never looked to the provision for a source of the state’s police power. In City of Huntington v. State Water Commission62, the court discussed the source of the police power and its purposes:

the police power is a grant from the people to their government agents . . . [and] is . . . not referable to any single provision of the Constitution, but inheres in, and springs from, the nature of our institutions . . . [T]he very existence of government depends on it, as well as the security of the social order . . . [I]t provide[s] for the protection of the safety, health, morals, and general welfare of the public.63

While the West Virginia court has not grounded the police power in any single provision of the state constitution, article III, section 3 is perfectly suited for that purpose. It mandates that government must be “instituted for the common benefit, protection and security of the people.” Consequently, while the great weight of authority indicates that article III, section 3 is not suited for judicial limitation of the police power, it also seems equally clear that the provision represents a potential source of the power within the constitution.

B. Inherent Rights

1. Case Law

Beginning in 1977, the West Virginia Supreme Court of Appeals has turned to article III, section 3 of the West Virginia Constitution with increasing regularity. In the past decade, the court has invoked

61 Marsh, 343 Mo. at 538-39, 121 S.W.2d at 743-44.
63 Id. at 795-97, 73 S.E.2d at 839-40.
this provision no less than 11 times, compared to the single time it was used in the preceding 105 years. One of the court's most extensive uses of article III, section 3 has been in support of the inherent political rights retained by the people.

The first time the court looked to article III, section 3 as authority for the political rights of the electorate was in *Cowan v. County Comm'n of Logan.* There, the court discussed the potential unconstitutionality of W.Va. Code § 8-2-2, which requires a community attempting to incorporate to file a petition, signed "by at least 30 per cent of the freeholders of the territory to be incorporated." The court noted that "valuable political rights are reserved for a majority of the community" not merely to freeholders. The court observed this deficiency in passing, however, and since the constitutionality of the statute was not before the court, it remained in place.

In *Shobe v. Latimer,* the court next turned to article III, section 3, in giving standing to citizens wishing to question governmental actions under the Declaratory Judgments Act even though the challenger had no direct legal interest affected. The dispute centered on whether the chairman of a trout-fishing organization had standing to challenge a government contract which would adversely affect a stream which was fished by members of his organization. In finding standing under the Declaratory Judgments Act, the court held:

Must members of the public whose substantial interests are directly and adversely affected by the acts of governmental officers stand idly by when their public servants violate the law? We think not. In our society, the people are sovereign . . . . 'All power is vested in, and consequently derived from, the people.

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66 Cowan, 171 W. Va. at 117 n.6, 240 S.E.2d at 681 n.6. Compare Piccirillo v. City of Follansbee, 160 W. Va. 329, 233 S.E.2d 419 (1977). There, a qualification of property ownership for eligibility to sit on a city council was invalidated because it violated the equal protection standard under article III, section 17 of the West Virginia Constitution (courts open to all; justice administered speedily). This raises the question whether the court in Cowan was evoking article III, section 3 as recognition of the majority's right to control government, or as a similar expression of equal protection. The author will defer an inspection of the court's equal protection analysis under this provision until the discussion infra note 119.
67 Shobe, 162 W. Va 779, 253 S.E.2d 54.
Magistrates [public officers] are their trustees and servants, and at all times amenable to them.' W. VA. CONSTR. art. III, § 2 . . . . Our constitution reserves unto the people an 'inalienable and indefeasible right to reform, alter or abolish [the government] in such manner as shall be judged most conducive to the public weal,' and the best form of government is declared to be the one which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration. W. VA. CONSTR. art. III, § 3 . . . .

We are bound to observe that if the people have an 'inalienable and indefeasible right to reform, alter or abolish [the government]' in order to correct the excesses of maladministration, they surely, through one or more of their numbers, individually or acting on behalf of the whole should have access to the courts to achieve the same end by judicial means.69

In a footnote, the court observed that the portion of article III, section 3 granting the right to alter or abolish the government has been called a reservation by the people of the "right of revolution."70

In Taylor County Commission v. Spencer,71 the court addressed the mode of revising county government as laid out in article III, section 9 of the West Virginia Constitution which essentially allows a change of county government to be initiated by petition of ten percent of the county's registered voters. The court commented that the framers of the constitution had wisely left the ultimate determination of the form of county government up to those most affected by it. The court noted, however, that notwithstanding this provision, or any other potential legislation in this area, "the people of the counties are free to modify their local government in any way which comports with the mandates of the constitution,"72 including article III, section 3. Thus, the court apparently held that the people's "right to revolution" extends to the local government level as well.

