CHAPTER 10. TAXATION AND FINANCE

A. Property Taxation

KILLEN V. LOGAN COUNTY COMMISSION,
170 W.Va. 602, 295 S.E.2d 689 (1982).

McGRAW, Justice:

This case comes to us upon a certified question from the Circuit Court of Logan County. The Logan County Board of Education and its president filed an action there seeking review of a decision by the Logan County Board of Equalization and Review which approved assessment values set by the Logan County assessor. The question certified to this Court is whether W.Va.Code § 18-9A-11..., which allows assessors to value property at 50-100 percent of its appraised value, violates the state constitution's guarantee of "equal and uniform taxation throughout the State ...." [Art. X, §1].[1] The trial court held that the statute was unconstitutional. We affirm that ruling.

The issue in this case is clear. W.Va.Code § 18-9A-11 purports to authorize county assessors to assess property at 50-100 percent of the appraised value determined by the state tax commissioner pursuant to the same statute. Article 10, section 1 of the West Virginia Constitution declares that "taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its *value* to be ascertained as directed by law." (Emphasis added.)

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[1]W.Va.Code § 18-9A-11 (1977 Replacement Vol.) provides, in pertinent part:

> The tax commissioner shall make or cause to be made an appraisal in the several counties of the State of all nonutility real property and of all nonutility personal property which shall be based upon true and actual value as set forth in [§ 11-3-1, et seq.] of this Code ....

The statute further directs that the tax commissioner shall deliver the appraisal to county officials after its completion and they:

> shall use such appraised valuations as a basis for determining the true and actual value for assessment purposes of the several classes of property. The total assessed valuations in each of the four classes of property shall not be less than fifty percent nor more than one hundred percent of the appraised valuation of each said class of property.

The Legislature amended the statute in 1980 to require that the total assessed valuation per class be at least 60 percent of the total appraised valuation per class. W.Va.Code § 18-9A-11(f) (Cum. Supp. 1981). All references to W.Va.Code § 18-9A-11 in this opinion are to the pre-1980 version.

Article 10, section 1 of the West Virginia Constitution provides, in pertinent part:

> [T]axation shall be equal and uniform throughout the State, and all property both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value ....

What is now article 10, section 1 of the West Virginia Constitution originally was article 8 of the Constitution adopted in 1863. At that time, the provision read:

> Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to value, to be ascertained as directed by law. No one species of property for which a tax may be collected, shall be taxed higher than any other species of property of equal value; but property used for educational, literary, scientific, religious, or charitable purposes, and public property, by law, shall be exempted from taxation.

In 1872, the people adopted a new constitution in which the taxation provision became article 10. Language was added at that time which allowed the Legislature to tax "franchises and privileges of persons and corporations." The Tax Limitation Amendment of 1932 transformed article 10 into its present form.

The respondents, the Logan County Board of Education and its president, argue that assessment of property at a fraction of its appraised value is unconstitutional because the 50-100 percent provision results in unequal and non-uniform assessment, and thus unequal and non-uniform taxation. The petitioners, individual property owners who intervened in the case below, contend that the 50-100 percent provision represents a legislative recognition that differences of opinion exist as to the value of property. In their view, the statute does not result in percentage assessment. We conclude that the 50-100 percent provision does result in fractional assessment and therefore violates article 10, section 1 of the West Virginia Constitution.

I.

It is axiomatic under the American republican form of government that "the representatives of the people must impose the taxes the people are to pay." 1 T. Cooley, The Law of Taxation § 21 at 84 (4th ed. 1924). This fundamental principle of government comes from England and precedes the American Revolution. It was recognized that imposition of taxes was a legislative power, and the sovereign could not levy taxes except as authorized by the representatives of the realm. Id. "No taxation without representation" subsequently became a rallying cry in the American colonies' fight for independence from the British crown, as evidenced by the list of grievances set out in the Declaration of Independence. That historic document condemned the British monarchy "[f]or imposing Taxes on us without our Consent."

The framers of the United States Constitution recognized the fundamental requirement of representative taxation in the organic law of this country when they gave sole authority "to lay and collect taxes" to Congress. U.S.Const. art. I, § 8. Similarly, the West Virginia Constitution vests in the Legislature the power to impose taxes. W.Va.Const. art. 10, §§ 1, 5, and 9. Thus, except as limited by the constitution itself, see, e.g., W.Va.Const. art. 10, §§ 1a, 1b, and 10, the authority to impose general state taxes is a legislative power.

Article 10 of the West Virginia Constitution is both a grant of power to the Legislature to tax and a limitation upon that power. The limitation consists of a specific application of equal protection principles to a particular area of governmental action--taxation. The basic and fundamental premise of the provision is that "equal and uniform taxation" be the rule and not the exception. This requirement is emphasized further by language prohibiting the taxing of one species of property "higher than any other species of property of equal value." See generally In re Assessment of Kanawha Valley Bank, 144 W.Va. 346, 109 S.E.2d 649 (1959).

Article 10, section 1 further mandates that property subject to taxation be valued as "directed by law." Thus, the Legislature must prescribe a system or method by which property is valued. Such a system must accomplish the constitutional requirement of "equal and uniform taxation." These provisions have been fundamental State law since 1863 when the citizens of West Virginia adopted their first constitution.

In 1932, the people amended article 10, section 1 by ratifying what was popularly called the "Tax Limitation Amendment." That amendment established four classes of property and fixed maximum rates at which each class of property could be taxed. These rates ranged from $.50 to $2 per hundred dollars of valuation depending on the property's classification.[2] The amendment also authorized the Legislature to prescribe rates which could exceed the specific maximums. The people tempered this grant of authority by imposing several conditions on enactment of such "excess" levies. First,

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[2]The maximum levy rate is $.50 per hundred dollars valuation for Class I property (tangible personal property, agricultural products, and intangible personal property); $1 for Class II property (residential and agricultural real property); $1.50 for Class III property (real and personal property located outside a municipality exclusive of Class I and II); and $2 for Class IV property (real and personal property located inside municipalities exclusive of Class I and II property). W.Va. Const. art. 10, § 1; W.Va.Code [§ 11-8-5].

additional rates could be imposed for no more than three years at a time. Second, 60 percent of the voters had to approve the levy. Third, the added levy rate could be no more than 50 percent of the maximum rate.[3]

Pursuant to section 1, the Legislature has prescribed the method of valuation and the levy rate for classes of property.[4] Over the years, the Legislature has responded to tax reform efforts and to increased revenue needs by enacting a variety of tax statutes. Some relate exclusively to property assessment and taxation while others also deal with financial support of public schools. See, e.g., W.Va.Code [11-1-1 to 11-8-33; 18-9A-1 to -20].

Valuation of property, establishment of the levy rate, determination and payment of taxes and distribution of revenue is a complex process which depends upon private persons and a variety of elected public officials, the duties for all of whom are prescribed by the Legislature, for successful completion. These officials include county assessors, see, e.g., W.Va.Code §§ 11-3-1 to -30; county sheriffs, see, e.g., W.Va.Code §§ 11A-1-1 to -18; and members of local levying bodies, such as county commissioners, city councilmen and school board members. The latter individuals, pursuant to statutory authority, actually fix the levy rate based on the assessment. W.Va.Code §§ 11-8-10, - 12, -14. The state tax commissioner has the duty of supervising all of the valuation process. W.Va.Code § 11-1-2; W.Va.Code § 18-9A-11.

The taxation process consists of two important elements: valuation and levying. Valuation is the act of placing a value on each piece of property. This phase of the process is sometimes referred to as assessment. W.Va.Code § 11-3-1. It is the responsibility of the county assessors, beginning with the property owner's appraisal, to fix the property's "true and actual value," subject to executive, legislative and judicial oversight. Executive oversight is provided first by the governor "who shall take care that the laws be faithfully executed," W.Va.Const. art. 7, § 5. The governor appoints the tax commissioner who must furnish the assessor with property appraisals, and must correct all incorrect assessments when county officials refuse to comply with the law.[5] W.Va.Code

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[3]As a consequence, article 10, section 1 permits voters to impose upon themselves an additional $.25 per hundred dollars valuation on Class I property for up to three years. Since the maximum levy is $.50 per hundred dollars valuation, the total levy can be $.75. For Class IV property, with a maximum rate of $2 per hundred dollars valuation, the maximum excess levy is $1. Therefore, a total levy of $3 per hundred dollars valuation may be applied on this category of property.

[4]Other provisions of article 10 also affect property taxation. Section 5 authorizes the Legislature to tax for discharge of the state debt, for support of public schools, and for payment of annual state operating expenses. Section 7 limits imposition of levy rates to 95 cents per hundred dollars valuation except for payment for schools and indebtedness which existed at the time of the constitution's adoption. Additionally, section 10, the "Better Schools Amendment," permits a five-year excess levy which cannot exceed 100 percent of the maximum levy rate established for school financing. . . .

[5]It is important to note the difference between the term "appraisal" and the term "assessment" in regard to property taxation. Appraisal generally means the estimate of value given a particular item or piece of property. Appraisals are made for a variety of purposes. See, e.g., W.Va.Code § 44-1-14 (1966) (appraisal of decedent's estate at true and actual value). W.Va.Code § 18-9A-11 requires the state tax commissioner to appraise all non-utility property in the state based on a true and actual value standard.

Assessment, however, is a more specific term used in a statutory sense to mean the listing and valuation of property for taxation purposes. W.Va. Code § 11-3-1; Moore v. Johnson Service Co., 158 W.Va. 808, 219 S.E.2d 315, 319 (1975), citing, Breckenridge v. County School Board, 146 Va.

§ 18-9A-11. Legislative oversight occurs through the Legislature's ultimate control of the assessor's and county commissioners' duties. Judicial oversight occurs through opportunities for de novo determination of assessment value, W.Va.Code § 11-3-25, as well as for judicial review of actions taken by Boards of Equalization and Review. Id.

Levying is the establishment and application of a rate of taxation upon the valuation of property, the result being the determination of the amount of the tax owed. For example, with the sales tax, the valuation is the amount of purchase. The levy rate is 5 cents per dollar. Thus, the tax on a five-dollar purchase (valuation) is 25 cents (5 cents X $5). In property taxation, the levy rate is the total amount set by the various levying bodies: the state,[6] county commissions, local school boards, and municipalities.

The valuation-levying process begins with the assessment of property. The state constitution provides that each county may elect not more than two assessors. W.Va.Const. art. 9, § 1. The duties of assessors are prescribed by statute. W.Va.Code § 11-3-1 directs that assessors "assess" property yearly as of July 1 at its "true and actual value." The Legislature has defined true and actual value to mean "the price for which such property would sell if voluntarily offered for sale by the owner ...." Id.

The first step in the valuation process is a democratic exercise in which each taxpayer swears what he deems to be the "true and actual value" of his property. W.Va.Code § 11-3-2 mandates that assessors "shall call upon every person in the territory"[7] subject to taxation. Assessors must furnish each taxpayer with a form to list all real and personal property and the "true and actual value" of such property. The property owner must swear to the accuracy of this listing. W.Va.Code §§ 11-3-4, -12. Failure to complete the listing and valuation of property may result in a monetary fine, payment of back taxes, and loss of standing to contest assessments made by county or state officials.[8] W.Va.Code § 11-3-10.

To ensure citizen participation, it is the duty of each county commission to provide the necessary personnel to see that every taxpayer is called upon by the county assessor or deputies.[9] If the county commission fails to provide the assessor with sufficient staff to complete this initial valuation, see generally W.Va.Code §§ 11-2-3, -4, the tax commissioner is empowered by statute to appoint special assessors to complete the task. W.Va.Code § 11-3- 1. As provided by statute, the county

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1, 135 S.E. 693 (1923). Like the tax commissioner's appraisals, assessments are to be based on true and actual value. W.Va.Code § 11-3-1.

[6]Article 10, section 1 limits the maximum state levy to $.01 per hundred dollars valuation.

[7]The requirement that the assessor "call upon" each taxpayer cannot be satisfied by having a temporary employee leave a property listing form at the taxpayer's residence or business. The assessor or his deputy must make a good faith effort to personally contact each individual. Otherwise, the oath which is to be administered to the property owner cannot be accomplished since a property owner cannot swear to the listing's accuracy by himself. W.Va.Code § 11-3-4.

[8]Owners of real property in this state have a constitutional duty to enter their land on the property books and to cause themselves to be charged with taxes. W.Va.Const. art. 13, § 6; Don S. Co. v. Roach, 168 W.Va. 605, 285 S.E.2d 491 (1981).

[9]The failure of the assessor to deliver the property listing should not defeat the property owner's right to value his property. The assessor must either visit the property owner or notify the taxpayer to contact the assessor's office. If the assessor does neither, the taxpayer does not lose his standing to challenge any assessment entered by county or state officials.

commission must pay the salaries of such special assessors. Id. The self-valuation of property by taxpayers is designed to ensure democratic participation in the taxation process and to avoid oppressive government practices.

The state constitution and the state code clearly contemplate that the assessor and his deputies shall possess the necessary qualifications to appraise and assess property. The use of the term "assessor" implies that such officials possess special knowledge and capacity to appraise property and to assign a market value to it. Without such expertise, accurate valuation of property cannot occur.

The Legislature has given county assessors from July 1 to January 30 of the next ensuing year to complete the assessment of each item of property. Valuations given by the property owner for the guidance of the assessor may be considered by the assessor as evidence "to settle and determine" the actual value of each item of property." Id. The assessor must complete his assessment and deliver the county property books containing assessment values to the county commission, sitting as the Board of Equalization and Review, by February 1. W.Va.Code § 11-3-19. During the month of February, the commission must review the assessments to determine if they are at "true and actual value." W.Va.Code § 11-3-24. Individual property owners may appear before the commission to protest their assessments or those of other taxpayers. W.Va.Code § 11-3-24; Tug Valley Recovery Center, Inc. v. Mingo County Commission, 164 W.Va. 94, 261 S.E.2d 165 (1979). A majority of commissioners must certify that the annual assessment of property at true and actual value has been completed by February 28. W.Va.Code § 11-3-24.

The next step is for the assessor to total the assessed property valuations per class of property and certify them to all levying bodies in the county. W.Va.Code § 11-3-6. This must be done by March 7. Id. The levying bodies must meet between March 7 and March 28 to determine their fiscal condition and to set a levy rate which will produce sufficient revenue to meet oncoming financial requirements. Once estimates have been developed, the bodies meet in April to hear objections to either the proposed estimate of financial need or the proposed levy rate. W.Va.Code §§ 11-8-10a, -12a, -14a. After considering any objections by any person, the levying bodies must approve both an estimate of needed revenue and a levy rate. Id.

Actual collection of taxes begins when the levying bodies transmit the levy rates to the assessor. The rates are then applied to the property valuations by the assessor and the amount of tax owed then is determined. W.Va.Code §§ 11-8-11, -13, -15; W.Va.Code § 11-3-19. By June 7, the assessor must deliver the property books, complete with the amount of tax owed, to the county sheriff. W.Va.Code § 11-3-19. The sheriff must begin tax collection by July 15, twelve and one-half months after the first day of the valuation period. W.Va.Code § 11A-1-6 .... Property owners may pay taxes in two installments--September 1 and March 1--with the latter date being 21 months after the first day of the property valuation period.

Much of the revenue produced from property taxes is used to finance public schools. Therefore, statutory provisions relating to public school financing have overlapped into property taxation and have led directly to this case. In 1958, the Legislature adopted article 9A of chapter 18 of the West Virginia Code relating to public school financing. Section 11 of article 9A provides for computation of a county's local share of school funding and contains provisions relating to the appraisal and assessment of property. The statute requires the state tax commissioner to appraise all nonutility real and personal property in each county based on its "true and actual value." W.Va.Code § 18-9A-11. This appraisal presumably was completed by 1967 and thereafter was updated yearly.[10]

After an appraisal has been completed for a class of property in a county, the state tax

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[10]In his amicus curiae brief, the tax commissioner notes that his "current goal is to value all types of properties which the state appraises on 1980 market year values." However, the tax commissioner does not indicate when he expects to accomplish this task.

commissioner must furnish the appraisal to the county assessor and county commissioners for use in the determination of assessed values. Id.; see also Tug Valley Recovery Center, Inc. v. Mingo County Commission, supra. Once the assessor has determined the assessed values, he must forward them to the tax commissioner for comparison with the commissioner's appraisal figures. The specific issue in this case is triggered under this statutory arrangement because W.Va.Code § 18-9A-11 purports to allow assessors to comply with the "true and actual value" requirement of W.Va.Code § 11-3-1 so long as their assessment totals, per class, are within 50 percent of the tax commissioner's appraisal values.[11]

II.

With this constitutional and statutory background established, we now consider the events which led to this case. In February, 1981, the Logan County Commission, sitting as a Board of Equalization and Review pursuant to W.Va.Code § 11-3-24, approved assessment values for the 1980 assessment year. These values had been entered on the property books by the county assessor as the "true and actual value" of property in Logan County. Ray Killen, president of the Logan County Board of Education and a party to this action, objected to the values proposed by the assessor. He asked the Board of Equalization and Review to utilize appraisal figures calculated by the state tax commissioner as assessment values rather than those submitted by the assessor. Use of these appraisals would have increased the total valuation of property in the county. Killen claimed that the assessor had under-valued property in Logan County; therefore, the values suggested by the assessor did not comply with the "true and actual value" requirement of W.Va.Code § 11-3-1 or with the provisions of article 10, section 1 of the West Virginia Constitution which require equal and uniform taxation according to value.

The Board of Equalization and Review approved the assessor's valuations over Killen's objections and the school board president sought judicial review in circuit court pursuant to W.Va.Code § 11-3-25.[12] Killen named the county commission and the three county commissioners as respondents in the action. At this time, individuals with extensive land and other property interests in the county (hereafter referred to as the taxpayers) intervened in the case on the side of the Logan County Commission.[13]

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[11]W.Va.Code § 18-9A-11 provides that "compliance with this section by the assessor and county [commission] shall be considered, pro tanto, as compliance with said chapter eleven."

[12]W.Va.Code § 11-3-25 authorizes taxpayers to appeal assessments made by the assessors and those actions taken by the Board of Equalization and Review with regard to assessments to the local circuit court within 30 days of the board's adjournment.