Finally, in Cooper v. Gwinn,73 the court again cited article III, section 3 as an example of the rights reserved by the West Virginia people when they formed a state government.74

69 Shobe, 162 W. Va. at 790, 253 S.E.2d at 61.
70 Id. at 790 n.7, 253 S.E.2d at 61 n.7.
72 Id. at 44, 285 S.E.2d at 661.
73 Cooper v. Gwinn, 298 S.E.2d 781 (W. Va. 1981) (case vested the right of rehabilitation to state correctional institution inmates).
74 Id. at 785.
2. Analysis

The West Virginia court's interpretation of article III, section 3 as a reservation by the people of ultimate control over their government is supported both by the historical context of the provision and the overwhelming weight of authority from other states. While other states have not applied these provisions in such diverse ways, the underlying rationale that the people control government is beyond question. Incensed by the tyranny of British colonial rule, Mason clearly stated through this provision that government is established only for the good of the people, who at any time may change it. Similarly, this provision's incorporation into the 1872 Constitution of West Virginia was the result of Colonel Johnson's demand for recognition of the people's ultimate control, their "heaven born right to revolutionize."75

In accord with this interpretation is one of the leading cases in the nation construing such a provision,76 Wells v. Bain,77 where the Pennsylvania court discussed the people's right to alter government:

[This clause] embrace[s] but three known recognized modes by which the whole people, the state, can give their consent to alteration of an existing lawful frame of government, viz:

1. The mode provided in the existing constitution.
2. A law, as the instrumental process of raising the body revision and conveying to it the powers of the people.
3. A revolution.

The first two are peaceful means through which the consent of the people to alteration is obtained, and by which the existing government consents to be displaced without revolution. The government gives its consent, either by pursuing the mode provided in the constitution, or by passing a law to call a convention. If consent be not so given by the existing government the remedy of the people is in the third mode revolution.78

75 JOURNAL OF CONSTITUTIONAL CONVENTION OF WEST VIRGINIA OF 1872, at 34.
76 PA. CONST. art. 1, § 2 reads:
All power is inherent in people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform, or abolish their government in such manner as they may think proper.
78 Id. at 47.
In interpreting its version\textsuperscript{79} of West Virginia's article III, section 3 the Iowa court, while clearly acknowledging the people's ultimate sovereignty, was not, however, as eager to constitutionally sanction revolution:

These principles are older than the constitution and older than governments. The people did not derive the rights referred to from the constitution, and, in their nature, they are such that the people cannot surrender them . . . . [And when the government refuses to change] it is evident that the people who think the public good requires a change, can establish these changes only by superior force. If they are powerful enough to succeed, well: they have altered or reformed the government; but if they are not powerful enough to succeed, their attempt to overthrow the government is treason, and they are liable to punishment as traitors . . . . It follows then, after all, that the much-boasted right claimed under this section is simply the right to alter the government in the manner prescribed in the existing constitution, or the right of revolution, which is a right to be exercised not under the constitution, but in disregard and independently of it . . . .

It is well that the powers of the people and their relations to organize society should be understood. No heresy has ever been taught in this country so fraught with evil as the doctrine that the people have a constitutional right to disregard the constitution, and that they can set themselves above the instrumentalities appointed by the constitution for the administration of law. It tends directly to the encroachment of revolution and anarchy . . . . It will be well if the people come to understand the difference between natural and constitutional freedom, before license becomes destructive of liberty.\textsuperscript{80}

The analysis of the Iowa court is compelling. The right of revolution must necessarily be exercised against the existing instrumentalities of government and consequently, against the constitution under which it is established. Further, the Iowa and Pennsylvania courts both correctly note that the right of revolution lies in the \textit{natural} power of the majority of the people. Even though the Iowa court declines to recognize this right while the Pennsylvania court does, the rationales of the two decisions lead to the same conclusion: that short of a revolution which will displace an existing constitutional government, the people's right to reform their government exists within the political process, either indirectly through their

\textsuperscript{79} IOWA CONST. art. I, § 2 provides: "All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right, at all times, to alter or reform the same whenever the good may require it."

\textsuperscript{80} Koehler v. Hill, 60 Iowa 543, 614-16, 15 N.W. 609, 615-16 (1883).
elected representatives, or directly through constitutional amendment.

It is in this area of retained rights that the Virginia court has made its only significant interpretation of Mason's original third Article. In *Staples v. Gilmer,* the Virginia court addressed the problem of the limited scope of a constitutional convention called under section 197 of the Virginia Constitution. In this discussion the court said:

> The power to amend or revise in whole or in part the Virginia Constitution resides in the people, not in the State legislature. The people are possessed with ultimate sovereignty and are the source of all State authority . . . .

> Undoubtedly the people have a right to 'reform, alter or abolish,' within democratic principles, a part or parts of their fundamental law without reforming, altering or abolishing all of it. The first binding declaration of this fundamental principle was made on the 6th of May, 1776 . . . . as sections 2 and 3 of the Bill of Rights.

Consequently, the Virginia court has similarly interpreted this provision as recognizing that the people's right to reform their government lies within the existing political processes.

In noting that article III, section 3 of the West Virginia Constitution speaks of rights not limited to freeholders, the West Virginia court in *Cowan* also follows the trend of authority. In *Wells v. Bain,* the Pennsylvania court continued its commentary on its provision:

> The people here meant are the whole those who constitute the entire state, male and female citizens, infants and adults. A mere majority of those persons who are qualified as electors are not the people.

Similarly, the Connecticut court interpreting its counterpart provision held:

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81 *Staples v. Gilmer,* 183 Va. 613, 33 S.E.2d 49 (1945).
82 Id. at 623-24, 33 S.E.2d at 53-54. Sections 2 and 3 of the Virginia Constitution are essentially identical to W. VA. CONSTR. art. III, §§ 2 & 3.
83 *Wells,* 75 Pa. at 39.
84 Id. at 46.
85 CONN. CONST. art. 1, § 2 states: "All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and they have at all times an undeniable and indefeasible right to alter their form of government in such manner as they may think expedient."
They [the framers] were speaking of rights personal to the individual, as a citizen of a free commonwealth, civil as distinguished from political, and belonging alike to each man, woman, and child among the people of Connecticut.\textsuperscript{6}

Such a broad interpretation of the rights reserved by West Virginia's article III, section 3 is consistent with the premise underlying every Bill of Rights, that such rights inhere in all men equally.\textsuperscript{87}

The West Virginia court's holding in \textit{Shobe}, that the rights reserved by article III, section 3 form the basis for a citizen's standing to challenge government action in the courts, also finds support in other jurisdictions. The New Jersey court, faced with a corrupt local commission, turned to its similar constitutional provision\textsuperscript{88} and held:

The citizen is not at the mercy of his servants holding positions of public trust nor is he helpless to secure relief from their machinations except through the medium of the ballot, the pressure of public opinion or criminal prosecution. He may secure relief in courts ... That the shortcomings of some public officers may not make them accountable in our criminal courts does not mean that their nefarious acts cannot successfully be attacked through the processes of the civil law.\textsuperscript{89}

Both the \textit{Shobe} court and the New Jersey court recognized that the primary purpose of provisions like article III, section 3 is to insure that government remains controlled by the governed. The use of the provision as justification for hearing challenges to governmental action facilitates this purpose and consequently is consistent with it.

While the West Virginia court has been in the legal mainstream in recognizing the people's right to alter their state government, its

\textsuperscript{6} State v. Williams, 68 Conn. 131, 131-52, 35 A. 24, 29 (1896).

\textsuperscript{87} The idea of political rights being vested only in freeholders seems easily disposed of now, but at the time George Mason drafted the Declaration of Rights, suffrage in Virginia was limited to white, male freeholders, as it would be well into the nineteenth century. It seems untenable to suggest, however, even from the colonial perspective, that any of the rights guaranteed in the original Declaration - enjoyment of life and property, due process, trial by jury, freedom of the press, or the right to abolish government - were limited to freeholders.

\textsuperscript{88} N.J. Const. art. I, ¶ 2 provides: "All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right at all times to alter or reform the same, whenever the public good may require it."

recognition in *Taylor County Commission*\(^9\) of such right in the context of local government may be problematic. If the right to reform government at the local level exists independently from state government control, the ability of the people to form a coherent and effective state government would be dramatically impaired. Local officials and their constituency could frustrate state government plans by simply restructuring the local way of doing government business. The New Jersey court recognized this problem in construing its parallel provision:\(^9\)

\[\text{[T]he whole of the constitution may be searched in vain for any specific provision guaranteeing to the people the right of local self-government, or prohibiting the legislature from exercising powers of local government through the instrumentality of commissioners, however chosen . . . . It is the very essence of government that it shall operate upon those unwilling to be governed. The right of local self-government if it exists, necessarily limits to that extent the powers of the general government; it creates, in some sense and to some extent, an imperium in imperio. Such a limitation is not to be implied.}\(^9\)

The Connecticut court was faced with a similar question under its constitution:\(^9\)

If it can be said that such a right [local self-government] ever existed, it was not one of the nature of those which were described by the framers of the constitution . . . . If there were any absolute right in the inhabitants of our towns to regulate their town finances and affairs which was superior to all legislative control, it would be a great "political power." It would create an imperium in imperio, and invest a certain class of our people . . . . with the perogative of defeating local improvements which the general assembly deemed it necessary to construct . . . . unless the work [was] done . . . . under town control. No set of men can lay claim to such a privilege under the constitution of Connecticut.\(^9\)

Undoubtedly, the West Virginia court did not have these results in mind in *Taylor County Commission* when it cited article III, section 3 in regard to local government. However, these cases point to the potential problems that may arise under this interpretation.

\(^\text{i}\) See N. J. Const. art. I, ¶ 2, supra note 88.
\(^\text{iii}\) See *Conn. Const.* art. I, § 1, supra note 85.
\(^\text{iv}\) *Williams*, 68 Conn. at 151-52, 35 A. at 29-30.
C. Free Speech

1. Case Law

In 1980, the West Virginia court developed a novel and innovative use of article III, section 3 which is ancillary though closely related to its stated purposes. In *Pushinsky v. W.Va. Bd. of Law Examiners*, the court first looked to this provision for support of the right to free political speech. In *Pushinsky*, the petitioner was an applicant to the West Virginia State Bar. In filling out his application, the petitioner declined to respond to a question asking if he belonged to an organization which advocated the forceful overthrow of either the West Virginia or the Federal governments. The petitioner was denied admission to the bar for this response. The court held that this question inpermissably infringed upon his rights of free speech and association as guaranteed by the First Amendment of the United States Constitution, and consequently, petitioner’s refusal to answer could not be grounds for excluding him from the practice of law. The court went further, however, and looked to the West Virginia Constitution for additional support:

Moreover, in view of our state constitutional provision regarding the right of the majority to ‘reform, alter, or abolish’ an inadequate government, we think that the West Virginia Constitution offers limitations on the power of the state to inquire into lawful associations and speech more stringent than those imposed on the states by the Constitution of the United States.