[13]Although a party to this action, the Logan County Commission did not file a brief nor participate in oral argument. The property owners who intervened below have been the real party in opposition to the Logan County Board of Education. In addition to the state tax commissioner, various other interested parties have filed amicus curiae briefs. These are the West Virginia Education Association, the Tug Valley Recovery Center, and West Virginians for Fair and Equitable Assessment of Taxes.

The tax commissioner argues that county assessors should retain discretion to set assessed values at less than appraised values and that assessors should retain primary authority over the assessment process. The remaining parties ask the Court to delay its decision until the lower court has completed its consideration of Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859 (1979), on remand, Pauley v. Bailey, Civil Action No. 75- 1278 (Kanawha County Circuit Court, May 11, 1982), and until the state tax commissioner has completed an up-to-date statewide tax appraisal. We note that the lower court has completed its consideration of Pauley; therefore, we do not agree that this Court

At trial, the parties agreed to certain facts surrounding property assessments in Logan County. First, they agreed that assessed valuations per class fell within the 50-100 percent range allowed by W.Va.Code § 18-9A-11. Second, they stipulated that the ratio of assessed-to-appraised valuation varied with individual property owners, and varied from the ratio of the total assessed valuations to the total appraised valuations per class of property. Third, the parties agreed that the tax commissioner's appraisals were based on information obtained in earlier years and differed according to the type of property.[14] Fourth, they stipulated that the ratio of appraised-to-assessed value for a particular class of property varied in different counties.

On cross-motions for summary judgment, the lower court ruled that W.Va.Code § 18-9A-11 was unconstitutional because assessment of property at a fraction of its actual value violated the requirement of equal and uniform taxation contained in article 10, section 1. Also, the trial court concluded that both W.Va.Code §§ 11-3-1 and 18-9A-11 mandated assessment at true and actual value. However, the court interpreted the provisions of W.Va.Code § 18- 9A-11, which permits up to a 50 percent discrepancy between appraised and assessed values, as merely a measurement of determining when a county had failed to carry out its responsibilities in funding schools or when an assessor and other county officials had failed to perform their duties. Thus, suggests the opinion of the lower court, the statute could be read as not authorizing fractional assessment.[15] The trial court, however, refused to adopt the tax commissioner's appraisals as the assessment values, despite finding that the Legislature had designed W.Va.Code § 18-9A-11 as a method of ensuring uniform statewide valuation. See Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859, 881 (1979). The lower court offered to conduct de novo hearings to determine the "true and actual value" of the taxpayers' property. The lower court then certified the following question to this Court pursuant to W.Va.Code § 58-5-2 (1966):

> Does Chapter 18, Article 9(A), Section 11 of the Code of West Virginia, insofar as it provides that the total assessed valuation in each of the four (4) classes of property shall not be less than fifty percent (50%) nor more than one hundred percent (100%) of the Tax Commissioner's appraised valuations of each of said classes of property, violate Article X, Section 1 of the Constitution of the State of West Virginia, and therefore, is unenforceable and invalid?

III.

To resolve the issue presented in this case, it is necessary to define "value" as that term is used in article 10, section 1 of the state constitution. That provision requires taxation of property according to its value "to be ascertained as directed by law." To determine the meaning of "value," we have looked to the four traditional sources of judicial definitions of words used in statutes and constitutions, but not specifically defined in them. These are: (1) dictionary definitions; (2) pronouncements by courts; (3) reliable extra-judicial commentary; and (4) definitions set or inferrable from debates and proceedings of the legislative bodies that drew the documents. [Pauley

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should delay its decision of this case.

We do agree, however, that an up-to-date appraisal is needed and required by law. W.Va.Code § 18-9A-11. Use of the tax commissioner's present appraisals will not automatically ensure equitable taxation. Property is now undervalued in much of the state and the tax commissioner's appraisal values do not necessarily reflect the most recent market value of property. See Tug Valley Recovery Center, Inc. v. Mingo County Commission, 164 W.Va. 94, 261 S.E.2d 165, 174 n.5 (1979).

[14]The appraisals of real and commercial property are based upon 1965 valuation factors, mineral interests upon 1977 valuation factors, and industrial property upon 1975 valuation factors.

[15]Indeed, W.Va.Code § 18-9A-11 specifically prohibits "use [of] a direct percentage application to the appraisal valuations."

v. Kelly].

We have consulted numerous dictionaries with regard to the meaning of "value." The result is unanimous. From the time of Dr. Samuel Johnson and his first English language dictionary, value has meant the property's "worth" in terms of what sale of the property would bring on an open market....

This definition of "value" is reflected in early statutes adopted in Virginia and later in West Virginia. In 1819, the Virginia Legislature enacted a statute directing assessors to value land at its "market price." Va.Code ch. 54, § 6 [1819]. Statutory provisions enacted after 1819 make specific references to assessment at value. See, e.g., Va.Code ch. 35, § 20 [1849]. The first West Virginia assessment statute was modeled after these Virginia statutes. Consequently, it referred to assessment at value. 1863 W.Va. Acts. ch. 155. Subsequent amendments to that statute reinforce "market value" as the definition of value. In 1866, the Legislature ordered a reassessment of all real property in the state. Property was to be assessed at "the fair cash value thereof in current money." 1866 W.Va.Acts ch. 33 (emphasis added). Also, the Legislature directed that individuals making the assessments had to certify them as the "fair cash value" of property. In 1868, the Legislature amended the statute with regard to appeals of assessments. The amendment provided that "no reduction shall be made in the assessed value of any such lands until the owner thereof files ... an affidavit stating the actual cash value thereof, and in no case, shall the assessments be reduced below the actual cash value." W.Va.Code ch. 129 [1868]. In 1904, when the Legislature adopted the forerunner of W.Va.Code § 11-3-1, the redundant adjectives "true and actual" appeared for the first time, emphasizing the constitutional meaning of "value." 1904 W.Va.Acts ch. 4, § 12. These provisions clearly show that value means the current "worth" of property in the open market.[16]

Case law, both in West Virginia and in other jurisdictions, reflects the common perception that value means worth. In Chesapeake and Ohio Railway Co. v. Miller, 19 W.Va. 408 (1882), the state auditor had assessed the railroad's property statewide and levied taxes on it.[17] The railroad company claimed that a state statute exempted its property from taxation until the company earned a 10 percent annual rate of return on capital. The Court ruled that article 10, section 1 of the state constitution required all property to be taxed in an equal and uniform manner according to value.

Thus, as early as 1882, 100 years ago, this Court determined that the state constitution requires all property to be taxed at its worth. When property is assessed at less than its market value, only a portion of that value is being taxed. In effect, the remaining portion is exempted from taxation. Thus, exemption of partial value (fractional assessment) is in reality partial exemption of property from taxation. As the Court declared 100 years ago,

> it was the intent of the framers of the Constitution to declare in most explicit terms that *all* property in the state should bear its equal share of the burden of Government, and there should be no property excepted from taxation, unless it was specifically excepted in the Constitution itself. . . .

The role valuation plays in the taxation process reinforces the necessity of defining "value" as the property's market value. Valuation, the determination of value, constitutes realization of the tax base. Without an accurate determination of the tax base, equal and uniform taxation cannot be achieved.

The success of the general property tax depends upon the quality of the assessments. If

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[16]The state tax commissioner has informed the Court that he equates the requirement of "true and actual value" assessment with "full value," "full cash value," "true value," and "market value." W.Va.Code § 11-3-1.

[17]County assessors are responsible only for valuing non-utility property. The State Board of Public Works values property belonging to public utilities. W.Va.Code [11-6-1 to -25].

> assessments are very unequal the foundation of the entire tax structure is unsound. Inequality of assessments means that those underassessed pay less than their fair share of public expenses and those overassessed pay their full share and, in addition, they have to make up for what the underassessed fail to pay. The greater the inequalities of assessment the greater the inequalities of the taxes and the more grevious the burdens upon those who find it most difficult to meet their obligations.

R. Blakey, Report on Taxation in West Virginia 107 (1930). . . .

Moreover, comments made at the time of the adoption of article 10, section 1 at the constitutional convention support a "market value" definition of value. In explaining the taxation process, the chairman of the taxation and finance committee stated, "For it must be remembered sir, that it is the value of any particular thing or object that is taxed, not the thing or object itself." 3 Debates, West Virginia Constitutional Convention, 1861-63 at 55 (remarks of Mr. Paxton). Thus, in explaining "value," another delegate stated, "I understand all property shall be taxed in proportion to its value. That is, if one horse is worth $5, tax it on $5, and if another is worth $125, tax it on $125." [Id.] (remarks of Mr. Sinsell).

Thus, dictionary definitions, the use of the word "value" in prior Virginia and West Virginia statutes, case law, and comments made at the West Virginia Constitutional Convention of 1861-63 lead to the conclusion that the term "value," as used in article 10, section 1 of the West Virginia Constitution, means the "worth in money" of a piece of property--its market value. We therefore reject the taxpayers' argument that value is such an elusive concept that the Legislature may provide those "shooting at the target" with a 50 percent leeway.

IV.

Having defined "value," we now reach the fundamental issue in this proceeding. Is the language of W.Va.Code § 18-9A-11, which permits 50-100 percent assessment, consistent with the constitutional requirement of assessing property at its current worth? Or, in other words, does a fraction equal a whole? Because the term "value" means current market value, we conclude that the statute does not satisfy the constitution. Assessment at a percentage of appraisal value, with the percentage varying from county-to-county within and among the various classes of property, cannot achieve equal and uniform taxation. While assessment of property does not of itself result in taxation, it is an integral part of the taxation process. Therefore, in order to assure achievement of the constitutional mandate, assessment values must be determined at 100 percent of the market value as represented by the appraisal value. Any system which permits the setting of assessments at lower than 100 percent of "true and actual value" violates [Art. 10, § 1] of the West Virginia Constitution. . . .

The desire for equal and uniform taxation manifested in article 10, section 1 of the West Virginia Constitution can be traced to inequities in the Virginia taxation system prior to the Civil War. In 1850, eastern and western Virginians gathered to consider adoption of a new constitution. By this time, Virginia's population centers had shifted from the tidewater area to the western part of the state. Legislative representation, however, remained concentrated in the east, a fact which infuriated individuals who had migrated over the mountains and successfully established new lives. Eastern Virginia interests, recognizing the need to compromise, surrendered control of the House of Delegates, but retained control of the Senate. At the same time, however, the western delegates agreed to a taxation amendment which would provide favorable tax treatment to eastern agricultural interests. During the 1850s, the amendment resulted in inequitable taxation of some species of property because some types of property were valued at less than their market value. Farber, Property Taxation In West Virginia--An Historical Analysis (unpublished 1982) (on file at the West Virginia University College of Law).

During the 1861-63 constitutional convention, the West Virginia delegates quickly agreed upon the principle that taxation should be equal and uniform. After debate, they also agreed that the state constitution should set forth clearly the notion that different types of property with the same value

should be taxed equally. The prevailing sentiment was that all citizens should pay their fair share of the cost of government. 3 Debates, West Virginia Constitutional Convention, 1861-63, at 55 (remarks of Mr. Paxton). Thus, the framers sought equal and uniform taxation on all property not exempted by the constitution. Chesapeake and Ohio Railway Co. v. Miller, 19 W.Va. 408 (1882).

The present system of equating assessments which are 50 percent of property's appraised value with true and actual value does not achieve the framers' intent and cannot achieve the constitutional requirement of equal and uniform taxation. One has only to look at the disparities in valuations within Logan County to reach this conclusion. If we multiply these disparities by the 55 counties, the concept of equal and uniform taxation quickly becomes meaningless.

The parties stipulated below that the total assessed valuations per class in Logan County met the minimum 50 percent ratio required by W.Va.Code § 18-9A- 11. The percentage was 61.56 for Class I property, 59.16 for Class II property, 71.51 for Class III property and 57.99 for Class IV property. These figures do not represent the ratio that any one property owner may have, but merely the aggregate total of all taxpayers with property of a certain category. Thus, as the parties stipulated below, some taxpayers' assessed values exceed the aggregate percentage and others fall below that figure. Consequently, some individual taxpayers are paying higher taxes because their property is valued at a higher percentage "of true and actual value," while their neighbors evade their civic duty.

This is true within a class of property and among the four classes in Logan County. For example, there exists almost a 14 percent difference between the aggregate assessment ratios for Class IV property and Class III property. With such disparity, equal and uniform taxation is an impossibility. Such a difference also violates the prohibition against taxation of property of equal value at a higher rate contained in article 10, section 1 of the state constitution. Class III property is currently valued at 71.51 percent of market value while Class IV property is valued at 57.99 percent. Items of property of the same value, but in different classes are being taxed at different levels because of the differences in classification and prevailing ratios. While Class IV property owners in Logan County may be happy with this system, Class III property owners are being treated inequitably.

The parties differ in their characterization of the aggregate assessment-to-appraisal ratio. The taxpayers contend that these ratios do not represent fractional assessments, but merely reflect a difference of opinion between the assessor and the tax commissioner as to the value of property. The taxpayers acknowledge that state law prohibits application of a percentage to true and actual value to determine the assessment value. W.Va.Code § 18-9A-11; In re Pocahontas Land Corp., 158 W.Va. 229, 210 S.E.2d 641 (1974). Consequently, they argue that the assessor does not consciously value property at a percentage of true value, but assesses at what he believes to be true and actual value. This contention stretches the limits of credibility. See In re United Steel Corp., 165 W.Va. 373, 268 S.E.2d 128 (1980); In re Tax Assessment Against Pocahontas Land Corp., 158 W.Va. 229, 210 S.E.2d 641 (1976), for examples of deliberate assessment at a percentage of appraised value.

The school board makes two arguments. First, it argues that these ratios are fractional assessments which directly violate article 10, section 1 of the state constitution. The school board claims that assessors consciously decide to value property at a fraction of its market value sufficient to meet the requirements of W.Va.Code § 18-9A-11, but less than full value. Alternatively, the school board asserts that the 50-100 percent range in W.Va.Code § 18-9A-11 does not alter the requirements of true and actual value appraisal and assessment found in that statute and in W.Va.Code § 11-3-1. Instead, it interprets the 50 percent figure as a benchmark to determine when county officials have met their statutory obligation to provide public school funding, or to determine when removal of county officials is justified.[19] The school board argues that failure to meet the 50

[19]As the lower court correctly found, fractional assessment has been the practice in this state and such practice violates article 10, section 1 of the West Virginia Constitution. Therefore, the school

percent figure triggers the penalty provisions of [§ 18-9A-11].

The divergent arguments presented in this case represent the historic and continuing battle over property taxation in this state. This struggle has been fought in other states and no doubt will occur elsewhere. West Virginia has long been a state in which real property has been owned or controlled by out-of-state interests. West Virginia historically has had a low tax rate in comparison to other jurisdictions, and property has often escaped taxation through undervaluation.[22] . . .

The leading reduction-in-assessment case is In re Assessment of Kanawha Valley Bank, 144 W.Va. 346, 109 S.E.2d 649 (1959). The bank argued that valuation of its shares at 100 percent of true value violated the constitutional guarantee of equal and uniform taxation because other types of property had been valued at less than full value. In finding that the bank was entitled to a reduced assessment, the Court correctly held that article 10, section 1 . . . requires equality and uniformity both within species of property and among different species of property. Since the facts in this case show that wide disparities exist both within and among types of property, the holding in Kanawha Valley Bank supports the result reached here.

One West Virginia case, however, has departed from the reduction-in-assessment pattern. In Tug Valley Recovery Center, Inc. v. Mingo County Commission, 164 W.Va. 94, 261 S.E.2d 165 (1979), the appellant sought to enforce the public's right to equal and uniform taxation. We recognized in that case that state law provided third parties with standing to challenge the assessment values of property owned by others. We based this decision on the clear rationale that all taxpayers have an interest in the assessed values of other property since undervaluation of some property may lead to an unequal shouldering of the tax burden by others. While the appellant in Tug Valley sought only to raise the assessment of one property owner, it ultimately hoped to have the valuation set at the standard adopted here--market value. ...

We conclude that the percentage ratio scheme contained in W.Va.Code § 18-9A-11 results in fractional assessment which is prohibited by the constitutional requirement of equal and uniform taxation as well as by W.Va.Code § 18-9A-11. As the lower court found, the Legislature has no authority to allow assessors discretion in determining the value of property. Value means the market value of the property. Equal and uniform taxation cannot result when each county assessor can vary assessments up to 50 percent of the appraised value both within and among classes of property. The fact that 55 assessors are granted this authority totally undermines any ability of the tax commissioner to assure equal and uniform taxation. As we have said, enactment of the statewide appraisal requirement reflects the Legislature's determination that uniform property assessment is the only way to assure uniform property taxation. [Pauley].

Achievement of uniform assessment and thereby equal and uniform taxation is a step-by-step

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board's alternative argument is of no consequence to the outcome of this case. Additionally, when county officials comply with the law, the need for a "trigger" percentage becomes pointless.

[22]"At present, there is no uniformity either as between the different counties or as between neighbors in the same village. The Commission has examined into this matter and finds that while in some counties property is assessed at its full market value, yet in others it is rated at one-half and in others again at less than half. The reason is this: the several assessors, whether of land or personalty, knowing that under our present method there is no recognized standard of valuation which is maintained and enforced throughout the state, have each adopted a standard of his own and in adopting his standard of valuation each assessor has endeavored to bring the property of his own county fully as low as the property of any other county; and be it observed, each assessor was unacquainted with the practice in other parts of the state, and merely guessed at the standard of valuation elsewhere. Hence, gross, glaring and notorious inequalities exist." West Virginia Tax Commission, Report 12-13 (1884). . . .

process. Because the law directs that competent appraisers or expert examiners will be appointed by the tax commissioner to value property, the appraisal values are to be considered presumptive evidence of the assessed value. Cf. W.Va.Code § 11-1-2 (Tax commissioner "may appoint competent persons to appraise property values ... and may employ experts to examine and report upon the different kinds and classes of property in the State, with a view to ascertaining the true and actual value thereof for assessment purposes ..."). In this manner, the tax commissioner can make a determination of the market value of property, thus eliminating the ad hoc assessment system now in place by which 55 assessors make individual determinations subject to minimal supervision and oversight. As we noted in Tug Valley Recovery Center, Inc. v. Mingo County Commission, supra, "It is incumbent upon the circuit court, *as it would be upon the county commission and the assessor, to set the assessed value of all parcels of land at the amount established by the State Tax Commissioner*." . . .