Thus, the West Virginia court reasoned that the inclusion of this provision in our constitution was a tacit endorsement of the people’s right to associate and speak against their government.

In *West Virginia Citizens Action Group v. Daley*, the court reaffirmed this application of article III, section 3. In *Daley*, the petitioner challenged the constitutionality of a city ordinance that restricted door-to-door canvassing and solicitation to “between 9:00

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96 Id. at 738, 266 S.E.2d at 446.
97 Id. at 745, 266 S.E.2d at 449.
98 Id. at 449 (footnotes omitted).
AM and sunset." In finding the ordinance an invalid time, place and manner restriction under the First Amendment to the United States Constitution, the court again went further, terming West Virginia article III, section 3 as "one of our state constitutional free speech provisions," which grants even greater protection to such activities.

In *Webb v. Fury* the court added yet another first amendment facet to its construction of this provision. The issue was the right to petition government for redress of grievances and its attendant first amendment protections. Again extending greater protection under the West Virginia Constitution than found under the United States Constitution, the court said:

West Virginia's constitutional provisions respecting the right to petition warrant that we give even greater room for activities alleged to be protected by the right. Our constitution not only expressly guarantees the right to petition under the provisions of article III. . . . Moreover article III, section 3 reserves to the people an inalienable and indefeasible right to 'reform, alter or abolish [the government] in such a manner as shall be judged most conducive to the public weal.' . . . Thus while the United States Constitution guarantees to the people the right to petition all branches of government, the West Virginia Constitution also gives the people the right to 'reform, alter or abolish' it.

2. Analysis

The West Virginia court's position in *Pushinsky*, that article III, section 3 extends first amendment protection to advocacy of the forceful overthrow of our government, is a distinctly minority view. The question of free speech as it relates to the violent overthrow of our government has been addressed several times in the context of prosecutions of members of the Communist Party under the Smith Act. In *Scales v. United States* the petitioner, a communist, had been convicted under the membership clause of the Act which

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100 Id. at 725.
102 Id. at 37 n.4.
makes it a felony to knowingly be a member of an organization which advocates the violent overthrow of the United States government. The United States Supreme Court rejected a first amendment challenge to the law and held that the teaching of revolutionary doctrines, coupled with advocacy of the violent overthrow of the government, took his speech beyond the limits of first amendment protection. Justice Douglas adamantly dissented, maintaining that the petitioner was really being prosecuted because of his communist beliefs. He further maintained that speech related to revolutionary overthrow of government should be constitutionally protected. In support of this contention, he cited some 15 state constitution provisions, including article III, section 3 of the West Virginia Constitution, that reserved the right of revolution to the people. Justice Douglas wrote:

This right of revolution has been and is a part of the fabric of our institutions. . . . [T]he right of revolution is ultimately reserved to the people themselves . . . [and] [t]o forbid the teaching of the propriety of revolution, even where the teacher believes his own lesson, is to hinder the people in free exercise of this great sovereign right.

However, as Justice Douglas’ position in dissent might indicate, state courts interpreting these provisions have not adopted his reasoning. The states of Maryland, New Hampshire, and Pennsylvania have all reached the question of whether their respective provisions extended such first amendment protections and each has held they do not. The rationales of these court decisions can be summarized by the words of Chief Justice Vinson in Dennis v. United States:

The obvious purpose of the statute [Smith Act] is to protect existing Government, not from change by peaceable, lawful and constitutional means, but

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106 Scales, 367 U.S. at 251.
107 Id. at 275 (Douglas J., dissenting).
108 Id. at 269, 277-78 (Douglas J., dissenting).
from change by violence, revolution and terrorism . . . . Whatever theoretical merit there may be to the argument that there is a 'right' to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change. We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy.\footnote{Id. at 501. It is noteworthy how closely Chief Justice Vinson's reasoning in \textit{Dennis} parallels that of the Iowa court in \textit{Koehler}. See \textit{supra} text accompanying notes 79-80.}

In accord with this view is the more recent case of \textit{Western Pennsylvania Socialist Workers v. Connecticut General}.\footnote{Western Pa. Socialist Workers v. Conn. General, 335 Pa. Super. 493, 485 A.2d 1 (1984). Interestingly, the attorney for the appellants was Jon L. Pushinsky, the same attorney to whom the West Virginia Bar granted admission in Pushinsky v. W. Va. Bd. of Law Examiners. \textit{See supra} notes 95-98.} There, petitioners were challenging the action of the owner of a shopping mall which had refused to allow them to circulate petitions on its property. The petitioners alleged this action "violate[s] their right to alter, reform, or abolish their government" as granted under the Pennsylvania Constitution, article I, section 2.\footnote{Western Pa. Socialist Workers, 335 Pa. Super. at 499, 485 A.2d at 4. For the content of Pa. Const. art. I, § 1 see \textit{supra} note 76.} The court refused to apply the provision in this way and said that its interpretation of the state free speech clause would control over any interpretation of Pennsylvania's article I, section 2.\footnote{\textit{Western Pa. Socialist Workers}, 335 Pa. Super. at 449, 485 A.2d at 4.}

Thus, the argument that provisions similar to West Virginia's article III, section 3 extend first amendment protection to speech related to violent overthrow of government has been an overwhelming loser. However, in situations not concerning the violent overthrow of government, there is case law to support that similar constitutional provisions do safeguard the right of political association. The Oklahoma court, in considering the Oklahoma Constitution, article II, section 1,\footnote{\textit{Okla. Const. art. II, § 1} provides:
All political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote their general welfare; and they have the right to alter or reform the same whenever the public good may require it; Provided, such change be not repugnant to the Constitution of the United States.} which reserves to the people the right to alter or abolish their government, has said:
There can be no question as to the right to reorganize an old or to organize a new political party. It is a right inherent in the electors of the state, and such a right is a necessary accompaniment of popular government, without which our government would be bereft of efficient vital force and in danger of the evils of absolutism.18

While this decision lends some support to the West Virginia court's interpretation of article III, section 3, the most persuasive authority for this provision as a safeguard for revolutionary speech lies in the peculiarities of the history surrounding its incorporation into the West Virginia Constitution of 1872.

The Confederate-backed Democrats took over the state government in 1871 to undo what the Republicans had done in the previous decade. The delegates of the Constitutional Convention of 1872 demanded a provision recognizing the "heaven born right to revolution," and article III, section 3 was the result. But to these delegates the right to armed revolution was more than a mere abstract philosophic ideal. Many of them had lost family members in the Civil War who gave their lives to exercise this right. Ex-confederates dominated their constituency and shared a profound belief in this right. Consequently, these delegates fully understood the importance of the words "the right to alter, reform, and abolish" government. Evidence of their belief that government should not restrict speech can be found in other changes made to the Bill of Rights.

Not surprisingly, the West Virginia Constitution of 1863, adopted during the Civil War, addressed the problem of speech advocating the violent overthrow of government. Article II, section 4 guaranteed the right of free speech, but it also provided:

Attempts to justify and uphold an armed invasion of the State, or an organized insurrection therein, during the continuance of such invasion or insurrection, by publically speaking, writing or printing, or by publishing or circulating such writing or printing, maybe, by law, declared a misdemeanor, and punished accordingly.

Article II, section 10 further reflected the 1863 convention's fear of revolution by creating the crime of treason against the state and prescribing death as one of the appropriate penalties.

18 Cooper v. Cartwright, 200 Okla. 456, 195 P.2d 290, 293 (1948). In accord with this view is the Texas case of Bell v. Hill, 123 Tex. 531, 74 S.W.2d 113 (1934).
As previously noted, the delegates to the convention of 1872 had a drastically different perspective on the concept of revolution. Not only did they adopt article III, section 3, but they also completely removed the crime of treason from the constitution and struck all language from the free speech clause forbidding speech advocating an insurrection.

When these changes are viewed together, the 1872 convention’s desire to protect speech in this area becomes clear. Consequently, while the West Virginia court’s use of article III, section 3 in the Pushinsky line of cases is virtually unique in American case law, the history of the early development of our state and the adoption of its constitution lend dramatic support to the correctness of this interpretation.

D. Equal Protection/Common Benefit

1. Case Law

The West Virginia court’s newest and most troubling interpretation of article III, section 3 came in United Mine Worker’s of America v. Parsons. The defendant Micheal Parsons, an Assistant Athletic Director at West Virginia University (WVU), was responsible for the operation of the Mountaineer Sports Network (MSN), a branch of the University’s athletic department. Although not a radio broadcaster itself, MSN developed program packages featuring West Virginia University football and basketball games and bartered them to individual radio stations. In exchange, the radio stations agreed to carry 15 minutes of advertising provided by the MSN sponsors. MSN determined the rate charged for the advertising, and sponsorships were filled on a first-come-first-served basis. Consequently, due to the popularity of the WVU athletic program and the fact that each sponsor had an option to renew for the following season, there was a long waiting list for prospective sponsors. The dispute in this case arose when the West Virginia Coal Association, a long time MSN

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120 Id. at 347.
sponsor, changed the nature and content of its advertisements. The Coal Association's ads began to reflect its political opinions concerning the depressed business climate of the state and the changes it felt were necessary to brighten the state's future. MSN, while recognizing the political nature of the advertising, felt it "inappropriate to refuse to run advertisements based upon their political content." Not unexpectedly, the United Mine Workers of America (UMWA) did not share the Coal Association's viewpoints on West Virginia's problems and demanded equal time on MSN broadcasts to rebut its views. MSN denied the request because there was no available advertising time. The court held that WVU, in the context of free speech, was a governmentally-created forum for the dissemination of information. Consequently, MSN, as a part of the University, had a duty to maintain neutrality in political debates and to present both sides of a political issue fairly. This fairness doctrine, derived from the Communications Act of 1934 requirement that radio broadcast content conform with the "public interest," required that MSN "coverage of issues of public importance...be adequate...and fairly reflect differing viewpoints." Here the doctrine was violated because MSN presented only the Coal Association's side of these controversial issues.