The statute itself supports this requirement. W.Va.Code § 18-9A-11 provides that the county officials "shall use such appraised valuations as a basis for determining the true and actual value for assessment purposes ...." This Court adheres to the view that "the use of the word 'shall,' without any modification unquestionably makes the direction therein mandatory." Crusenberry v. Norfolk and Western Railway Co., 155 W.Va. 155, 159, 180 S.E.2d 219, 222 (1971)[.] . . . Similarly, we recognize that the statute uses the term "a basis" in reference to use of the appraisal. Therefore, we interpret this term to mean that county assessors may consult other credible and reliable sources of information, e.g., the property owner's sworn valuation and appraisal by bona fide appraisers, in determining the assessed value. W.Va.Code 11-3- 2, -4, -12; see also In re Shonk Land Co., 157 W.Va. 757, 204 S.E.2d 68 (1974).

The lower court declined to adopt mandatory use of the tax commissioner's appraisal and instead offered to conduct de novo hearings on the question of the taxpayers' property values. The trial judge apparently believed that use of appraisal values would be a denial of due process to these taxpayers. Due process requires procedures by which taxpayers and other interested parties may challenge use of the appraisal values as assessment values if the former are either too high or too low. This can be accomplished by use of the procedures prescribed by W.Va.Code § 11-3-24. Once the assessor sets an assessment value, the taxpayer may appear before the Board of Equalization and Review. W.Va.Code § 11-3-24. The Board may increase or decrease assessments to achieve "true and actual value." Id. If the taxpayer or other party still is unsatisfied, an appeal may be taken to the circuit court. W.Va.Code § 11-3-25, Tug Valley Recovery Center, Inc. v. Mingo County Commission, supra. The circuit court shall "correct the assessment, and fix the property at its true and actual value" if it determines an incorrect assessment has been made. [§ 11-3-25].

Use of the tax commissioner's appraisal is premised in part on the need for assessment uniformity in both methodology and result. Therefore, the tax commissioner's appraisal should be presumed to be correct and the assessed value should correspond to the appraisal value in the usual case. An objection to any assessment value may be sustained only upon the presentation of competent evidence, such as that equivalent to testimony of qualified appraisers, that the property has been under- or over-appraised by the tax commissioner and wrongly assessed by the assessor. The objecting party, whether it be the taxpayer, the tax commissioner or another third party, must show by a preponderance of competent evidence that the assessment is incorrect.

To maintain the integrity of the appraisal system, it is incumbent upon the county assessor and county commissioners to inform the tax commissioner of all challenges made to assessment values based on claims of under- or over-appraisal by the tax commissioner. The tax commissioner has a supervisory duty over both the county assessor and the county commissioners to establish assessments. It is the tax commissioner's duty to ensure that assessment occurs at market value. The tax commissioner must see that county officials are complying with the constitutional and statutory requirements of full value assessment. W.Va.Const. art. 10, § 1, W.Va.Code §§ 11-3-1, 18-9A- 11. We note that W.Va.Code § 18-9A-11 gives the tax commissioner authority to set "the assessments

at the required ratios [100 percent]" in a county. Thus, we recognize that the tax commissioner has the authority and duty to correct assessments in a county where local officials are unable or unwilling to comply with the law.

We wish to dispose of one final contention made by the taxpayers. They argue that the constitutional phrase "equal and uniform taxation throughout the State" does not mean what it says. They interpret this phrase to require only uniformity of methodology in determining value within a county. As already demonstrated, the existing "uniformity" of methodology has not, and cannot result in uniform taxation, either within a county or within this state. Since [Art. 10, § 1] of the West Virginia Constitution requires equal and uniform taxation in all areas of the state, both the method and the result of taxation are essential to compliance with the constitution.

The parties contest the propriety of applying our decision to the assessments made July 1, 1980, which are at issue here. The taxpayers argue that this would be retroactive application. We disagree. The issue being litigated in this proceeding is the legality of the 1980 assessments. Retroactive application would mean alteration of assessments made prior to the 1980 tax year.

We realize, however, that the valuation-levying cycle based on the 1980 assessments is well under way. In fact, taxpayers should have made their final installment payments on those assessments this past March. Additionally, the valuation- levying cycle for the 1981 assessment year is almost half complete. Taxes based on those assessments are due this September and next March. Therefore, the assessments already made in 1980 and in 1981 and the levy rates based on those assessments are to remain in force, provided they are otherwise lawful. This approach is in accord with the decisions of other jurisdictions which have held that full value assessments are required. ... Therefore, we hold that it is the duty of all county assessors to comply with the law. It is the duty of the tax commissioner to proceed with all deliberate speed to develop an up-to-date appraisal for each assessment year for all the 55 counties. The tax commissioner has a duty to appoint the necessary special assessors and appraisers to accomplish this end. [§ 18-9A-11.]

This Court is not unmindful that this decision may result in increased taxes to some, particularly those who have not paid their fair share in the past. However, if governmental expenditures remain the same, it should lower the taxes paid by other property owners.[29] Individuals whose property has been undervalued to any great extent face the greatest likelihood of increased taxes. Those whose property has been valued at or near its market value will benefit because others will be taxed on the same ratio of full value--100 percent. The tax commissioner has calculated that almost 40 percent of the value of taxable property in West Virginia escaped taxation in 1980. H. Rose, Study of Property Valuations As They Relate To Levies Laid For The Support Of Schools In West Virginia For The Tax Year 1981 at VI (Dec. 1, 1981). This results in a disproportionate levy on the remaining 60 percent of value. Thus, with full valuation of property, the local levying bodies should be able to reduce the applicable levy rates.

During the argument of this case, there was much discussion respecting who is ultimately responsible for establishment of property tax rates. Clearly, the Legislature has the duty and responsibility to levy taxes. W.Va.Const. art. 10. The Legislature has authorized local levying

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[29]For example, assume that the need for revenue remains static. Thus, a property owner whose property was valued at 70 percent of full value will pay more taxes when assessment becomes 100 percent of market value and the levy rate remains the same. Assume the levy rate was $2 per hundred dollars valuation. If the assessed valuations county-wide increase 40 percent, then the levy rate may be cut by an appropriate amount. Depending on the levy reduction, the property owner may pay less tax than before. Of course, the property owner whose property has been valued higher than the prevailing percentage is more likely to benefit than the person whose property has been under-valued substantially. This is simply because the latter group has further to go to bear its fair share of taxes.

bodies to establish levy rates within constitutional and statutory limits. W.Va.Const. art. 10, § 1; W.Va.Code §§ 11-8-1 to -33. It is just as clear that county assessors are not involved in the process by which a levy rate is established and approved. The assessors mechanically apply the approved levy rates to the total assessed values of the county to determine the amount of tax owed. This duty is ministerial in nature. In re National Bank, 137 W.Va. 673, 73 S.E.2d 655 (1952), citing, State ex rel. Hallanan v. Rocke, 91 W.Va. 423, 113 S.E. 647 (1922). Assessed valuations are independent of the levy rate process. Since assessments are calculated prior to establishment of the levy rate, no assessor knows what the exact levy rate will be. Conversely, the levy rate is tied directly to the assessment, in that the levy rate is properly determined by calculating the amount of revenue needed to finance government operations given the total assessed valuation. W.Va.Code § 11-8-3. As charged by the Legislature, it is the responsibility of these elected officials, ultimately responsible to the electorate, to decide whether the levy rate and property taxes increase, decrease, or remain at current levels. The levying bodies may never need to levy at 100 percent of their lawful capacity. It is their duty to set the levy rate and to determine the property tax paid by each taxpayer.

Given these relative duties and responsibilities of the assessors and the levy bodies, all prescribed by the Legislature, it is appropriate here to comment generally on the state-county relationship. Although the office of assessor is created by the constitution, the assessor's duties are prescribed by the Legislature. State ex rel. Hallanan v. Rocke, 91 W.Va. 423, 113 S.E. 647 (1922). For example, the Legislature has prescribed how the assessor is to value property, [§ 11-3-2], when he is to value it, id., and how he is to use the valuation. [§ 11-3-19]. The Legislature has given the state tax commissioner general supervisory and enforcement authority over assessors concerning establishment of those values. [§§ 11-1-2; 11- 3-1; 18-9A-11]. In other words, the assessor is answerable not only to the county commission, but also to the state in the person of the tax commissioner. ...

For the foregoing reasons, we hold that W.Va.Code § 18-9A-11 violates article 10, section 1 of the West Virginia Constitution. In answer to the certified question, we hold that W.Va.Code § 18-9A-11, "insofar as it provides that the total assessed valuation in each of the four (4) classes of property shall not be less than fifty percent (50%) nor more than one hundred percent (100%) of the Tax Commissioner's appraised valuation of each of said classes of property," violates the constitutional guarantee of equal and uniform taxation. A fraction does not equal a whole. Fifty percent does not equal 100 percent.

The state tax commissioner has a duty to do as the Legislature has instructed and his appraisals are to be considered presumptive evidence of property's "true and actual value." However, "any person claiming to be aggrieved" -- property owners, the tax commissioner, other taxpayers, or public officials -- may challenge any assessment under the procedures set forth in W.Va.Code § 11-3-24. The assessor, the Board of Equalization and Review, or the circuit court may reduce or increase assessment values, provided that a preponderance of competent evidence shows that the commissioner's appraisal values do not represent "true and actual value." The certified question is answered in the affirmative. . . .

NEELY, Justice, dissenting:

I respectfully dissent from the majority's opinion. I believe that the analysis of my brothers is technically flawed and, in large part, disingenuous, and that their decision is unnecessary and fundamentally wrong. I

The words of Article X, § 1 of the West Virginia Constitution do not mandate or even imply the result in this case. The majority has focused in syllabus point 3 on the word "value," taken out of its context. The context in which the word "value" is found is as follows: "... taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law.". . . Constitution's command is that

taxation be in proportion to value, and the current taxing system obeys that command. If the drafters of our Constitution had intended today's result, they could have required that property "shall be taxed at its value to be ascertained by law."

It should be obvious that the expression "in proportion to value" has a very different meaning from the word "value" alone, and in the past, this difference has not escaped us. In numerous cases we have required that taxation be equal and uniform in the sense that the tax paid by each taxpayer must be in the same proportion to the value of his property as the taxes paid by similarly situated taxpayers are to the value of their property. See, In re United States Steel Corp., 165 W.Va. 373, 268 S.E.2d 128 (1980); In re Assessment against Pocahontas Land Corp., 158 W.Va. 229, 210 S.E.2d 641 (1976); In re Assessment of Kanawha Valley Bank, 144 W.Va. 346, 109 S.E.2d 649 (1959).

I have no quarrel with the majority's definition of the term "value" and the exhaustive authority they marshal to support it. The majority can define value until they are blue in the face and still not escape the fact that the Constitution requires only that property be taxed in proportion to even admittedly full and fair value.

Furthermore, there is nothing in the phrasing of the Constitution to indicate that the dependent clause, "to be ascertained as directed by law," is intended to modify "value" alone. The clause could equally operate to mean that the proportion to value is to be ascertained by law. Indeed the West Virginia Code appears to give this provision such a reading: the law directs that the proportion to value be ascertained at "not less than fifty percent nor more than one hundred percent of the appraised valuation of each said class of property: Provided, however, that beginning July one, one thousand nine hundred eighty-one, the total assessed valuation in each of the four classes of property shall not be less than sixty percent of the appraised valuation of each said class of property." W.Va.Code, 18-9A-11(f). ...

II

Courts are not infallible in their readings of statutory or constitutional language, but it is unfortunate when such an error is made by a court of final appeal. In this case the tragedy is that by insisting on applying their erroneous reading the majority has improperly intruded into the province of the legislature. The issue of taxation is, probably more than any other subject, first and last an issue for the legislature. It is the classic political question into which courts should not intrude themselves. . . .

III

There is little more to law than its application, and its application is determined by institutions. The value of stare decisis is not only that it protects reliance interests, but also that the doctrine helps provide a stable environment in which the institutions which apply laws can grow and change gradually. A successful analogy can be made to the situation in which an oyster finds himself when a piece of sand enters his shell. He cannot dislodge it, so he accommodates himself to it by encasing it in pearl. Similarly, law, even bad law, is made livable and useful by institutional coatings. Shattering the pearl in order to remove the speck of sand would be a foolish tactic, yet that is exactly what this Court has done.

The ramifications of this decision are many. First and foremost, we have today raised taxes. The majority opinion observes that "the framers of the United States Constitution recognized the fundamental requirement of representative taxation in the organic law of the country when they gave sole authority to lay and collect taxes to Congress. U.S.Const., art. 1, § 8. Similarly, the West Virginia Constitution vests in the legislature the power to impose taxes." However, by requiring that property be assessed at its full appraised value, the Supreme Court of Appeals has raised property tax bills by an average of over 60%. . . .

IV

Property taxes are among the most regressive taxes available to a sovereign. They look to the value of one's property, not to one's ability to pay. Thus a working-class West Virginian might save

and struggle all his life so that from the age of fifty on he and his family can enjoy a house worth $150,000, while a dentist fresh from the West Virginia University Dental School might purchase such a house at the age of 27. While both the ordinary worker and the dentist have property of equal value, they assuredly have differing capacities to pay a property tax. Where the lion's share of a political subdivision's revenue comes from taxation of property, the worker making $25,000 a year bears the same tax burden as the dentist making $95,000 a year.

Considerations going to the regressive nature of property taxes in general have led West Virginia to select other taxes of a less regressive nature whenever needs for more revenue have appeared in recent years. The Constitution has been amended in order to fix maximum rates for ad valorem property taxes, thereby all but eliminating the property tax as a source of revenue for state government.[4] W.Va.Const., Art. X, § 1 (adopted by amendment in 1932). Revenue demands have been met by enacting various alternative tax measures, including the business and occupation tax and the consumer sales tax in 1933, the cigarette tax in 1947, the soft drink tax in 1951, the personal income tax in 1961, and the carrier income tax and corporation net income tax in 1967. Although some of these taxes are more progressive than others, all are substantially more progressive than the property tax. Income taxes are, of course, by definition progressive. The business and occupation tax is at least levied on the basis of volume of business, if not on profitability. The consumption, or value-added taxes are progressive in the sense that they tax a transaction from which, particularly in the case of luxury or unnecessary items, citizens may abstain.

The State of West Virginia funds with these taxes a uniquely high proportion of county school costs. The policies inherent in the property tax limitation amendment have led the State practically to take over the financial support of county schools. The majority writing in Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859 (1979) made the observation:

> The Legislature almost forty years ago recognized that: "Because of the adoption of the 'Tax Limitation Amendment', it has become necessary for the State to participate to an increasing degree in the financing of the free public schools." ... It passed what is now W.Va.Code, 18-9B-1, et seq., creating the State Board of School Finance and giving it a variety of administrative and budgetary powers over county boards of education. [Id.]

This is a good example of the oyster and pearl phenomenon. In order to mitigate the effects of regressive taxation the property tax limitation amendment was added to the State Constitution. This forced the State to fund the lion's share of county education through its more progressive taxes. The elaborate provisions of Articles 9, 9A and 9B of Section 18 of the West Virginia Code created an entire bureaucracy to permit and oversee the transfer of State funds received from other sources than the property tax to county schools in order to finance the bulk of county school expenses with revenues not derived from the regressive property tax.

Now it appears that this long and arduous legislative effort is for naught. The Court has permitted the Logan County Board of Education a judicial end run around this legislative bulwark, and handed over to it the fruits of a regressive tax which the bulwark was deliberately erected to protect.

This legislative protection of West Virginia's citizens from the regressive property tax is not limited to school finance. In 1972 the Federal Grants and County and Municipal Aid Amendment to the West Virginia Constitution was proposed and ratified. W.Va.Const., Art. X, § 6a. This amendment provided that state taxes could be imposed or dedicated "for the benefit of and use by counties, municipalities and other political subdivisions of the State for public purposes." Id. This

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[4]Currently, 99 1/2 percent of property tax revenue remains in the counties. Study of Property Valuations, supra, p. ii. This revenue is insufficient to fund the counties, however, so the property tax limitation amendment in effect requires vast transfusions of state revenue to the counties. It operates not as a limitation on county revenue, but as a limitation on the amount of revenue a county is permitted to receive from the regressive property tax.

amendment allowed the State to funnel revenue from more progressive taxes to the counties, thereby limiting the regressive tax burden on West Virginia's citizens. Today's decision thus violates a clear legislative policy disfavoring regressive taxes.

V

The majority opinion speaks darkly of "out-of-state interests" who own the land. However, most land in West Virginia is held by West Virginia residents or businesses. Evidence has been presented before the Court in this case that the small, individual landowner bears a disproportionate weight of the tax burden in West Virginia because of inequitable appraisals by the State Tax Commissioner himself resulting from delays in the state-wide reappraisal demanded by the legislature. Enforcement of the one hundred percent assessment by the same official will therefore only serve to increase the disproportionality of the tax burden.

The majority should have considered that for every coal company that underpaid its taxes, there will be countless retired couples (the favorable exemptions going to the very poor notwithstanding) who will either lose their homes because they cannot pay the court's new tax, or will otherwise be required to live in penury during their declining years because this Court has imposed upon them an unconscionable, regressive tax that would never have been countenanced by their elected officials. Finally, since the commissioner of commerce is constantly soliciting bigger and better "out-of-state interests" to come to West Virginia to open factories and mines, it appears that out-of-state interests are not entirely pernicious. . . .

VII

Article IX, § 1 of our Constitution directs that "the voters of each county shall elect ... one and not more than two assessors, who shall hold their respective offices for the term of four years." The inescapable implication of the Constitutional requirement that assessors be elected is that they are expected to be, in some sense, representative. The majority decision postulates vigorously the principles that there should be no taxation without representation, and that the representatives of the people must impose the taxes the people are to pay. This artful rhetorical smoke cannot obscure the actual effect of their decision. The elected office of the assessor has been emasculated, and the assessors have been made the minions of an appointed central taxing authority.