The most disturbing part of the court's opinion revolved around its reliance on article III, section 3 as constitutional support for this doctrine of fairness. The court opined:

The obligation upon broadcasters under the Communications Act of 1934, 47 U.S.C. §§ 151 et seq. to operate in the 'public interest' is analogous to the obligation imposed upon state government by the West Virginia Constitution to act 'for the common benefit, protection and security of the people.' The West Virginia's 'common benefit, protection and security' provision is an equal protection clause. It is as applicable in the marketplace of ideas as it is in any other context. By requiring governmental neutrality in the field of ideas and the balanced presentation of opposing points of view in governmentally created forums, our state constitution's 'common benefit' provision serves important equal protection objectives that federal communications law has not been interpreted

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111 Id. at 349.
112 Id.
113 Id. at 351.
114 Id. at 354.
116 Parsons, 305 S.E.2d at 353.
to serve. One of these objectives is fundamental fairness, a concept inherent to equal protection. Accordingly, we conclude that when a state agency or instrumentality sells advertising for broadcast which presents one side of a politically controversial issue of public concern, it is obligated under W.Va. Const. art. III, § 3 and art. III, § 7 [free speech clause] to preserve its neutrality by providing a reasonable opportunity for the presentation of contrasting points of view in order that the "common benefit, protection and security" be served and fundamental fairness preserved.¹²⁷

Thus, in one fell swoop, the court not only declared article III, section 3 an equal protection clause, a conclusion unsubstantiated in 111 years of jurisprudence under the provision, but it also formulated a separate test, possibly more exacting than that of equal protection, requiring that government action be in the "common benefit, protection and security" of the people. Consequently, a new and unprecedented judicial standard of review was created.

The court affirmed its belief in article III, section 3 as an equal protection clause in Allen v. State Human Rights Comm’n.¹²⁸ The court said "fundamental concept of equal opportunity is also reflected in several of our constitutional provisions,"¹²⁹ including the common benefit, protection and security clause of article III, section 3.

Most recently, in West Virginia Citizen Action Group v. Public Serv. Comm’n of West Virginia,¹³⁰ the court, in a discussion of equal access to public speech forums, quoted with approval the language from Parsons when it held the PSC had jurisdiction to monitor politically-oriented inserts that public utilities placed in monthly bills.¹³¹

2. Analysis

A discussion of the holding in Parsons must begin with the court’s assertion that article III, section 3 is an equal protection clause. No

¹²⁷ Id. at 354 (emphasis added).
¹²⁹ Id. at 108-09.
¹³¹ Id. at 856-58. The court did not reach the question of whether the utilities were constitutionally required to include inserts with opposing viewpoints. However, in Pacific Gas & Elec. v. Pub. Util. Comm’n, 475 U.S. 1, reh’g denied, 106 S. Ct. 1667 (1986), the United States Supreme Court ruled that a California regulation requiring such inserts violated the first amendment to the United States Constitution.
prior precedent, in either West Virginia or Virginia, supports this interpretation. In fact, the West Virginia court has repeatedly looked to its due process clause as a source for the concept of equal protection. In *State ex rel. Harris v. Calendine*, the court said:

> In the continuously evolving tradition of Anglo-American common law there can be no fixed definition of due process of law, which is an inherently elusive concept; nevertheless, it is apparent that due process of law under the *West Virginia Constitution* contains an equal protection component the scope and application of which are coextensive or broader than the equal protection clause of the Fourteenth Amendment to the *United States Constitution*.

Thus it appears that the *Parsons* decision leaves West Virginia in the unique position of having more than one equal protection clause in its constitution.

The history surrounding the drafting of Article III of the Virginia Declaration of Rights and its ultimate incorporation into the West Virginia Constitution, also fail to support this interpretation. As previously discussed, George Mason intended this provision to extol the right of the people to combat the evils of an oppressive government, not as a judicial mechanism to measure government action or enforce equal protection of law. The provision's inclusion in the West Virginia Constitution came as a result of the call for a provision recognizing the people's right of revolution, not the need for recognition of equal protection.

An examination of other state constitutions is of limited use in evaluating the merits of this interpretation. While these provisions all have a similar import, the particular wording of each provision renders some more suited as sources for equal protection. Provisions

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133 *Calendine*, 160 W. Va. 172, 233 S.E.2d 318.

134 *Id.* at 179 n.3, 233 S.E.2d at 324 n.3.

135 The problem may be more accurately characterized as the absence of an equal protection clause from the West Virginia Constitution which has led the court to strain its analyses to find components of equal protection in several provisions of the state Bill of Rights, including W. Va. Const. art. III, §§ 1, 3, 10, 17, 20. See *Allen*, 324 S.E.2d at 108-09.

136 See supra discussion accompanying notes 8-14.

137 Such a change in wording is the inclusion of the word "equal" in the provision. See *Ind. Const. art. I, § 1*; *Ohio Const. art. I, § 2*; *Okla. Const. art. I, § 1*; *S.D. Const. art. VI, § 26*; *Utah Const. art. I, § 2*. For other equally effective wording changes: See *N.H. Const. pt. I, art. 10*; *R.I. Const. art I, § 1*; *Vt. Const. ch. I, art. 7*. 
more closely worded to article III, section 3 have consistently been interpreted as inappropriate vehicles for judicial application of an equal protection analysis. Consequently, it appears from the paucity of authority for this construction that the court must derive this interpretation by equating the words “common benefit” with the concept of equal protection. It seems clear, however, that the two are not synonymous.