Such an interference with the political balance is inexplicable on the basis of true and uniform valuation requirements. If we are to have to live with the majority's construction of the Constitutional valuation requirement, it would still have been possible, from a mechanical point of view, to have enjoined the local assessors to assess property at its "true and actual value," leaving to the Tax Commissioner only the overall supervisory powers currently attendant on that office. It is unnecessary to mandate that the commissioner's appraisal be the standard. In a matter as changing and complex as the calculation of property tax, the simplistic conclusion that the appraisal equals the fair market value will be accurate only coincidentally.

The practice of allowing local assessors to establish the property tax value, subject to the legislative requirement that their assessments total no less than fifty percent (now sixty percent) of the commissioner's appraisal, has long been accepted in West Virginia. The majority questions whether the elected assessors should set the proportion of taxes by the assessment percentage or the levying body should do so through levy rates, and concludes that the "proportion to value" should be determined by the levying body. There is no cogent authority for that proposition to outweigh the force of a long-established custom based on political practicality, particularly in light of the rigidity of those levy rates, discussed supra.

The custom of permitting elected assessors to establish the relationship between value and assessment has become an integral part of the taxation process, allowing for local relief from the State Tax Commissioner's appraisals on a large scale and without the expense and nuisance of having to resort to court on a case by case basis. Courts can now expect a deluge of litigation; given the small staff of the tax commissioner and that staff's unfamiliarity with property in the fifty-five counties, I should think the commissioner's evaluations are hardly precise.

There is a final irony to the majority's ill-advised and destructive foray into the realm of tax assessments. This catastrophic endeavor was undertaken to ensure that "taxation shall be equal and uniform throughout the State" W.Va.Const., Art. X, § 1, and yet the decision does not require that any county levy (through the county commission) at exactly the same rate as other counties. "... blind guides, which strain at a gnat, and swallow a camel." Matthew 23:24.

MILLER, Chief Justice, concurring:

While I concur with the majority opinion, it seems to me that some clarification might be added to it, particularly in light of the dissenting opinion.

First, it cannot be doubted, and the parties to this litigation do not assert otherwise, that we are confronted with two statutes that contain irreconcilable language. The first is W.Va.Code, 11-3-1, which provides in material part:

> "All property shall be assessed annually as of the first day of July at its true and actual value; that is to say, at the price for which such property would sell if voluntarily offered for sale by the owner thereof, ..."

The second statute is W.Va.Code, 18-9A-11, which, in relevant part, states:

> "The tax commissioner shall make or cause to be made an appraisal in the several counties of the State of all non-utility real property and of all non-utility personal property which shall be based upon true and actual value as set forth in article three [§ 11-3-1 et seq.], chapter eleven of this Code. * * *
>
> "[A]fter such appraisal is so delivered and received, the county assessor and the county court, sitting as a board of equalization and review, shall use such appraised valuations as a basis for determining the true and actual value for assessment purposes of the several classes of property. The total assessed valuation in each of the four classes of property shall not be less than fifty percent nor more than one hundred percent of the appraised valuation of each said class of property."

The clear import of W.Va.Code, 18-9A-11, is that while the tax commissioner shall make appraisals of real and personal property "based upon true and actual value," the local assessors are empowered to set the local assessments between fifty and one hundred percent of the true and actual value appraisements made by the State tax commissioner. However, the fifty to one hundred percent assessment setting authorized by W.Va.Code, 18-9A-11, obviously conflicts with the plain requirement of W.Va.Code, 11-3-1, which requires assessors to assess "at its true and actual value." An assessor who is required by W.Va.Code, 11-3-1, to assess at "true and actual value" can hardly square this duty with W.Va.Code, 18-9A-11, which enables him to assess at fifty percent of the true and actual value.

The majority resolves this conflict between these two statutes by looking to the provisions of Section 1 of Article X of the West Virginia Constitution to determine the meaning of the phrase "all property both real and personal shall be taxed in proportion to its value." There can be no doubt that under our real and personal property tax statutes, as is common elsewhere, the assessor's value or what is commonly called the "assessed value" of property is what is entered on the property books. It is against this value that the applicable tax or levy rate is calculated. These tax rates are set out in W.Va.Code, 11- 8-1, et seq., which allocates them to the various local governmental entities.

The dissent proceeds on a misconception that our constitutional phrase which reads "and all property ... shall be *taxed* in proportion to its value" should be read to mean that "all property ... shall be *assessed* in proportion to its value." (Emphasis added) Obviously, there is a total difference in meaning between the word "taxed" and the word "assessed." As previously indicated, "taxed" refers to the amount of the levy rate and this is expressed throughout W.Va.Code, 11-8-1, et seq., as so many cents "on each one hundred dollars" of assessed value. W.Va.Code, 11-8-6. Thus, the dissent, by substituting the word "assessed" for the word "taxed" in Section 1 of Article X, avoids discussing

the real issue in the case--which is the meaning of the word "value."

As the majority opinion demonstrates, our constitutional phrase "taxed in proportion to its value" is found in other state constitutions. Courts that have had occasion to construe this phrase have rather uniformly determined that the term "value," standing alone, is deemed to mean fair market value or actual value or some other equivalency....

Finally, I must take exception to the dissent's characterization of this case as a "political question" and that somehow we should have avoided deciding this case. The dissent overlooks the fact that the case had already been decided by the Circuit Court of Logan County. We occupy the position of being the final arbiter of our State's law. We would do no credit to our office and our oath if we avoid complex or controversial cases by refusing to decide them under the guise of calling them "political issues." To make such an assertion is to ignore all of the tax cases that have been decided by this Court in the past.

Surely, the test of whether a given opinion is correct cannot be based on whether it will gain popular acceptance by all who will feel its impact. If this were the yardstick, no court would hold any tax measure proper. Reference need only be made to Bee v. Huntington, 114 W.Va. 40, 171 S.E. 539 (1933), to find the true measure for a court. There, this Court was confronted with the then recent amendment to Section 1 of Article X of our Constitution, which had set the maximum tax or levy rates that could be charged against the various classes of real and personal property. The practical effect of this amendment was to seriously curtail the amount of property tax revenues that had been formerly available to local governmental bodies.

The Legislature, in response to the outcry for more funds by the local governmental units, had enacted a statute to permit the local levying bodies to exceed the constitutional maximum levy rates by utilizing "additional levies 'to meet current requirements of now-existing indebtedness.'" 114 W.Va. at 43, 171 S.E. at 451. This Court held the statute to be unconstitutional. Justice Kenna in his concurring opinion acknowledged the difficult choice that faced the Court in these words:

> "I concur in the majority opinion. In doing so, I have a full appreciation of the very serious nature of the difficulty involved and of the far-reaching consequences with which the question is fraught. On the one hand, it is urged that we are faced by the probability of a breakdown of local government in a large number of the taxing units throughout the state through lack of money realized from taxation to provide for their essential functions, and, on the other, that the sovereign will of the people, expressed by them in the very instrument to which these taxing units owe their existence, will be thwarted in a matter of vital importance." 114 W.Va. at 50, 171 S.E. at 544.

I am sure Justice Kenna and the other members of that Court would have been comforted to learn from today's dissent that they could have avoided the entire issue as a "political question."

NOTES

[Parts of Notes 2-5 are extracted from portions of ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 286-88 (2nd ed., Oxford University Press, 2016).]

1. *Killen* provoked an immediate popular (or, rather, unpopular) and legislative response that led to passage of "The Property Tax Limitation and Homestead Amendment of 1982," which fixed assessments at 60% of actual value, unless the Legislature by two-thirds vote in each house sets a higher rate. *See* Art. X, § 1b(A).

2. The Tax Limitation Amendment of 1932, amending Article X, § 1, imposed substantial caps on property taxes, ranging between four classes of property (personalty, residential and agricultural, other property outside municipalities, other property inside municipalities) from $.50 on each hundred dollars of value for Class I property to $1.00 for Class II, $1.50 for Class III, and $2.00 for

Class IV. These limits apply in the aggregate, to all *ad valorem* taxes set by all levying bodies within the tax district. They may be exceeded but only by fifty percent, or one-hundred percent for school district levies, and only when approved by sixty percent of the voters, or fifty percent for school district levies, and only for a maximum of five years at a time, or three years for statewide levies. Article X, §§ 1, 10-11. So, statewide excess levies under § 1 must be approved by sixty percent of the voters and may be imposed only for a period of three years. Article X, §§ 10 and 11 allow school district, county, and municipal excess levies to extend for up to five years, and § 10 permits school excess levies upon approval by a simple majority. County and city excess levies must still meet the 60% level. State taxes on property may not exceed one cent on one hundred dollars of value. *But see* §1b(E) (state may impose statewide levy to support schools). Section 1's supermajority of qualified voters required by the Amendment for excess levies means 60% of the votes actually cast, *Warden v. County Court* (1935), and it has been upheld against a federal constitutional challenge that it violates the one-person-one-vote principle. *Gordon v. Lance*, 403 U.S. 1 (1971).

Although user fees are not included as part of the basis for calculating whether § 1's caps have been exceeded, fees assessed for government services can be included if they are predicated on the value of property. Thus, *City of Fairmont v. Pitrolo Pontiac-Cadillac* (1983) and *Hare v. City of Wheeling* (1982) held that where a city's police or fire service charge was based upon the value of property as fixed by the assessor, it was an *ad valorem* tax upon property, and if property in the city was already taxed to the maximum permitted by § 1, the ordinance imposing the charge was void. On the other hand, the Supreme Court upheld a municipal service fee used to pay for fire and flood protection imposed on building owners based upon an annual rate plus a percentage based upon the square footage of the structures. *City of Huntington v. Bacon*, 196 W. Va. 457, 473 S.E.2d 743 (1996).

3. Under § 1, to the extent that any property in a class is subjected to taxation, then all property within the class must be taxed equally. Exemptions to taxation are the exception to the rule and must be strictly construed. The test for § 1's exemption of property "used for educational, literary, scientific, religious or charitable purposes" is the physical "use" of the property, and the purpose claimed to support an exemption must be primary and immediate, not secondary and remote. *Central Realty Co. v. Martin* (1944). If property is owned by a charitable organization, but is leased out for private purposes, it is not exempt, even if the rental income is applied to charitable purposes. Thus, in *Central Realty*, the Court disallowed an exemption for a hotel owned by the Odd Fellows, who had leased the hotel and applied all its net proceeds to operation of the Odd Fellows Home, a charitable institution. In an unusual exemption case, *State ex rel. Cook v. Rose* (1982), a circuit judge and a probation officer, after a number of failed attempts to get indigent, troubled juveniles admitted to hospital psychiatric units, sought a writ of mandamus to compel the State Tax Commissioner to promulgate guidelines for determining the charitable tax-exempt status of hospitals. The Court granted the writ, ordered the Commissioner to issue and enforce "specific and clear" guidelines, and stated that "the constitutional standard for defining hospitals used for charitable purposes requires provision of free and below-cost services to those unable to pay."

"Property used" modifies only the language, "for educational, literary, scientific, religious, or charitable purposes," and does not affect the exemptions for cemeteries and public property. Accordingly, such property may be exempted without regard to its use. In *State ex rel. County Court v. Demus* (1964), for example, the Supreme Court concluded that where a county proposed to sell revenue bonds to buy real and personal property to be leased to a private industrial plant, that property would be exempt from taxation for as long as the county owned it. *In re Hillcrest Memorial Gardens, Inc.* (1961), however, held that while the cemetery exemption embraced a privately owned and operated cemetery, it did not include the corporation's office furniture or equipment. Rather, it applied only to the plots, walks, grounds, shrubbery, and ornaments necessary

for the use of the cemetery. Similarly, a commercial and administrative building located on a for-profit cemetery is not exempt. *In re Northview Services, Inc.* (1990).

See also Article X, §§ 1a, 1b, and 1c, which create additional exemptions.

4. The 1872 Convention inserted in § 1 an authorization to the Legislature "to tax, by uniform and equal laws, all privileges and franchises of persons and corporations." The Tax Limitation Amendment of 1932 repeated that grant of power but deleted the "uniform and equal" restriction. The Equal and Uniform Clause in the first sentence of § 1 does not apply to such taxes but applies only to property within a class. The Amendment also authorized the Legislature to tax personal and corporate incomes, to classify and graduate income taxes, and to exempt incomes below a minimum to be set by the Legislature.

5. Voters in 2014 approved a constitutional amendment, The Nonprofit Youth Organization Revenue Exemption, and added it as Article X, § 12. The amendment basically permits the Boy Scouts to lease out facilities at its 10,600 acre reserve in Fayette County yet retain its nonprofit – and tax-free – status.

6. The Court recently addressed the validity under the Equal and Uniform Clause of a State Tax Department policy concerning the calculation of property taxes on gas wells. *Steager v. Consol Energy, Inc.*, ___ W. Va. ___, 832 S.E.2d 135 (2019). The Department used a formula that, essentially, started with a well's gross receipts and deducted from it the well's "operating expense" figure, which was set as a percentage of the gross receipts subject to a fixed cap on the deduction. Thus, for tax year 2016, the operating expense for conventional wells was set at 30% of receipts with a cap at $5,000, and for Marcellus wells the figures were 20% and $150,000, respectively. Both the caps and the percentages reflected the average for the industry. The Court had little difficulty in rejecting the Department's position that the cap and the percentage were "merely two expressions of 'the same' average figure." Speaking for the Court, Justice Workman explained the obvious: "using a percentage operating expense deduction creates a variable number – variable depending on the amount of the gross receipts to which it is applied. The static 'cap' is not variable and therefore does not maintain a pro rata relationship to the gross receipts as the percentage. They are mathematically not 'the same.'" Consequently, the Court concluded that the Department's formula violated both the Equal and Uniform Clause as well as the rational basis test under equal protection doctrine.

B. State Borrowing and Lending

WINKLER V. STATE SCHOOL BUILDING AUTHORITY, 189 W.Va. 748, 434 S.E.2d 420 (1993).

MILLER, Justice:

The question that we are asked to decide on this appeal is whether the Circuit Court of Kanawha County was in error when it held in its July 9, 1993 order that the Capital Improvement and Revenue and Refunding Bonds, Series 1993, issued by the appellant, State of West Virginia School Building Authority (SBA) in the amount of $338,145,000, were invalid as violating Sections 4 and 6 of Article X of the Constitution of West Virginia. These constitutional provisions restrict the ability of the State to issue bonds that draw upon the State's general revenue funds.

I.

The appellants are the SBA and the United National Bank (Bank). The Bank is the Trustee under a certain Trust Indenture between it and the SBA dated January 1, 1990, which is part of the bond

financing arrangements. The appellees are two citizens and taxpayers who sought a declaratory judgment with attendant injunctive relief against the SBA on June 16, 1993, in the Circuit Court of Kanawha County. Their claim was that the 1993 Series revenue bonds about to be issued pursuant to W.Va.Code, 18-9D-1, et seq., were unconstitutional because issuance of the bonds violated the provisions of Sections 4 and 6 of Article X of the West Virginia Constitution prohibiting state debt.

On June 21, 1993, the circuit court granted the Bank the right to intervene in this case. After several hearings were held, the circuit court, by order entered July 9, 1993, held that issuance of the bonds was unconstitutional, and therefore enjoined the SBA from issuing the bonds. . . .

There is no question that the challenged bonds were authorized by the SBA under the provisions of W.Va.Code, 18-9D-1, et seq. The general outline of that article, with regard to the bond arrangement, is as follows. Under Section 4, the SBA may issue revenue bonds under the guidelines set out in that section. Pursuant to Section 6, a building capital improvement fund is "created in the state treasury." This same section authorizes the SBA to pledge this fund to liquidate the revenue bonds. Section 8 provides further directions as to the issuance of the bonds, the trust indenture agreement, and the pledge of funds to liquidate the bonds. Section 12 spells out in more detail the trust agreement for the benefit of the bondholders. Section 13 mandates that a sinking fund be created in the State Treasurer's office in order to liquidate the bonds. Finally, under Section 14, this statement is made:

> "No provisions of this article shall be construed to authorize the school building authority at any time or in any manner to pledge the credit or taxing power of the state, nor shall any of the obligations or debts created by the school building authority under the authority herein granted be deemed to be obligations of the state."

It is Section 14, together with the disclaimer on the face of the bonds and language in the trust agreement, that causes the appellants to claim that the bonds are neither legal obligations of the State nor of the SBA, and therefore, that the bonds do not constitute a debt obligation of the State under Sections 4 and 6 of Article X of the West Virginia Constitution. The relevant proposed bond language is as follows:

> "The Series 1993 Bonds are limited obligations of the Authority payable solely from the Trust Estate pledged under the Indenture. The Authority may not at any time or in any manner pledge the credit or taxing power of the State, nor shall any of the obligations or debts created by the Authority under the Indenture be deemed to be obligations of the State.
>
> "The Series 1993 Bonds are being issued on a parity with the lien of certain outstanding bonds of the Authority on amounts on deposit in the Revenue Fund. All Bonds issued under the Indenture are secured by a pledge of moneys appropriated by the West Virginia State Legislature and transferred to United National Bank, as the trustee, for deposit in the Revenue Fund established under the Indenture. AMOUNTS AVAILABLE TO BE TRANSFERRED TO THE TRUSTEE FOR DEPOSIT IN THE REVENUE FUND ARE SUBJECT TO ANNUAL APPROPRIATION BY THE STATE LEGISLATURE. THE STATE LEGISLATURE IS NOT LEGALLY OBLIGATED TO MAKE APPROPRIATIONS IN AMOUNTS SUFFICIENT TO PAY DEBT SERVICE ON THE BONDS."

The applicable language in the trust agreement relied upon by the appellants is:

> "All Bonds issued under the Indenture, including the Series 1993 Bonds, are secured by a pledge of Revenues. 'Revenues' means (i) any moneys appropriated by the State Legislature, deposited in the Building Fund and transferred to the Trustee in conformance with the Constitution and laws of the state and (ii) any other moneys, income or property pledged by the Authority to the payment of Bonds.
>
> "Moneys appropriated by the Legislature and transferred to the Trustee are currently the sole source of Revenues. AMOUNTS AVAILABLE TO BE TRANSFERRED TO THE TRUSTEE ARE SUBJECT TO ANNUAL APPROPRIATION BY THE LEGISLATURE. THE STATE LEGISLATURE IS NOT LEGALLY OBLIGATED TO MAKE APPROPRIATIONS IN AMOUNTS SUFFICIENT TO PAY DEBT SERVICE ON THE BONDS."

Before addressing the merits of the particular bond issue in this case, it is useful to review some of our prior cases analyzing Sections 4 and 6 of Article X of the West Virginia Constitution.

II.

A.

. . . The appellees appear to suggest that the Thorough and Efficient Education Clause can validate revenue bonds that are authorized by the Legislature, but are found to be unconstitutional under Sections 4 and 6 of Article X of our Constitution. We cannot agree with such an assertion because the generality of the Thorough and Efficient Education Clause in Section 1 of Article XII of our Constitution cannot override the more specific provisions on state debt limitation contained in Sections 4 and 6 of Article X. We pointed out in State ex rel. Brotherton v. Blankenship, 157 W.Va. 100, 108, 207 S.E.2d 421, 427 (1973), that: "Questions of constitutional construction are in the main governed by the same general rules as those applied in statutory construction." (Citation omitted). See also State ex rel. City of Princeton v. Buckner, 180 W.Va. 457, 461-62, 377 S.E.2d 139, 143 (1988).

We have frequently utilized the rule of statutory construction set out in Syllabus Point 1 of UMWA by Trumka v. Kingdon, 174 W.Va. 330, 325 S.E.2d 120 (1984):

> "The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." . . .

B.

We begin our legal discussion regarding the validity of these school revenue bonds by noting that there is a category of bonds that override the specific limitations contained in Sections 4 and 6 of Article X. They are bonds that the Legislature issues after following the procedures contained in Section 2 of Article XIV of our Constitution relating to constitutional amendments. Under the amendment procedure, a majority of qualified voters voting on the issue must approve the issuance of the bonds.

Bonds issued pursuant to a constitutional amendment override the more general bond limit restrictions because they were approved by the voters for the specific purposes contained in the amendment. Thus, under our traditional rules of constitutional construction, these bonds supersede the general bond limitations. See State ex rel. Brotherton v. Blankenship, supra; State ex rel. City of Princeton v. Buckner, supra. The bonds in this case do not fall into the category of bonds approved by constitutional amendment.[10]

C.

The two constitutional provisions at issue in this case, Sections 4 and 6 of Article X, have been interpreted by this Court to serve the common purpose of restricting the Legislature's ability to create long-term debt. These provisions are often cited together in the same case; however, each provision serves a separate purpose. The restrictions contained in Section 4 of Article X deal with the creation of long-term debt by the State or its agencies through revenue bonds or other similar obligations by way of legislative enactments. See State ex rel. Board of Governors of West Virginia University v. O'Brien, 142 W.Va. 88, 97, 94 S.E.2d 446, 451 (1956). Moreover, in State ex rel.

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[10]Another limitation on the restrictions under Section 6 of Article X, which limits the State's extension of credit or money to municipalities, counties, or other political subdivisions, is found in Section 6a of Article X. This article permits the State (1) to appropriate state funds for federal matching funds, and (2) to dedicate a state tax, or a portion thereof, to the benefit and use of municipalities, counties, or other political subdivisions. The amendment was adopted in 1972. We addressed some aspects of this amendment in State ex rel. Boards of Education v. Chafin, 180 W.Va. 219, 376 S.E.2d 113 (1988), and State ex rel. Kanawha County Building Commission v. Paterno, 160 W.Va. 195, 233 S.E.2d 332 (1977). Section 6a of Article X is not asserted in this case.

County Court of Marion County v. Demus, 148 W.Va. 398, 409, 135 S.E.2d 352, 359 (1964), we compared the purpose of Section 6 of Article X with Section 4, noting: "Section 4 of Article X of the Constitution imposes upon the state limitations with respect to indebtedness similar to those imposed upon counties and cities by Article X, Section 6 of the Constitution[.]" Indeed, the plain language of Section 6 is designed to restrict the State from granting credit to subordinate political subdivisions such as municipalities and counties, as well as to forbid the State from granting credit or assuming liabilities for debts of private persons or other entities.

Earlier, in Bates v. State Bridge Commission, 109 W.Va. 186, 188, 153 S.E. 305, 306-07 (1930), in alluding to the purpose of Section 4 of Article X, we spoke about "the experience of the mother state with debts contracted by her,"[14] of which the framers of our 1872 Constitution were aware and therefore "provided that this state should not contract indebtedness, except in specified instances[.]" 109 W.Va. at 189, 153 S.E. at 307. Moreover, in State ex rel. West Virginia Housing Development Fund v. Waterhouse, 158 W.Va. 196, 208-09, 212 S.E.2d 724, 731 (1974), the purpose of Section 6 of Article X was given the following summary: "This Court expressly noted that the 'purpose of Section 6 of Article X was to guard against the granting of the credit of the State in aid of any county, city, township, corporation or person....'." Quoting State ex rel. Dyer v. Sims, 134 W.Va. 278, 289, 58 S.E.2d 766, 773 (1950), rev'd on other grounds, 341 U.S. 22, 71 S.Ct. 557, 95 L.Ed. 713 (1951).

Thus, we believe our cases make clear the substantive distinction between the provisions of Sections 4 and 6 of Article X of our Constitution. In this case, we deal only with Section 4. In State ex rel. Dyer v. Sims, supra, in regard to Section 4 of Article X, we stated in Syllabus Point 5:

> "Under Section 4, Article X, of the Constitution of this State, the Legislature is without power to create an obligation to appropriate funds, for a purpose not mentioned in said section, by future Legislatures. Such legislation, if otherwise valid, would be void under said section, as creating a debt inhibited thereby."

Although the wording of Syllabus Point 5 of State ex rel. Dyer v. Sims, supra, is somewhat awkward, it seems clear that the Court did not literally mean that any contract entered into by a state agency that extended over more than one year was constitutionally infirm. Dyer recognized that by creating state agencies, the Legislature was obligating itself, in a constitutionally permissible manner, to pay funds necessary for those agencies' operational expenses from future general revenue funds:

> "Ordinarily, the creation of a State board or commission which requires an appropriation of public funds to carry out its purposes is not treated as the creation of a debt, although its generally contemplated continuation from year to year, and for an indefinite period, must necessarily involve future appropriations. Practically all agencies created by the Legislature require appropriations from time to time, and that was necessarily contemplated at the time they were created." 134 W.Va. at 290, 58 S.E.2d at 773.

Much of this same type of reasoning also was recognized in State ex rel. Hall v. Taylor, 154 W.Va. 659, 672, 178 S.E.2d 48, 56 (1971), where we said: "[A]dmittedly it is contemplated by the

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[14]The full text of Bates, 109 W.Va. at 188-89, 153 S.E. at 306-07, with regard to Virginia's financial plight, is as follows:

> "When our Constitution of 1872 was formed, the experience of the mother state with debts contracted by her, and with suits to compel payment, were fresh in the minds of the framers of that Constitution. Numerous suits ending in heavy judgments and costs had been prosecuted against the commonwealth; illiberal contracts and guaranties of enterprises had been made by governmental agencies detrimental to her interests; public officers and agencies had not been always zealous and careful in the conduct of public affairs; and juries leaned toward the individual as against the commonwealth."

statute that the rent will be paid from general revenue funds to be appropriated by the Legislature to the various agencies and departments of the state government from year to year." Moreover, in State ex rel. Board of Governors v. Sims, 133 W.Va. 239, 244, 55 S.E.2d 505, 508 (1949), we specifically recognized that the Legislature's creation of a pension system, which required periodic funding from general revenues, did not constitute "the creation of a debt inhibited by Section 4 of Article X of the Constitution."

It is the fact that state agencies have recurring needs for services, such as rental space and utility services, that form the basis for our cases approving the State's lease-financing arrangements. In such a situation, the lease payments are used to retire revenue bonds that were issued to construct the building. See State ex rel. State Bldg. Comm'n v. Moore, 155 W.Va. 212, 184 S.E.2d 94 (1971). The foregoing rationale formed the basis for our approval of the energy supply contract entered into by the West Virginia University in State ex rel. West Virginia Resource Recovery-Solid Waste Disposal Authority v. Gill, 174 W.Va. 109, 323 S.E.2d 590 (1984), even though the contract was not a lease. We stated in Syllabus Point 1 of Gill: "Bonds of a state or political subdivision payable solely out of revenue derived from a utility of a public nature acquired by the money derived from the bonds do not create debts within the constitutional inhibition against the contraction of public debt."

Moreover, the foregoing rationale also was behind our approval of the issuance of industrial and commercial revenue bonds under W.Va.Code, 13-2C-1. Under this legislation, a county acquires land and contracts with a private corporation to lease the land for a rental sufficient to retire the bonds that are issued by the county to secure the funds to build the facility. See, e.g., State ex rel. Ohio County Comm'n v. Samol, 165 W.Va. 714, 275 S.E.2d 2 (1980); State ex rel. County Court of Marion County v. Demus, supra. All these various types of lease arrangements have been generally accepted elsewhere as valid against a claim of constitutional debt infirmity.

In addition, we have given our approval to the payment of revenue bonds that are liquidated out of a special fund. This concept is related to the lease-financing arrangement, but differs because the special fund is ordinarily a tax or a fee generated from the facility itself, such as tolls for the use of a bridge or road, or parking-garage fees. In State ex rel. Hall v. Taylor, 154 W.Va. at 672, 178 S.E.2d at 56, we stated the general basis for the special fund concept:

> "It is difficult to state the 'separate fund doctrine' precisely. Its application varies somewhat among appellate courts of various states. It is applied uniformly in relation to projects or facilities which are self-liquidating, such as the toll bridge cases. Some courts hold that the doctrine applies in any case of a fund created by a special excise tax as distinguished from property taxes."

The special fund doctrine provided the basis for both our approval of the State Road Commission's special fund to generate revenues to construct the building for the Department of Highways in State ex rel. Building Commission v. Moore, supra, and the use of the Alcoholic Beverage Control Commission's profits in the same case to fund the construction of its warehouse. The same rationale supports our toll-bridge cases and our cases dealing with the construction of student dormitories at West Virginia University out of special student fees. The special fund doctrine is generally recognized in other jurisdictions as not being violative of constitutional debt limitations.

The appellants argue that both the special fund doctrine and the service contract or lease agreement concept still involve funds that ultimately can be said to come from potential general revenue sources. Thus, they assert that these principles, which we have acknowledged to be acceptable as not violating [Article X, § 4], are really no different than the more direct payments from general revenue funds used in this case.

We disagree because appellants overlook several significant differences. First, the special fund doctrine is based on the fact that a specific source of revenue is required to be identified and committed to the repayment of the bonds beyond mere annual appropriations from the general revenue fund. Second, by identifying and dedicating this specific source of funds, the process

automatically limits the total value of bonds that can be used. The Legislature will have to quantify initially the amount it is willing to commit in order to avail itself of the special fund doctrine.

Much the same process occurs in the case of a service contract or lease arrangement. There, the revenue source is the rental payments or the amounts paid under the service contract. These amounts are ultimately controlled by the cost of the building, which determines the total value of bonds to be issued. The cost of the proposed building, in turn, will be governed by economic and market considerations which limit the cost of the project and the total value of bonds to be issued.

In other words, these funding sources, which we have approved in earlier cases, have built-in restraints that must be considered by the Legislature when it authorizes legislation for the issuance of the bonds. In this case, the bonds have no such identifiable controls because their payment is directly from the general revenue fund. There is no statutory restriction on the total value of SBA bonds that may be issued and, unlike special-fund or lease-payment bonding, there is no identifiable source that controls the total value of bonds to be issued.[19]

From the foregoing law, the general principle emerges that Section 4 of Article X is not designed to prohibit the State or the State's agencies from issuing revenue bonds that are payable from contracts that require rental payments of another state agency or require other necessary recurring contractual expenses such as utilities; nor does this constitutional provision preclude the issuance of revenue bonds which are to be redeemed from a special fund.

D.

The appellants place primary reliance on State ex rel. West Virginia Resource Recovery-Solid Waste Disposal Authority v. Gill, 174 W.Va. 109, 323 S.E.2d 590 (1984), and in particular, on [Syl. Pt. 3]:

> "The ultimate issue in determining whether bond financing creates a state debt in violation of Article X, Section 4 [of the West Virginia Constitution] is not whether the bonds may be paid from future legislative appropriations, but whether successive legislatures are obligated to make such appropriations."

We do not find Gill persuasive simply because in Gill there was a revenue source for liquidation of the bonds that was independent of a direct grant from the State's general revenue fund. In Gill, the West Virginia Resource Recovery-Solid Waste Disposal Authority (Authority) was authorized to issue revenue bonds to construct a power generating facility in Morgantown. West Virginia University had contracted to purchase a substantial amount of its energy use from the Authority and the University's payment for this service was to be used to liquidate the bonds issued by the Authority.

In the instant case, the appellants argue that although future legislative appropriations may be used to pay for the bonds, it is clear from the language of the bonds themselves that there is no legal obligation requiring the Legislature to make such appropriations. Certainly, Syllabus Point 3 of Gill, if divorced from the facts in that case, could be used to support the appellants' position. However, this syllabus point was derived from a conclusory statement at the end of the opinion. There was no discussion therein of its impact on Section 4 of Article X of our Constitution beyond the facts of Gill.

From a literal standpoint, if Syllabus Point 3 of Gill is the litmus test for the constitutionality of bonds issued by a state authority, then the constitutional limitation of Section 4 of Article X is meaningless. Under such an interpretation, the Legislature could authorize the State or its agencies to issue bonds in any amount so long as the bonds are used for a public purpose, and so long as the terms of the bonds make clear that the bonds are not state obligations and that the Legislature is

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[19]This is not to say that the Legislature could validate these bonds by merely identifying a total dollar amount that could be issued. There would still be the necessity of identifying a particular source of funds for their payment.

under no obligation to fund the bonds.

It is difficult for us to understand how the Gill case, under its facts, could be construed to authorize a radical change from our earlier bond cases. Certainly, the financing arrangement for the bonds in Gill was markedly different from the financing arrangement for the bonds in this case. The critical language in Gill followed a lengthy discussion and citation of cases approving long-term contracts by public agencies for the purchase of necessary services and concluded with this language: "We see no reason why the so-called 'service contract doctrine' should not apply to contracts entered into by the State or its agencies to buy energy." . . .

The obvious import of Gill was to loosen the rather harsh restrictions created in State ex rel. Hall v. Taylor, supra, as to the use of lease contracts to finance the retirement of revenue bonds. In Hall, the Legislature authorized the State Building Authority to issue some $24,000,000 in revenue bonds. The proceeds of the bonds were to be used to build several office buildings for the purpose of housing a variety of state agencies. The revenues for the repayment of the bonds were to come from rents paid by the various state agencies leasing the buildings. We concluded that because the agencies were funded by general revenue appropriations from the Legislature, that the Legislature would thus be required to pay the agencies' rents from such funds. This arrangement would create a state debt in violation of Section 4 of Article X of our Constitution.

Certainly, Gill 's attempt to rectify Hall might have been better understood if its language were more precise. Gill also might have mentioned State ex rel. State Building Commission v. Moore, 155 W.Va. 212, 184 S.E.2d 94 (1971), where we approved the legislative authorization of the use of certain State Road Fund monies as rent for office space for the Department of Highways in a building constructed by the State Building Commission. The rental payments were to be utilized to liquidate revenue bonds issued by the Commission in order to build the facility. Moore also approved of a separate statutory provision that authorized a special fund from the sale of liquor "to be used by various agencies or departments of state government for payment of rent for office space leased from the Building Commission as a means of paying the principal of and the interest on 'state building revenue bonds of the state' ... issued ... to finance the construction of the buildings[.]" 155 W.Va. at 231, 184 S.E.2d at 105. We found in Syllabus Point 4 of Moore that the legislation at issue therein did not violate Section 4 of Article X of our Constitution.

We earlier observed that none of our prior cases, including Gill, have ever considered a revenue bond mechanism similar to the one in the present case. Our earlier cases share a common mechanism for constitutional acceptance, i.e., the revenue bonds were payable from either a special fund dedicated to the purpose for which they were issued or were payable from lease rental payments or similar contract arrangements for a necessary service on the part of the public agency. Here we are faced with bonds issued by the SBA which will be liquidated by legislative appropriations from the general fund that the Legislature is not legally obligated to make. The ultimate contention in favor of the bonds' constitutionality is that because there is no legal obligation to pay the bonds, then there is no state debt created. Consequently, there is no violation of [Article X, § 4].

While we may admire the legal sophistry of this argument, it defies our practical judgment. If the bonds are not paid, it is obvious that the State's credit will be impaired. The default on a bond issue of this size hardly can be expected to draw cheers from the bondholders or their brokerage houses or the bond financial rating services.

In considering the validity of revenue bonds, Hall v. Taylor, supra, admonishes us that "[i]t is the duty of this Court ... to consider the substance of the plan envisioned by the statute in determining the question of constitutionality." 154 W.Va. at 673, 178 S.E.2d at 57. (Citation omitted). Moreover, Hall espoused the concept that a "mere legislative declaration that a state debt is not created ... is not conclusive or binding on a court." 154 W.Va. at 674, 178 S.E.2d at 57. Following other jurisdictions, Hall held that it is a judicial and not a legislative question "[w]hether a state debt is created by [a] statute[.]" . . .

W.Va.Code, 18-9D-6, creates in the "state treasury a school building capital improvements fund to be expended by the authority for the purposes of this article." This same section authorizes the SBA "to pledge all or such part of the revenues paid into the school building capital improvements fund as may be needed to meet the requirements of any revenue bond issue or issues authorized by this article ... and in any trust agreement made in connection therewith[.]"

W.Va.Code, 18-9D-8, relates to the issuance of the bonds and requires them to be signed by the governor and by the president or vice-president of the SBA "under the great seal of the state, attested by the secretary of state[.]" It goes on to require:

> "Any pledge of revenues for such revenue bonds made by the school building authority shall be valid and binding between the parties from the time the pledge is made; and the revenues so pledged shall immediately be subject to the lien of such pledge without any further physical delivery thereof or further act."