The conclusion the author has reached about George Mason’s use of the “common benefit” clause does not support this interpretation. The preceding historical analysis concluded that this clause of the West Virginia Constitution simply set out the philosophic goals of government and reiterated the proposition that government is run for the benefit of the governed, not for the profit of those in power. In his authoritative work, The First Constitutions, W. P. Adams at length examines the meaning of the phrases “common good” and “common benefit” as they were used in Revolutionary America. According to Adams, during the Revolutionary period the “common good” was a rallying cry, used to inspire the factious colonists to put aside their individual interests and unite, for the “common good,” in the fight against the crown. Adams notes that the third article of the Virginia Bill of Rights “names the common good as the highest consideration guiding government action and a justification for resistance against the abuse of governmental power.” One colonial writer said that

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138 The only exception to this statement the author has found is Commonwealth v. Irving, 347 Pa. Super. 349, 500 A.2d 868 (1985). There, an inferior Pennsylvania court also asserted, without precedent, that PA. CONST. art. 1, § 2 (see supra note 76) was an equal protection clause. However, this case can be distinguished from Parsons on at least two grounds. First, while the Pennsylvania provision now contains none of the language typically associated with equal protection clauses, its predecessor provision, clause 5, Declaration of Rights, Pennsylvania Constitution of 1776 was more appropriately worded for an equal protection interpretation:

That government is or ought to be instituted for the common benefit, protection and security of the people, nation or community and not for the emolument or advantage of any single man, family or set of men who are part only of the community . . . . (emphasis added)

Second, while the Pennsylvania court called the provision an equal protection clause, it did not apply a separate, more demanding “common benefit” analysis.

139 According to Adams, the phrases “common good” and “common benefit” are synonymous. W.P. ADAMS, THE FIRST CONSTITUTIONS 218 (1980).

140 Id.

141 Id. at 222.
the "common good" demanded public servants who will "promote the greatest happiness of the greatest number - who will not devote their time, their abilities and the powers with which they are vested, in advancing their personal profits and honors, and those of their respective families and friends."142 The writers of the time believed "that the decline of the state was imminent" whenever individuals saw their interests as divided from those of the public.143

From these passages, it is clear that the phrase "common benefit," as it was used in colonial America, was not a synonym for equal protection. It was, in fact, a concept of self-sacrifice of individual desires to further the good of all people. Adams notes, however, that the various bills of rights written at that time failed to "reach a definition of common good that resolved the ambiguities inherent in the concept."144 Adams concludes by observing:

[The constitutionalism of 1776 presupposed not the uniformity of private interests but only the possibility of resolving conflicts within the political system . . . At the heart of their solution for resolving conflict was the principle of representation. They assumed that with the help of a fair system of representation, conflicts could be resolved and the common good achieved.145]

This passage points out the inherent dangers of the West Virginia court's "common benefit" standard as set out in Parsons. Traditionally, it has been for the people to decide what is, or is not, in the common good; thus, the title of West Virginia's article III, section 3 is Rights Reserved to People.146 The court's use of the provision in Parsons completely ignores this fundamental precept. Article III, section 3 is a reservation by the people of the right to reform government when they feel it is in their common benefit. Nowhere does the court explain its leap of logic in construing this reservation to

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142 Id. at 226 (quoting an anonymous writer in the colonial newspaper; Massachusetts Spy, May 18, 1776).
143 Id. at 221.
144 Id. at 223. In attempting to define "common good," Black's Law Dictionary merely states: "[A] generic term to describe the betterment of the general public." BLACK'S LAW DICTIONARY 250 (5th Ed. 1979).
145 Id. at 229 (emphasis added).
146 Herein lies the irony of the court's "common benefit," equal protection interpretation. The court has taken a provision designed to recognize the rights of the majority of the people to control government and has used it as a tool to protect minorities.
the people as empowering the judiciary. If any branch of government can lay claim to being the spokesman for the people and the common benefit, it is the legislature, not the courts. Other state courts, when asked to strike down government action not in the "common good," have reached the same conclusion.

In Donahoo v. Mason & Dixon Lines the Tennessee court was confronted with just such a challenge under its parallel constitutional provision. There, gross weight limits placed on state highways were challenged as being "for public injury and not public welfare and contrary to the purpose of Government." After noting such regulation was well within the powers of the state legislature, the court observed:

Even if the Legislature has made a mistake of judgment in the exercise of its discretion with reference to maximum weight loads, that is a matter entirely within their sphere of action and it is not within the province of the Courts to undertake to correct any such mistake of judgment.