The right of the SBA to enter into trust agreements for bondholders is contained in W.Va.Code, 18-9D-12. In the following section, W.Va.Code, 18-9D-13, a sinking fund is created "in an amount sufficient to meet the requirements of any issue of bonds sold under the provisions of this article, as may be specified in the resolution of the authority authorizing the issue thereof and in any trust agreement entered into in connection therewith." Finally, we observe that while W.Va.Code, 18-9D-14, provides that the SBA cannot pledge the credit or taxing power of the State, and that the SBA's obligations are not "deemed to be obligations of the state," it does not contain any language to the effect that the Legislature is not obligated to fund the bonds.

From the foregoing provisions, it would be difficult to conclude that the revenue bonds issued by the SBA are not obligations of the State. Certainly, the requirement of maintaining the sinking fund in order to service the bonds and provide for their redemption indicates a financial commitment by the Legislature. The same is true with respect to the pledge of the fund for the benefit of the bondholders.

Moreover, in 1992, Section 17 was added to Article 9D of Chapter 18. It directs that unencumbered interest in an amount of One Million Dollars ($1,000,000) held by any bank acting as trustee be transferred to the State's general revenue fund. This section goes on to explain:

> "The purpose of the transfer of funds required by this section is to facilitate the appropriation of a like amount to the school building capital improvements fund, within the state budget for the fiscal year commencing on the first day of July, one thousand nine hundred ninety-two, to be used as debt service for revenue bonds to be issued by the authority pursuant to the provisions of section eight [§ 18-9D-8] of this article to finance needs projects to be selected by the authority which have not heretofore been funded because of the unavailability of necessary funding, and to pay the costs and reserves of such bond issues."

Here again we see a positive commitment on the part of the Legislature to pay the debt on the bonds.

Finally, unless we are to abandon our logic and common sense, we cannot help but conclude that the statutory scheme surrounding these bonds bespeaks a legislative requirement that they be funded. . . . Even if we were to close our eyes to this statutory language, we could not close our minds to the practical consequences of this revenue arrangement. To accept the premise that the Legislature is not bound to fund the bonds and would allow a default, thereby impairing the credit rating of the State, assumes a naivete on our part that we simply do not possess.[26]

Accordingly, we hold that the revenue bonds authorized under the School Building Authority Act constitute an indebtedness of the State in violation of Section 4 of Article X of the West Virginia Constitution. To the extent that Syllabus Point 3 of State ex rel. Resource Recovery-Solid Waste

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[26]It is particularly true in view of the fact that if we exclude the bonds issued by constitutional amendments, the SBA's new revenue bonds would constitute almost 15 percent of the State's other bonded indebtedness. . . .

Disposal Authority v. Gill, supra, holds to the contrary, it is overruled. However, for the reasons assigned in the next sections, we decline to make this decision retroactive so as to invalidate the bonds earlier issued. Nor do we foreclose the SBA from exercising its right under W.Va.Code, 18-9D-9, to issue refunding bonds on the earlier issued bonds in order to secure a more favorable interest rate and, thereby, save state funds. . . .

V.

In closing, we wish to reemphasize what we stated earlier: No prudent bond counsel reading the specific financial arrangements outlined in Gill could have believed that it would authorize the revenue bonds at issue in this case. We are amazed that no attempt was made before the original issue of the SBA bonds to obtain an opinion as to their validity from the Attorney General. Moreover, in view of the amount involved and the purpose of the bonds, prudence would have dictated that a court determination should have been sought as to their legality. We cannot help but echo the admonition of this Court given more than twenty years ago in [Hall v. Taylor]:

> "If by this decision this state may be embarrassed financially, it is not the fault of this Court. The parties knew or should have known that this was a questionable procedure, and the matter of the validity of these bonds and the question of whether they were general obligation bonds or revenue bonds could have been tested in a proper proceeding in a court of competent jurisdiction before the Building Commission proceeded to the point where admittedly chaos may result because of the decision of this Court in this case."

We, therefore, conclude for the foregoing reasons that the judgment of the Circuit Court of Kanawha County should be affirmed. . . .

NEELY, Justice, concurring:

. . . Our constitutional framers well understood that political leaders become wildly popular by spending money and wildly unpopular by taxing. Thus, political leaders, if left to their own devices, will inevitably reward supporters with jobs, contracts and public works without raising taxes whenever possible. This, of course, can usually be done only by borrowing money that future generations must repay.

American electoral democracy has two components--voter numerosity and voter intensity. Although taxpayers are numerous, they are not intense. It is the providers of government services who are intense, because their entire livelihoods depend on government largesse. Provider intensity translates directly into political campaign contributions, organized election day support and constant badgering from the providers' influential lobbyists.

Counter-intuitive as it may seem, the means invariably overwhelm the ends in the world of practical politics. Political battlefields are perennially littered with the mangled corpses of officials who believed government could be run like a business. But government and business run on completely different principles: business thrives on efficiency; government thrives on patronage. Business always lowers costs as a means to an end, while in government the means are the end. That's why the back-slapping, log-rolling, pork-barrelling, job-giving, vote-buying and deal-making M.M. Neelys, Dick Daleys (senior) and Alfonse D'Amatos of this world are so wildly successful in politics, while the narrow, clean-cut, honest, technocratic, humorless Michael Dukakises, Jerry Browns and Richard Lamms are such stupendous failures.

None of politics' exotic considerations come into play in private business where most voters dwell. When a person sells swimming pool cleaner, for example, he doesn't worry about things like inherited political party preference or low primary election voter turn out. No customer boycotts Brand X pool cleaner because Mrs. X looks like an unmade bed or hires illegal aliens, nor does he boycott because Mr. X isn't black or a woman or more actively against abortion. Most importantly, no customer's purchase of Brand X pool cleaner depends upon some cockamamie formula by which one customer gets pool cleaner free while another customer pays three times the market price.

Government, however, does have a cockamamie scheme whereby some customers get goods free while others pay three times the market price. The big difference between government and business, then, is that in business every customer must purchase his own goods and services with his own money, while in government a customer quite possibly may obtain a valuable good or service and have somebody else pay for it. In government, the sale of bonds without a constitutional amendment or dedicated revenue source is the ultimate shell game; under that scheme, even those who actually will pay are more or less led to believe that the goods are free. Such a mechanism, therefore, is exactly what W.Va. Const. art. X, § 4 prohibits.

Notwithstanding all of the free-market rhetoric of the Reagan era, the longest peacetime boom in recorded history (1982-1990) was fueled by the largest peacetime deficit in recorded history, much of which went into a massive defense build-up. Instead of the old Roosevelt "tax tax, spend spend, elect and elect," the stolid Republicans of the 1980s improved upon the New Deal vote buying formula with "borrow borrow, spend spend, elect and elect." This worked for quite awhile, but only because Reaganomics was really Keynes as restated by Kafka. Now, however, having stretched ourselves to the breaking point, only big tax hikes will give us more government programs. Roughly six percent of our gross national product (not our federal budget) is devoted exclusively to paying the interest on the national debt.

States and cities are now approaching the same funding problems that vex the federal government, but with two notable differences: States and cities cannot print money or borrow for decades without repayment with near impunity. In fiscal year 1992-93, California had over a $14 billion budget gap, the budget gap of the state of New York exceeded $6 billion, and most other state governments -- including Illinois, Pennsylvania, Massachusetts and Maryland -- experienced serious financial problems.

Indeed, failure to exert responsible controls on borrowing may be the downfall of New York City. Between 1989 and 1992 debt service payments rose faster than any other major expense, growing by 47.7 percent after adjusting for inflation, versus only 9.2 percent in the preceding three years. Debt service accounted for three-fourths of the net real increase in city spending between 1989 and 1992. This recent growth occurred because the city deferred interest payments by refinancing debt during the 1980s. This brought debt service costs down momentarily: They consumed 11.0 percent of the general fund in 1983, versus only 6.3 percent in 1990. But the bill is coming due today, just as the city is experiencing severe recession. The wisdom of our West Virginia constitutional framers, then, appears to be timeless. We must profit from the mistakes of others like New York City who failed to discipline themselves.

"Budget gaps" are not "deficits." Through a combination of cuts in services and blue smoke and mirrors, California and New York theoretically spent no more than they took in. But, in order to prevent the "budget gaps" from becoming "deficits" the governments cut important existing services. The budgets for police protection, fire protection, road maintenance, and other traditional, desirable, valuable local government services have been reduced to prevent the state governments from running actual deficits. Given the limited potential for states significantly to increase their revenues in the near future, the decision of which services are provided by the states has increasingly become a zero-sum game. Debt today, then, leads directly to cuts in services tomorrow.

W.Va. Const. art. X, §§ 4 and 6, are designed to prevent one generation of politicians from helping their friends whilst leaving the next generation of taxpayers to foot the bill. Any given project that effectively bestows government benefits today and postpones taxpayer pain until tomorrow is prohibited by W.Va. Const. art. X, §§ 4 and 6, unless the voters approve the project with a constitutional amendment. That is what explains the results in the cases duly cited and discussed by the majority.

Among the instances where we have allowed bonds to be issued without voter approval, the easiest cases to explain are the real "revenue bond" cases where bond proceeds were to be used to

build projects like toll bridges, the West Virginia Turnpike or state college buildings.[6] In these cases, the projects generate cash revenue from third parties. The government revenue bond scheme is simply a straight-up business deal involving government in its proprietary capacity: Lenders conclude that the income from the project will be sufficient to cover repayment of interest and principle; when lenders are wrong, lenders, not taxpayers, take a bath.

Then, there are the quasi-revenue bond cases where the government agrees to pay rent on a new building that is technically owned by the bondholders.[7] Well, the security for the bondholders is the building, and if the government can find cheaper alternative facilities, the government is technically entitled to depart, leaving the bondholders holding the bag. However, the distinction between what the bondholder's security is--building versus general credit--is not really the most important distinction. The important distinction is that in office building cases there is a measurable need that can be met efficiently and cheaply through the issuance of quasi-revenue bonds. Furthermore, office buildings, unlike schools, have a non-governmental use and can be rented to non-government tenants although, perhaps, at a loss.

The same can be said for the power generating plant at West Virginia University; this plant was designed to earn a fair market return from the outset.[8] The plant had a narrow purpose and the scheme's economic viability was never any more in doubt than the best laid plans of successful private corporations.

School bonds, on the other hand, are for the purpose of building structures whose revenue returns are nonexistent. While thousands of jobs and millions of dollars in contractor profits will emerge from school construction, there appears to be little correlation between the quality of school buildings and the achievement level of students leaving the system. The big correlations in education are between school success on the one hand and the student's family structure, the student's parents' social class, and student's parents' educational level on the other. . . .

At a minimum, then, W.Va. Const. art. X, § 4 requires that bonds of any sort issued without a constitutional amendment be secured ONLY by the project the bonds are issued to build, and that there be a definitely ascertainable special revenue source from which the bonds are to be retired. That, at least, inspires lenders to inquire carefully into whether the project is built for a specific and

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[6]See State ex rel. State Road Commission v. O'Brien, 140 W.Va. 114, 116, 82 S.E.2d 903, 904 (1954) (principal and interest to be paid "out of the revenues to be derived from the operation of the bridge"); Guaranty Trust Co. of N.Y. v. West Virginia Turnpike Commission, 144 W.Va. 266, 269, 107 S.E.2d 792, 795 (1959) ("the tolls and other revenues received from time to time by the Commission" are pledged or assigned "to secure the payment of such bonds"); State ex rel. Board of Governors of West Virginia University v. O'Brien, 142 W.Va. 88, 90, 94 S.E.2d 446, 447 (1956) ("principal of and interest on such bonds shall be payable solely from the special non-revolving fund" in which are deposited "all fees collected . . . from students at the university other than students in" specified schools).

[7]See State ex rel. State Building Commission v. Moore, 155 W.Va. 212, 217, 184 S.E.2d 94, 98 (1971) (rents for state buildings are pledged to secure the bonds that are to be paid from a special fund into which "an annual payment of $3,600,000 [is] to be made by the West Virginia Alcohol Beverage Control Commissioner from profits accruing from the sale of alcoholic liquors pursuant to statutes which create a state monopoly for the sale thereof").

[8]See State ex rel. West Virginia Resource Recovery-Solid Waste Disposal Authority v. Gill, 174 W.Va. 109, 110, 323 S.E.2d 590, 591 (1984) ("[t]he board would buy steam for the university, and revenues received from those steam sales would retire the bonds and pay plant operation and maintenance costs").

measurably profitable end and whether the revenue source is adequate to retire the bonds.

However, as I have attempted to make clear in this concurrence, I do not believe that a cosmetic change of what amounts to general obligation school bonds to a lease purchase arrangement using a revenue bond format would permit the scheme to pass constitutional muster unless a new, fiscally sound, dedicated tax were enacted. In general, the bond-funded projects that have been approved without a constitutional amendment created measurable benefits that directly translated into earned or saved tax dollars. This cannot be said for schools by any stretch of the imagination. Borrowing money for consumption (like New York City) or to build projects that will give no tax dollar return is fiscal idiocy. For those projects, the voters must either approve the project at the polls or the legislature must muster the resolve immediately to enact a new, dedicated tax.

At the beginning of this opinion I discussed the plight of New York City because of the city's rapidly accelerating debt. One reason that borrowing has gotten out of hand there is that provider lobbies have successfully argued that such things as health care should be funded through the capital budget. All providers will always make the argument that health care, education, drug treatment facilities, shelters for run away children, etc. are actually "investments" in human capital. This may be true, but then again it may not be true. Certainly it doesn't seem to be true in education at this particular moment. Therefore, any time the credit of the State is even implicitly pledged, as it would be whenever a project has no measurable revenue-generating potential, the specter of means overwhelming ends becomes sufficiently prominent that the spirit of W.Va. Const. art. X, § 4 is confounded and the proposed project must be taken to the people.

Therefore, it seems to me that in order for a bond issue to survive W.Va. Const. art X, § 4 scrutiny, there are three criteria that must be met. First, the project must be reasonably calculated either to earn or save money, not enhance quality of life or increase some speculative "investment" in human capital. Second, the financing scheme must rely on a lease/purchase structure where the bonds are secured only by the project the bonds are issued to construct and not even implicitly by the credit of the State. And, third, there must be some special fund, preferably from third party payors, but also possibly a dedicated tax or portion of existing budgets (such as the portion for maintenance) that can be pledged to the retirement of the bonds. Thus, we have a situation analogous to a mathematical equation where X . Y . Z = k. If X is very large, then perhaps Y and Z can be a little smaller, and if Z is large, then perhaps X and Y can be a little smaller.

In all of this each branch of government has its place. It is the proper role of the governor to be forward-looking, imaginative, enthusiastic and optimistic. Similarly, it is the role of the legislature to make sure that if there is political pork, that pork will be equitably distributed. It is also the role of the legislature to temper the enthusiasm of the governor whenever his zeal threatens even narrow constituent interests, including the interest in lower taxes. . . .

Courts, with their long and secure tenure are the repository of society's collective memory. That, in many regards, is what a constitution is all about. Although it is not possible to say in advance what "special fund" schemes will qualify as outside the W.Va. Const. art. X, § 4 prohibition, what can be said is that when each scheme is evaluated on its merits, the history of other states' fiscal problems and the fiscal problems of the mother Commonwealth of Virginia at the time our Constitution was drafted will be what most forcefully instruct our understanding.

NOTES: MORE ABOUT ARTICLE X LIMITS ON CONTRACTING DEBT

[Parts of Notes 3-6 are extracted from portions of ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 303, 306-07, and 310 (2nd ed., Oxford University Press, 2016).]

1. The Supreme Court of Appeals also struck down the Legislature's response to *Winkler* and the second attempt to finance SBA projects through bond sales. *State ex rel. Marockie v Wagoner* (1993). This time, the lawmakers tried dedicating a portion of the existing consumers sales tax to

liquidation of the bonds. Although the measure created a "separate fund," of sorts, it nevertheless failed to satisfy § 4 because the sales tax receipts had historically been deposited in the general revenue fund. There was no new tax and no increase in an old tax – and therefore no taxation decision or revenue source created to accompany the spending decision. Rather, there was merely a slight-of-hand to distinguish this measure from that invalidated in *Winkler*.

The Legislature finally got it right when it provided for financing of SBA bonds through a separate revenue source funded by the lottery. *State ex rel. Marockie v. Wagoner* (1994). The proceeds there did not come from tax assessments or the general revenue fund. Rather, they were to be drawn from lottery profits dedicated to the "School Building Debt Service Fund," which was derived from individuals' voluntary purchases of lottery tickets.

Section 4 does authorize the State to incur indebtedness in several narrow categories: to meet casual deficits, to redeem a previous liability, and to suppress insurrection, repel invasion, or defend the State. "The Supreme Court addressed the first two of those exceptions in *Dickinson v. Talbott* (1933), when it considered the constitutionality of the Legislature's issuance of bonds to cover deficits that had occurred over five years at the beginning of the Great Depression. Each year the Legislature had enacted a balanced budget, but each year projected revenues fell short of meeting expenditures and the ensuing Legislature was unable to enact levies to satisfy the deficit. (*See* Art. X, § 5.) Because the deficits were unanticipated and were the result of economic emergencies beyond the Legislature's ability to prevent or assuage, the Court concluded they were 'casual deficits,' which could be paid off through State-issued bonds. In addition, the Court rejected an interpretation of 'a previous liability of the State' that would have limited that phrase to indebtedness existing when the Constitution was originally adopted. Instead, the Court held, it 'applies to any liability of the state existing at any time when the legislature in recognition of the same, regardless of when it arose, adopts a plan for the refunding and eventual discharge. ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 296 (2nd ed., Oxford University Press, 2016). The Previous Liability Clause and *Dickinson* are the subject of more expansive treatment in *Perdue v. Wise*, which follows these notes.

2. More recent decisions have sustained additional bond issues, although one of the cases has, unfortunately, muddled the picture considerably. As noted in Chapter 2, the Legislature in 1998 directed the Public Employees Retirement System ("PERS") to invest $150,000,000 in bonds to be issued by the Regional Jail Authority to finance construction and repair of correctional facilities. The enabling act also directed that the Authority should repay the bonds out of revenues from pre-existing insurance taxes. That arrangement, of course, directly conflicts with *Marockie*. Speaking for the Court in *State ex rel. West Virginia Regional Jail Authority v. West Virginia Investment Management Board*, 203 W.Va. 413, 508 S.E.2d 130 (1998), Justice Maynard apparently agreed, as he explained:

> [T]o repay the capital and to pay the earnings on the investment mandated by House Bill 4702, the insurance taxes already established by statute will be deposited in the insurance tax fund and ultimately transferred to the regional jail and correction facility investment fund. Previously, however, these same insurance taxes were paid into the State treasury for the benefit of the State fund. Therefore, according to *Marockie,* the Legislature has impermissibly designated funds to repay the capital and the earnings on the investment in the Jail Authority out of a current tax source that flows into the general revenue fund. Because this tax revenue is no longer available to the general fund, a debt is created that burdens the existing revenue fund in violation of Article X, Section 4. We do not believe, however, that this disposes of the issue before us.

The Court went on to conclude that the 1997 approval of the Modern Investment Management Amendment to Article X, § 6 overruled that portion of *Marockie* that says the Legislature may not designate existing taxes to liquidate revenue bond issues to the extent that that holding would prevent the Legislature from "exercising its power to prudently invest State or public funds"

pursuant to § 6.

The 1997 amendment to § 6 states: "The investment of state or public funds shall be subject to procedures and guidelines heretofore or hereafter established by the Legislature for the prudent investment of such funds." Hence, by the Court's reasoning, by requiring the PERS to invest its funds in the Jail Authority's bonds, the Legislature has made a "prudent investment" under § 6, and if the Jail Authority cannot issue the bonds, then the PERS will not be able to carry out the investment decision. In other words, the Court concluded that the § 6 amendment authorizing investment in stocks and the like to earn a better return on the State's considerable portfolio also simultaneously (and silently) amended § 4's edict against State borrowing. This was news to the voters.

The economic development grants case, *West Virginia Citizens Action Group v. West Virginia Econ. Dev. Grants Comm.*, 213 W.Va. 255, 580 S.E.2d 869 (2003) (*see* Chapters 5 & 6, *supra*), also had an Article X, § 4 issue. There, the Legislature relied on the special fund doctrine to pay off the bond sale. Under that doctrine, the State may provide for a bond issue if the bonds are to be liquidated not through "the imposition of tax, but instead 'from the action of the members of the public who, on a wholly voluntary basis,'" purchase whatever it is the State is selling. Examples have included use of the turnpike, liquor, seats at Mountaineer Field, and video lottery. Quoting an earlier decision, the Court stated that "the doctrine cannot be applied to a fund which is created and maintained, in whole or in part, by general tax revenues, for the reason that such would clearly violate the purpose and intent of constitutional provisions such as [Article X, § 4]." The legislation at issue survived that analysis because the bonds were to be paid from a special account to be fed by excess lottery funds, which are separate from general revenues.

So far, those excess lottery funds have been designated as the source for paying off the billion plus dollars of bonds issued by the School Building Authority, the $240 or so million sold by the Grants Committee, and all of the Promise Scholarship awards.

Start gambling.

3. As noted in *Winkler*, § 4 should be read in conjunction with Article X, § 6, which bars the State from granting credit to local governments and to private entities and persons. Basically, § 4 (sort of) prohibits the State from borrowing money and § 6 (sort of) prohibits the State from lending money to or assuming the debts of local governments and private enterprises. Note, however, that neither preclude the State from just giving away the money. [Explain that!] Sections 4 and 6 challenges are often raised simultaneously because the State and its subdivisions usually finance their loans to private enterprise by borrowing through the issuance of public bonds. Thus, for example, when a county loans money to a corporation to attract it to the county's industrial park, the county will sell bonds to pay off the loan. Typically, the bonds would be paid off by the corporation, who has benefitted from the lower interest rates on the tax free government bonds.

Several points should be added about § 6.

First, the Court has developed an analysis, similar to that used in applying § 4, to hold that the State may finance governmental programs with self-liquidating bonds. *E.g.*, *State ex rel. West Virginia Development Fund v. Waterhouse* (1974); *State ex rel. West Virginia Development Fund v. Copenhaver* (1969); *County Court of Marion County v. Demus* (1964).

Second, as noted above, the voters in 1998 approved a significant amendment to § 6. The amendment eliminated a part of § 6 that had prohibited the State from "becom[ing] a joint owner, or stockholder in any company or association in the State or elsewhere, formed for any purpose whatever." This restriction had seriously limited the investment potential of the State's pension and welfare funds. The Modern Investment Management Amendment of 1998 thus deleted that language and inserted in its place the above quoted authorization for the Legislature to create procedures and guidelines for the prudent investment of the State's funds. Thus, the State may now include stocks in its portfolio.

Third, whatever restrictions that § 6 places on the State's ability to create or loan money to corporations, they do not apply to the creation or financing of public corporations executing public purposes. The framers of § 6, the Court has concluded, "were exclusively concerned with stock corporations formed for profit making purposes." Queen v. West Virginia University Hospitals, 179 W.Va. 95, 100 365 S.E.2d 375, 380 (1987). The notion of what constitutes a "public purpose" is extremely broad. Activities pursue a "public purpose" when they are for the common benefit of the public generally and not for the special benefit or the private gain or profit of particular interests. Thus, the State has been permitted to transfer a government-owned hospital to a corporation, Queen v. West University Hospitals, Inc. (1987); *Shaffer v. Monongalia General Hospital* (1950), and to establish an airport authority, *Meisel v. Tri-State Airport Authority* (1951). Even legislation that has the effect of benefiting particular private interests can have a public purpose if those interests can be converted into a benefit for the public generally, *e.g.*, *Waterhouse* (financing private housing was necessary to retain or attract employers); *State ex rel. West Virginia Board of Educ. v. Sims* (1954)(payment to faculty during sabbatical leaves promoted educational purposes); *State ex rel. Roth v. Sims* (1954)(public funds used to enable a state employee to receive specialized training furthered agency's mission), or if the expenditure discharges a moral obligation of the State, as in compensating individuals who have incurred an injury because of the conduct of State officers or employees. *E.g.*, *State ex rel. Lippert v. Gainer* (1961); *State ex rel. Catron v. Sims* (1950). In all such cases, the Court has been extremely deferential to the judgments of the other branches. "A legislative determination of what is a public purpose will not be interfered with by the courts unless the judicial mind conceives it to be without reasonable relation to the public interest." *State ex rel. West Virginia Housing Develop. Fund v. Waterhouse*, 158 W.Va. 198, 216, 212 S.E.2d 724, 735 (1974) (*quoting County Court of Marion County v. Demus*, 148 W.Va. 398, 135 S.E.2d 352 (1964).

4. Section 6 has also been qualified by §6a, which confers upon the Legislature a qualified power to raise and appropriate funds for the direct benefit of local governments. Inserted into Article X in 1972 as the "Federal Grants and County and Municipal Aid Amendment," § 6a enables the State and its local governments to take full advantage of federal programs that require state or local matching funds and to funnel money to local governments through tax measures more effective and progressive than reliance on traditional and regressive property taxes. *Killen v. Logan County Commission* (1982). By virtue of § 6a's first grant of power, the Legislature now has full discretion as to when and under what conditions State funds can be used to enable governmental subunits to participate in programs that promise additional federal funding. The grant has an obvious basis in common sense; many of the State's local governments did not have enough money to qualify for and take advantage of federal programs that would return significant revenues to the state. Now, the Legislature at least has the ability to help.

The second power permits the Legislature to impose or dedicate a tax for local governments and political subdivisions. The first and most typical of this tax was the severance tax placed on coal mined within each county. *Killen*. Under that system, the Legislature imposed the tax, the State collects it, and the State then redistributes it to the counties in direct proportion to the number of tons of coal mined in each. *State ex rel. Kanawha County Building Commission v. Paterno* (1977). Because the section is both recent and narrowly drawn, its specific provisions override not only the more general state credit prohibitions in § 6 but also the similarly general state and county debt bans in Article X, §§ 4 and 10. *Id.*

Section 6a does not, however, permit the State to incur a debt to finance the activities of a State agency, even if the agency's mission directly benefits local governments. *State ex rel. Marockie v. Wagoner* (1993).

5. Section 8* of Article X sets forth the procedures that local governments must follow in order to issue bonds or otherwise incur a debt. The section also imposes limits on their borrowing. There was no predecessor provision in the 1863 Constitution. In 1950, the "School Bond Amendment" made two insertions. It added to the first sentence the language ("on all taxable property therein, . . . to all other taxes for all other purposes") requiring that the direct annual tax for paying off debts must be imposed on taxable property and must use the ratio specified in Article X, § 1. The amendment's second addition appears in the second sentence and precedes the proviso. Consistent with the provisions in Article X, §§ 4 and 6, this section reflects the framers' reaction to unsound governmental borrowing in the nineteenth century, their philosophy that government ought generally to be a pay-as-you-go proposition, and their belief that government should not borrow money and commit the public treasury unless the people have specifically authorized it.

The first sentence establishes the limitations. A local government may not incur a total indebtedness greater than five percent of the value of the taxable property within the government's boundaries; when it borrows, it must also enact a direct annual tax on taxable property; the tax must be sufficient to cover the interest annually and to discharge the principal in no more than thirty-four years; and the tax must use the ratio stated in Article X, § 1 for the four classes of property. The School Bond Amendment, however, in the beginning of § 8's second sentence, permits a tax to exceed § 1's limits if the tax is for the purpose of paying off bonds issued by a school district, so long as the aggregate of the school bonds does not exceed three percent (now five percent, *see* Art. X, § 10) of the district's assessed value. The Legislature may impose additional restrictions on local government borrowing. Section 8 does not confer any power on local governments; it merely provides that to the extent the Legislature authorizes the State's subdivisions to borrow, that authority must stay within the restrictions imposed by this section. *Sanders v. County Court* (1934); *Pfalzgraf v. Wood County Court* (1914). *See* W. Va. Code 8-16-1, *et seq.*, 11-8-16, 13-1-4, *et seq.*, and 17-17-32 for legislation affecting local government borrowing and bonds.

The proviso at the end of § 8 conditions any local government borrowing on voter approval. Before a local government may incur a debt, it must submit all questions relating to the debt to the voters and receive the voters' approval. Section 8 states the approval must receive the assent of at least sixty percent of those voting, but a subsequent amendment, enacted as § 10, has reduced the requisite approval rate for school district excess levies to a mere majority. The language, "all questions," requires the submission to the voters to include such information as the character of

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*Section 8 states: No county, city, school district, or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become indebted, in any manner, or for any purpose to an amount, including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness; nor without, at the same time, providing for the collection of a direct annual tax on all taxable property therein, in the ratio, as between the several classes or types of such taxable property, specified in section one of this article, separate and apart from and in addition to all other taxes for all other purposes, sufficient to pay, annually, the interest of such debt, and the principal thereof, within, and not exceeding thirty-four years. Such tax, in an amount sufficient to pay the interest and principal on bonds issued by any school district not exceeding in the aggregate three per centum of such assessed value, may be levied outside the limits fixed by section one of this article: Provided, that no debt shall be contracted under this section, unless all questions connected with the same, shall have been first submitted to a vote of the people, and have received three fifths of all the votes cast for and against the same.

proposed bonds to be issued or the proposed debt, the purpose for which the funds will be used, the aggregate amount in principal and interest, the rate of interest, and the dates of maturity. *Lawson v. County Court* (1917). The proceeds of a bond sale or loan may not be applied to any purpose other than that specified in the referendum voted on by the people. *Id*.

As with the interpretation of the provisions in Article X, § 4, regulating State indebtedness, the restrictions in § 8 do not apply to self-liquidating bonds issued by local governments, *State ex rel. County Court v. Demus* (1964), or to long term contracts for the purchase of necessary services, such as electricity and water. *Solid Waste Disposal Authority v. Gill* (1984). In addition, local governments may issue bonds to retire existing bonds without seeking voter approval if three conditions are met: (1) the amount of the refunding may not exceed the total indebtedness (principal and interest) previously authorized by the electorate; (2) the liquidation period for refunding bonds may not be longer than that authorized for the original bond issue; and (3) the aggregate of the principal and interest payments made on the original bonds prior to their refunding, when added to the amounts to be paid on the refunding bonds and any outstanding original bonds that are issued but not refunded, cannot exceed the original indebtedness approved by the voters. *Board of Education v. Slack* (1985); *see also* W. Va. Code 13-1-1, *et seq.*

6. Section 8's application to school districts and school finance has been modified by the Better Schools Amendment, Article X, § 10.** That section provides counties and school districts with greater flexibility in funding public education by qualifying other constitutional provisions that restrict government financing. It was added to the Constitution in 1958 as the "Better Schools Amendment." In 1982, the "Fair Education Opportunity Amendment" lowered the level of voter approval required by the first paragraph for adoption of excess levies and added the third paragraph.

The first paragraph permits school districts to exceed the maximum rates for property taxes stated in Article X, § 1 by as much as one hundred percent. These excess levies may be imposed for up to five years if they are approved by a majority of the county's voters. Section 1 would otherwise limit excess levies to a fifty percent increase for a period of three years and would require sixty percent voter approval.

The second paragraph makes clear that excess levy revenues may be used for operating expenses. It also permits school districts to service bonded indebtedness by imposing levies of up to five percent on the value of the taxable property in the county, thus raising the limit set in § 8. Levies for paying the principal and interest on bonds may be adopted beyond the outer limits. *See* 48 A.G. Op. 84 (1959); Note, *Equal Education: A Public School Financing Proposal for West Virginia*, 75 W. VA. L. REV. 50, 63 (1972). But such levies must be separately laid, and their rates applied to the classes of property set forth in Article X, § 1 must be in the same proportions as the rates imposed

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**Section 10 states: Notwithstanding any other provision of the Constitution to the contrary, the maximum rates authorized and allocated by law for tax levies on the several classes of property for the support of public schools may be increased in any school district for a period not to exceed five years, and in an amount not to exceed one hundred percent of such maximum rates, if such increase is approved, in the manner provided by law, by at least a majority of the votes cast for and against the same.

Notwithstanding any other provision of the Constitution to the contrary, the maximum rates provided for tax levies by school districts on the several classes of property may be used entirely for current expense purposes; and all levies required for principal and interest payments on any bonded indebtedness, now or hereafter contracted, not to exceed five percent on the value of the taxable property therein, the value to be ascertained in accordance with section eight of this article, shall be laid separate and apart and in addition to such maximum rates, but in the same proportions as such maximum rates are levied on the several classes of property.

Notwithstanding the provisions of section eight of this article relating to a vote of the people or any other provisions of this Constitution, a county board of education may contract indebtedness and issue bonds for public school purposes as provided by law, if, when submitted to a vote of the people of the county, in the manner provided by law, the question of contracting indebtedness and issuing bonds is approved by a majority of the votes cast for and against the same.

by the regular and excess levies.

The final paragraph authorizes a school district to issue bonds if they are approved by a majority of its voters, rather than the sixty percent supermajority previously required by Article X, § 8.

A 2002 amendment added Article X, § 11, which authorizes city and county excess levies to extend for up to five years, the same as is applicable to school districts.

7. In 2002, the State's voters ratified Article X, § 8a, which authorizes cities and counties to use what is called Tax Increment Financing ("TIF"). The amendment was required to validate TIF because it would otherwise violate Article X, § 8. *State ex rel. County Commission of Boone County v. Cooke*, 197 W.Va. 391, 475 S.E.2d 483 (1996). Under TIF, the local government attempts to promote economic development by financing new investments through the sale of revenue bonds. The bonds are then paid off by the increased amounts of property taxes that are generated by the new investment.

According to the West Virginia TIF statute, W. Va. Code 7-11B-1, *et seq*., when a local government creates a TIF district, the assessor determines the base value of the property in the district. Each year thereafter, for the duration of the TIF, the assessor redetermines the property's value. Any taxes paid on the property's value over and above the base value is directed into the tax increment financing fund, which is then used to pay what is due on the revenue bonds. Section 8a authorizes the term for such financing to extend for up to thirty years, which is much longer than most TIF arrangements. They more typically last twenty years.

PERDUE v. WISE,
216 W. Va. 318, 607 S.E.2d 424 (2004).

Albright, Justice.

Appellants, the State Treasurer and the State Auditor, appeal from [an] order of the Circuit Court of Kanawha County granting summary judgment to Appellees, the Governor and the Acting Secretary of the Department of the Administration, in connection with the declaratory and injunctive action Appellants initiated to determine whether issuance of $3.9 billion in general revenue bonds pursuant to the Pension Liability Redemption Act (the "Act") is in violation of our state constitution. Upon our careful review of the issues presented against the record of this case, we determine that the lower court was in error in ruling that the Act does not run afoul of the constitutional provision that prohibits the state, as a general rule, from incurring debt. Because we do not find any exceptions to the constitutional debt prohibition to be applicable, we are compelled to conclude that such a funding mechanism cannot be undertaken absent express approval by the citizens of this state in the form of a constitutional amendment. Accordingly, we reverse the ruling of the circuit court on the specific grounds that the issuance of general revenue bonds pursuant to the Act would be in violation of section four, article ten of the West Virginia Constitution.

I. Factual and Procedural Background

. . . Appellants filed a complaint [to] preclude the Governor's issuance of certain general obligation bonds and to have the Act authorizing the issuance of the bonds declared unconstitutional. Under the statutory scheme challenged by Appellants, bonds in the amount of $3.9 billion were to be issued by the State, with the proceeds from the bond sale credited to three public retirement systems. The interest bearing bonds were to be issued as general obligations of the state that would be repaid from the general revenues of the state over a period of twenty-five to thirty years. The bond sale proponents envisioned that investment of the proceeds would yield income in excess of the interest payable on the bonds and thereby enable the state to reduce its future annual appropriations for the three pension systems. Opponents of the plan stressed that the investment plan contemplated by the Act necessarily includes the possibility of sustaining substantial losses due to

stock and money market fluctuations. They raised the possibility that, rather than reducing future appropriations, the bond sale could have the opposite result, if due to poor performance, the state has to pay any part of the debt costs associated with the bond issuance while also having to meet the annual appropriations required to support the three pension plans at issue.

The three systems addressed by the Act are the Judicial Retirement System, the State Troopers Retirement System, and the Teachers Retirement System. The parties agree that the three retirement systems at issue are actuarially sound, which means that their existing assets combined with the future employee and presently required future employer contributions are sufficient to pay the obligations of the systems as they become due at the present time.