In Campbell v. Jackman Bros., the Iowa court was asked to strike down legislation regulating the sale of intoxicating liquors as not being for "the protection, security and benefit of the people." In an impassioned opinion, the court reacted strongly to the suggestion that these words from their constitution were intended as a restriction on legislative action. The wisdom of this opinion, and the directness with which it speaks to the Parsons court, merit its inclusion at length:

This [clause] as will be seen, has no immediate reference to restraints imposed upon the legislative department of government, but is rather, a declaration of the reserved or natural right of the people to alter or amend their form or scheme of government whenever in their judgment such alteration or amendment will promote

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148 Tenn. Const. art. I, § 1 provides:
That all power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety, and happiness; for the advancement of those ends they have at all times, an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper.
149 Donahoo, 199 Tenn. at 151, 285 S.W.2d at 128.
150 Id. at 151, 285 S.W.2d at 128.
152 Iowa Const. art. I, § 2.
the general good. To say that the Legislature can not enact a valid law which works an injustice or wrong or injuriously affects public interest or legalizes an immoral thing is a proposition which will not stand investigation. *In its last analysis, it makes the test of validity of every statute its conformity to the court's view of the moral law and not to the terms of the Constitution...* [T]he nature and object of all construction is to arrive at the meaning and effect of the particular words under consideration, and, when that meaning is found, it is still the written Constitution which must govern us and furnish the ultimate standing by which the validity of all statutes is to be tested... *The question presented by the appeal is whether the court, failing to find any constitutional provision expressly or impliedly in point, may still declare a given statute void because it is violative of an assumed unwritten Constitution or because it is out of harmony with the court's conception of the general spirit of the written instrument.* To our minds the suggestion is one filled with danger. To acknowledge an unwritten Constitution is to create a legal fog bank into which every court experimentally inclined may enter and return laden with some new theory of governmental powers and limitations until the written charter framed by our fathers and solemnly ratified by the people is relegated to the shelf of forgetfulness.\(^{153}\)

As the Iowa court cautions, the "common benefit" as a standard of judicial review is an invitation to ruin. It runs the risk of arbitrary judicial intervention where the court substitutes its judgment for that of the elected representatives of the people. This risk is equally as real when the court is asked to examine the acts of a government agency, as it was in *Parsons*. While the decision in *Parsons* may have been justifiable on free speech grounds alone, the court's reliance on the "common benefit" analysis leaves open the potential for more troubling decisions in the future. Consequently, this use of article III, section 3 by the West Virginia court is not only the one most unsupported by the case law and history of the provision, it is also the one most fraught with potential harm to those the provision is intended to protect — the people.

**IV. Conclusion**

Article III, section 3 of the West Virginia Constitution has undergone an expansive growth in the case law in the last decade. This notion of the reserved natural rights of the people has been used to bolster the right of free political speech and association, to define

\(^{153}\) *Campbell*, 140 Iowa at 483-84, 118 N.W. at 758-59 (emphasis added).
the control which citizens have retained over the action and form of their government, and to further notions of equal protection of law. The timing of this expansion, 1977, marks "the A.D. of recorded West Virginia judicial history."154 The innovative and activist nature of the post-1976 West Virginia court is well-documented.155 The development of article III, section 3 into a substantive, judicially enforceable provision is a miniature study of the court's activist tendencies and their inherent attributes and dangers.

The court's use of the provision to strengthen free speech protection for those petitioning the government or advocating its overthrow is justified by the unique history surrounding the provision's incorporation into the West Virginia Constitution of 1872. Likewise, the use of article III, section 3 to insure political participation of a majority of the community and to find standing in citizens who challenge government action is consistent with George Mason's mandate that government remain representative of, and responsive to, the governed. The court's creation and use of the "common benefit" standard in Parsons, however, runs contrary to these ideals of representative democracy.

The nebulous nature of the "common benefit" standard will necessarily lead to the imposition by the court of its own political and social views on the actions of the legislative or executive branches of government. Potentially, this could result in ruinous consequences. While the Parsons court used the "common benefit" standard to further what it felt were egalitarian goals, a future court may not be so wise when reading its own philosophies into what is in the "common benefit." The classic example of this potentiality is Lochner v. New York,156 where the United States Supreme Court struck down a New York law that limited bakery workers to "only" 60 hour work weeks. The Court, in the spirit of free enterprise, found that the law

violated the due process clause of the fourteenth amendment by unreasonably depriving both the employees and the employers of the freedom of contract, a freedom implicit in personal liberty. While the Court said that it would not "substitute the judgment of the court for that of the legislature," it admitted "[w]e do not believe in the soundness of the views which uphold the law." In one of the most famous dissents in constitutional history, Justice Holmes warned of the dangers of a court substituting its judgment for that of other branches of government:

The constitution is not intended to embody a particular economic theory. . . . It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Thus, while the court in Parsons found equal protection "natural and familiar" to the "common benefit," a court of another day may find laissez faire economics just as beneficial. Therein lies the problem with the West Virginia court's loose construction of article III, section 3. It has looked beyond the clear meaning of the provision's words to its own sense of right and wrong. Perhaps the court should heed the words of Justice Neely, who in another dispute over constitutional interpretation has written:

Apparently, the author of the majority opinion did not agree with the drafters of our State Constitution. . . . Neither the existence of his opinion nor even its correctness, however, can erase the words from the page. That is the essence of constitutional government, government by law and not men. If judges are not mindful of that restraint, who will be?

Phillip B. Scott*

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157 Id. at 56-57; J. Nowak, supra note 56, at 437.
158 Lochner, 198 U.S. at 61; J. Nowak, supra note 56, at 437.
159 Lochner, 198 U.S. at 76-77 (Holmes, J., dissenting).
160 Pittsburgh Elevator, 310 S.E.2d at 691 (Neely, J., concurring in part and dissenting in part).
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