What the Act and the attempted bond issuance are aimed at addressing is an accounting projection referred to as the "unfunded actuarial accrued liability," ("UAAL"), which is essentially the excess of the actuarial accrued liability[13] of the respective pension funds over the actuarial value of their assets. As of June 30, 2003, the valuation performed by the Consolidated Public Retirement Board's actuary identified UAAL figures in the amounts of $ 44 million for the Judges Retirement System; $350 million for the State Troopers Retirement System; and $5.05 billion for the Teachers Retirement System. To address these massive unfunded liabilities, the state is statutorily required to make supplemental appropriations that are recalculated annually to amortize the UAAL over a specific term. While the state is at present meeting the funding obligations imposed by the supplemental appropriations required because of the UAAL, the concern remains, based on the projection of future appropriations required to keep the respective funds in actuarially sound condition, that these annual supplemental appropriations could eventually present an insurmountable funding burden for this state.

In recognition of these looming funding concerns, the Legislature enacted the subject statute in 2000 with the intention of pursuing the issuance of $3.9 billion in general revenue bonds for the stated purpose of "redeeming" the UAAL. The Act states specifically that it

> provides for the redemption of the unfunded actuarial accrued liability of each pension system, which is a previous liability of the state, through the issuance of bonds for the purpose of: (i) Providing for the safety and soundness of the pension systems; and (ii) redeeming each such previous liability of the pension systems in order to realize savings over the remaining term of the amortization schedules of the unfunded actuarial accrued liabilities and thereby achieve budgetary savings.

W.Va. Code § 12-8-2(f).

III. Discussion

At the core of this appeal is the fundamental question of whether issuance of the bonds authorized by the Act would violate the debt clause of the state constitution. That provision mandates that: "No debt shall be contracted by this State, except to meet casual deficits in the revenue, *to redeem a previous liability of the State,* to suppress insurrection, repel invasion or defend the State in time of war[.]" W.Va. Const. art. X, § 4 (emphasis supplied). In upholding the Act, the circuit court determined that the UAAL was a "previous liability of the State" based on prior decisions of this Court requiring adequate funding of public retirement systems. Upon analysis, however, we cannot agree with the lower court's conclusion that the bonds can issue without violating the debt clause under the guise of characterizing the UAAL as a "previous liability of the State." W.Va. Const. art. X, § 4.

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[13]The term "actuarial accrued liability" ("AAL"), as defined by Scott L. Dennison, an actuary previously employed by the Consolidated Public Retirement Board, is essentially "the 'present value' of the difference between the estimated cost of future benefits less the estimated [regular] contributions expected in the future." In other words, the AAL is "a measure of future predicted shortfalls between the cash made available by anticipated future [regular] contributions relative to anticipated future benefit payouts, with these shortfalls being discounted to their present value." In relation to the AAL, the UAAL is simply the plan's AAL minus the plan's existing assets.

A. Obligations Imposed on State by Public Pension Plans

A review of this Court's rulings concerning the obligations imposed on the state as a result of various public pension funds is necessary to understand why the bond sale authorized by the Act does not fall within the "previous liability" exception to the debt provision.[20] In *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167 (1995), this Court explained why the creation and operation of public retirement systems do not ordinarily create debt in violation of the state constitution:

> This Court concluded long ago that our pension systems do not involve the creation of an unconstitutional debt. *State ex rel. Board of Governors v. Sims,* 133 W.Va. 239, 244, 55 S.E.2d 505, 508 (1949). Although *Sims* did not discuss the rationale behind its reasoning on this issue,. . . it should now be clear that pension systems are constitutional for the same reasons that special revenue bonds are constitutional: The pledge for the pension fund derives from the actuarially sound contributions of the employees and the Division; that is, the fund is expected to generate its own money to meet its eventual obligations. Because money is expected to be put away as a condition precedent to fund the system, pensions are legitimate debts of the State. Consequently, *W.Va. Const.* art. VI, § 51(B)(3)(d) requires the Governor to prepare a yearly budget that allows for payment of pensions as constitutionally created debt of the State.
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> . . . The mechanism that prevents the pension obligation from being unconstitutional in terms of its characterization as a debt is the expectation that the employee contributions plus the state/employer's statutorily specified contribution levels will provide sufficient funds to meet the required level of annual benefit payments. In syllabus point fourteen of *Booth,* we recognized the remedy that is available to a pensioner upon the state's failure to make pension installments:
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> Because pensions are a lawful debt of the State, the proper remedy for any failure to pay a pension is a mandamus action against the state treasurer and auditor. The funding of any pension program is the legislature's problem – not the state employees' problem – and once the legislature establishes a pension program, it must find a way to pay the pensions to all employees who have substantial reliance interests.
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> [As] this Court explained in *Booth,* there is no enforceable cause of action by a retiree against the state treasurer or auditor *until* the funds are not available to pay the pension benefits to which retirees are statutorily entitled.

In the seminal case addressing the obligations of the State to meet its pension commitments, we acknowledged that "the realization and protection of public employees' pension property rights is a constitutional obligation of the State." Syl. Pt. 18, in part, *Dadisman v. Moore* (*Dadisman I*), 181 W.Va. 779, 384 S.E.2d 816 (1988). We further recognized in syllabus nineteen of *Dadisman I* that "the payment of statutorily promised pension benefits, on maturity, is a general and moral obligation of the State." [*Id.*] We specifically identified the constitutional underpinnings for the protections that attach to the rights of public employees to receive statutorily established pension benefits. Those constitutionally mandated principles include protection from the impairment of contracts and require application of due process principles when modifications are sought that would affect the receipt of vested, retirement benefits. Based on the contractual nature of such pension rights, the state is obligated to remit to public retirees those retirement benefits to which they are entitled by law. *See id*. at 791-92, 384 S.E.2d at 828-29.

B. Public Debt versus "Prior Liability"

The events that precipitated the *Dadisman I* decision were the underfunding of the Public Employees Retirement System ("PERS") over a period of four years combined with the legislative transfer of funds originally appropriated for PERS to the general revenue fund. . . . In *Dadisman I,*

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[20]We note that the Legislature attempted to resolve this issue in advance by including in the legislative findings the statement that the UAAL "is a previous liability of the state." W.Va. Code § 12-8-2(e), (f). Analysis of this Court's prior decisions makes clear that we have never made such a determination.

a retired public employee sought a writ of mandamus to ensure the proper funding of PERS and to obtain directives requiring the expedient-imposition of fiscally sound management practices. In discussing the underfunding of PERS in *Dadisman I,* this Court declared that "the amount of employer contributions earned by State employees *which have been wrongfully withheld or diverted over the past four years* is a *public debt,* which must be repaid." [*Id.*] Recognizing the folly of borrowing from the PERS trust for the "purposes of political expediency," we rejected that practice as placing an assured and unwise "heavy tax burden on posterity." *Ibid.* In moulding relief for the misappropriations at issue in *Dadiman I,* we directed that an independent actuary be hired to determine whether such funding decisions had "rendered [PERS] actuarially unsound." *Ibid.* And, in the event that the retirement fund at issue was declared to be actuarially unsound, we required that an appropriation plan be developed to return PERS to actuarial soundness.

In response to this Court's directives in *Dadisman I,* the Legislature authorized an audit of PERS [which] revealed that PERS was not rendered actuarially unsound by the underfunding in view of an amortization plan that involved replacement of wrongfully withheld or diverted appropriations from PERS over a sixteen-year period. *State ex rel. Dadisman v. Caperton* (*Dadisman II)*, 186 W.Va. 627, 413 S.E.2d 684 (1991). Consequently, . . . we found the issue of adequate funding essentially mooted[.] . . .

Significantly downplaying the historical underpinnings to the characterization of misappropriated funds as a "public debt" in *Dadisman I,* Appellees argue that this Court's recognition of a duty to repay those funds to PERS combined with the legislation at issue is sufficient to invoke the debt clause exception that permits extension of this state's credit for a "previous liability of the state." W.Va.Const. art. X, § 4. Further analysis of the law as it pertains to pension rights and payment obligations, however, demonstrates why this Court's acknowledgment of a "public debt" with regard to misappropriations that affected PERS - a retirement system that is not even at issue in this case - does not cause the UAAL identified with respect to the three retirement systems at issue here to rise to the constitutionally significant level of a "previous liability of the state" for purposes of involving this state's credit in the manner contemplated by the Act. *Id.*

The recognition by this Court in *Dadisman I* and *II* and in *Consolidated Public Retirement Board* that the respective retirement funds must be funded pursuant to statutory requirements which extend over a period of years does not entitle the Legislature to invoke the "previous liability" exception to the clear constitutional prohibition against incurring debt on the state's behalf. While the term "previous liability" is certainly subject to differing views,[23] we are certain that the mere designation of the state's obligation to continue to fund PERS, the teachers retirement funds, and by logical implication all other retirement systems that are statutorily established, does not fall within the ambit of what the constitutional drafters intended as a permissible basis for extending the state's credit. As Appellants aptly note, if recognition of an obligation to fully or adequately fund was the threshold test for invoking the "previous liability" exception, there are virtually no state funding obligations for which the reasoning upon which Appellees rely would not "justify" the use of an investment scheme such as that contemplated by the Act.[24]

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[23]During oral arguments advanced during *Dickinson v. Talbott*, 114 W.Va. 1, 170 S.E. 425 (1933), it was posited that the term "pertains only to indebtedness existing at the time of the adoption of the original constitution." That interpretation was squarely rejected by this Court. . . .

[24]A related concern was articulated more than seventy years ago by opponents of legislation authorizing a bond issue to generate funds to repay almost $5 million in indebtedness incurred by the state due to insufficient tax receipts during the Depression:

> It was suggested in oral argument that if the act is upheld, any legislature at any time may direct the issuance of bonds to meet shortages in the income of the state, and thereby the pay-as-you go plan of the Constitution will be destroyed. This proposition is a non-sequitur. The instant act was passed because of a great and unusual emergency. Therein alone

C. Enforceable Sum Specific Debt

Even a cursory review of the decisions of this Court in which the subject exception to article X, section 4 has been discussed and applied demonstrates that an obligation to fund is not the equivalent of a "previous liability" within the meaning of this state's debt clause. Significantly more than a moral obligation to pay is required to invoke the exception under discussion. In each case in which the "previous liability" exception has been examined and its application approved by this Court, there has been an existing sum specific indebtedness involved - an actual enforceable debt. In *Dickinson v. Talbott,* 114 W.Va. 1, 170 S.E. 425 (1933), we discussed how invocation of the "previous liability" exception to the debt clause is directly tied to the discharge of an indebtedness. Through that decision, this Court approved the issuance of state bonds for the purpose of discharging a specific indebtedness that resulted when the state, due to insufficient tax receipts and tax levying during the Depression, borrowed funds from various banks to meet the state's obligations and transferred funds from special funds not intended for general revenue purposes. Under the facts of *Dickinson,* two exceptions to the debt clause were determined to permit the bond issuance: the exceptions granted for casual deficits and redemption of a previous liability. *See* id.[;] W.Va. Const. art. X, § 4.

In discussing the debt clause, we observed in *Dickinson* that

> The phraseology employed in the section under consideration [art. X, § 4] indicates that the framers of the Constitution anticipated that emergencies might arise in the state's finances when it would be necessary for indebtedness to be incurred by the state, and therefore provisions were made that such conditions might properly be met if and when they should arise...
>
> ...
>
> We are of the opinion also that legislative justification of the five-million-dollar bond issue is based not only on the existence of casual deficits within the meaning of section 4, Article X of the Constitution, but as well on the existence of "a previous liability of the State" within the meaning of said section. The unanticipated decline in receipts of public revenue produced first the deficits in such revenue *and then, to meet the same, indebtedness was incurred by the state as hereinabove stated.*

. . . In upholding the bond issue in *Dickinson,* this Court made clear that application of the "previous liability" exception to the debt clause requires an existing indebtedness and an accompanying liability that results when that specific indebtedness is discharged or satisfied:

> When, by reason of casual deficits in its revenues, the state incurs liability in the discharge of indebtedness incident to such deficits, the same may be funded by state bonds for the issuance of which provision is made by legislative enactment, on the basis of the redemption of "a previous liability of the State" within the meaning of section 4, Article X, West Virginia Constitution.

. . . More recently, we were again asked to approve a bond issuance under the "previous liability" exception to the debt clause.

In *State ex rel. Department of Employment Security v. Manchin*, 178 W.Va. 509, 361 S.E.2d 474 (1987), we upheld the sale of bonds pursuant to The Debt Fund Act – legislation designed to repay the federal government for moneys borrowed to pay unemployment compensation premiums.[26] In

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> is there justification for the enactment. Only on similar basis could any subsequent bond issue be upheld. It is a canon of law that officials will perform their duty. We cannot assume that the Legislature will at sometime pass a similar act unless another grave emergency justifies it. Neither the Legislature nor the courts would approve an issue that was not grounded on the plainest necessities.

Dickinson, 114 W.Va. at 8-9, 170 S.E. at 429.

[26]The borrowing was necessitated by the depletion of this state's unemployment security account in the early 1980's due to severe economic recession.

syllabus point one of that decision, we recognized that "*W.Va. Const.*, art. X, § 4, allows the legislature to issue bonds without a constitutional amendment 'to redeem a previous liability of the State.'" Just as in *Dickinson,* this Court found the "previous liability" exception applicable due to preexistent borrowing compelled by bleak economic conditions:

> There is no question that the money borrowed from the federal government pursuant to our qualifying agreement with the Secretary of Labor...is a valid, existing debt of the State...
>
> Thus, having determined that there is a preexisting liability of the State that in one way or another must be repaid to the federal government, we find no impediment in *W.Va. Const.*, art. X, § 4.

. . . In *Gribben v. Kirk,* 197 W.Va. 20, 475 S.E.2d 20 (1996), this Court rejected the Legislature's attempt to characterize a judgment against the state for unpaid overtime owed to police officers under certain wage payment statutes as a "moral obligation[] of the state." [*Id.*] Based on the fact that this judgment representing unpaid overtime and interest was a "valid legal obligation[] of the State," this Court determined that the financial obligation was a "previous liability of the State" under section 4, article X "which must be discharged in a manner consistent with our Constitution." [*Id*.]

There is no dispute that the three funds at issue are currently in actuarially sound condition. While Appellees want us to view the Legislature's obligation to inject increasingly large appropriations into the funds at issue because of the UAAL as the type of enforceable debt that translates into a "previous liability" within the meaning of the debt clause exception, we are not persuaded by this argument. To be required to make appropriations is one thing; to have a valid and enforceable debt against the state is an entirely different matter.

In marked contrast to those three decisions in which this Court has approved extension of this state's credit under the "previous liability" exception, there has been no default in the payment of pensions which would in turn give rise to the creation of an enforceable sum specific indebtedness. The existence of a recognized moral obligation to pay pension benefits – one that is currently being met - does not equate to a "previous liability" of the state within the constitutional meaning of that exception to the debt clause. Provided the Legislature is currently appropriating sufficient funds and continues to responsibly make additional appropriations necessitated by past imprudent financial decisions, there is no "present indebtedness" resulting from the discharge of a specific liability. Moreover, the statutorily required and prudently performed annual calculations of the UAAL relative to the pension systems at issue do not in any manner reflect or represent amounts that are currently owed to anyone. As such, these calculated projections, which can be altered at any time based on different assumptions and market results, similarly cannot come within the constitutional meaning of a "previous liability" of the state.

Notwithstanding the Legislature's ostensibly foresightful attempt at reducing anticipated future appropriations required to maintain the fiscal soundness of the funds at issue,[27] the necessary financial prerequisite for extending the state's credit is not demonstrated by the record before us. Because of the current actuarially sound status of the three retirement funds at issue and because there is no "present indebtedness" resulting from the actual discharge of "debt" attributable to such funds, there is no "previous liability" within the meaning of section four of article ten of the state constitution that would permit issuance of the general revenue bonds contemplated by the Act. Absent the applicability of this constitutional exception to incurring debt on the state's behalf or any

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[27]We acknowledge Appellants' contention that the risk of losses due to inherent stock market fluctuations is grounds enough for rejecting the funding plan contemplated by the Act. That issue, which essentially questions the wisdom of the Act's provisions, is a policy decision that is for the Legislature and not this Court to determine in the first instance. Under our decision today, however, the people of this state will also be required to pass on the wisdom of such a funding mechanism through a constitutional amendment referendum if the Legislature decides to pursue this funding plan.

other exception, the bond sale and investment plan at issue may only be implemented with the consent of the people expressed by the adoption of a constitutional amendment. Accordingly, we hold that the Pension Liability Redemption Act is unconstitutional in that implementation of its provisions would result in violation of the debt clause set forth in section four, article ten of the West Virginia Constitution.

As this Court wisely enunciated in *Dickinson,* "the state's constitutional requirements are for the preservation of the state and the maintenance of its integrity and for the protection of the people." . . . Though the specific historical concerns which prompted the inclusion of the debt clause may no longer exist, the objectives for which the debt clause was initially enacted - to curtail the accumulation of mountainous financial obligations that would severely saddle future generations of this state - remain as valid as when the constitution was first adopted. Despite the passage of time, the "pitfalls and dangers attendant upon unrestrained expenditures of public funds to be derived from revenues in the future" of which our constitutional forebears were justifiably determined to prevent are just as deserving of vigilant watchdogging today as in 1872. *State ex rel. State Road Comm'n v. O'Brien,* 140 W.Va. 114, 128, 82 S.E.2d 903, 910 (1954) (Lovins, J., dissenting). *See generally* R. Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law,* 34 Rutgers L.J. 907, 909, 952 (2003) (noting existence of "enormous gap between the written provisions of state constitutions and actual practice;" recognizing judicial complicity in evasion of constitutional restrictions on debt limitation, and observing that "voter approval requirements are an important theme in contemporary tax and expenditure limitations").

Having determined that the Pension Liability Redemption Act is unconstitutional, the decision of the Circuit Court of Kanawha County is hereby reversed.

NOTE

A 2014 amendment added § 12 to Article X and provides for a property tax exemption to nonprofit organizations that promote “adventure, educational or recreation activities for young people and others” and that invest at least one hundred million dollars in facilities on their property. The amendment’s proponents argued that it would promote economic development by enabling the Boy Scouts of America to use its large complex in Fayette County for profitable use. The amendment was needed to create an exception to Article X, § 1's requirement that taxes shall be uniform and equal.