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The Constitutional Aspects of Home Rule

by

HENRY FLOYD*

Perhaps what we should do is trace the history of the constitutional concept of home rule in South Carolina and then get around to the most important thing: what questions we have to deal with.

Initially, I think home rule is nothing new to South Carolina which might surprise some of you. In fact, the constitution of 1868 contained a provision that was taken from the Ohio constitution that provided as follows: "The qualified electors of each county shall elect three persons for the term of two years who shall have jurisdiction over roads, highways, ferries, bridges, and in all matters relating to taxes, disbursement of money for county purposes and in every other case that may be necessary to the internal improvement and local concern to the respective counties."

Now you can see that's quite a broad provision and very progressive and ahead of its time for 1868, and unfortunately, that provision, as I said being ahead of its time, became one of the focal points of the power struggle between the so-called carpetbaggers in the late 1800's and the white democrats. That struggle consumated in a repeal of that particular provision in the 1890's. In fact, county government for all practical purposes was left out of the 1895 constitution in terms of how it would be constructed or what forms there would be. Now there are some provisions in other parts that we'll discuss later, but basically it was just ignored.

The general law carryovers of the board of commissioners and the roads and bridges jurisdiction of county government was maintained in Article X, Section 6 of the constitution. As I said, the provision was repealed and left out of the constitution of 1895 and subsequently the power to run both state government and county government was placed in the general assembly and for some 80 odd years now it's been run for all practical purposes out of Columbia, which, in my own personal opinion is contrary to the concept of home rule and it does not best meet the needs of the people. This particular attitude of having county government run from the state house rather than the court house

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was carefully guarded by the judiciary in interpreting a number of decisions in which they treated county government as an arm of state government. And the court house for all practical purposes, became merely a place of record keeping, with an occasional visitation from the circuit court. There were some confrontations between local office-holders, county auditors, etc., but the real power to run local government was in the state house in the supply bill.

Now South Carolina took its own good time leaving the 19th century. The counties were virtually ignored in the 1895 constitution, and the taxing power, which is the real power of government, was left with the legislature.

The fellow that drafted Article X, Section 6 was really an unimaginative fellow when he drafted the so-called county purpose doctrine, because even that particular concept limited the individual legislator or the delegation severely in how to deal budgetarily with county government. You may be familiar with that provision but generally it provides just for the maintenance of roads and bridges, the burial of paupers and a few other very restricted kinds of things. The county government couldn't deal in water districts or sewer systems or fire protection or a number of other things that have become almost necessary in today's society. To get around Article X, Section 6, some of our people contrived the idea of the special purpose district which I'll address myself to in just a minute.

But there became increasingly from 1895 a recognition by a number of people that this kind of government was not in the best interest of the local people. And I suppose we should pay tribute to the holy city of Charleston and the county of Charleston because in the late 1940's they initiated the first County Council Act. It was challenged in a court decision in 1948 and survived for all practical purposes the constitutional questions with some exceptions. Any constitutional question that was raised by the county council act, 1948, and all those thereafter, I think, have been resolved by the passage of the new Article VIII.

Now as I said just a minute ago, to get around the problems of Article X, Section 6, the counties began to develop a form of government called Government By Special Purpose Districts. The counties couldn't do certain things but somebody in the legislature used their imagination and decided that setting up a special purpose district within the county would get around the constitutional provision, and that is exactly what happened. Now we have some 200 or more of these particular kinds of districts in South Carolina. The special purpose district was a good innovation for two or three reasons. One, it showed a
little imagination, to overcome the constitutional provisions. Second, it met a specific need in the area, for example, for fire protection for a particular area, or for water service or sewer service. On the other hand, their proliferation was something akin to rabbits, there are just too many of them. And the ultimate effect of special purpose districts was that they began to strangle not only municipal government but county government. So we had to take a look at that in view of what it was doing to those bodies of government that were dually constituted to run local affairs, and that was one of the reasons behind Article VIII.

The break finally came in terms of getting local government back in the hands of the people as a result of reapportionment. The battles of 1960, and those that continue even today will ultimately end, I hope, in the reapportionment of the senate. The legislative delegation is no longer capable of managing local affairs, not only from a legal and fairness standpoint, but particularly from a time aspect because the responsibility of a legislature has become almost full-time in Columbia.

In the late 1960's there was developed a constitutional revision study committee and they proposed the now enacted Article VIII. The people voted on it in 1972 and belatedly the General Assembly enacted this particular implementing legislation in 1975. Thus there began constitutionally a local government renaissance which had been originally born in 1868 but now reborn again in 1975.

The court test to the new constitutional Article VIII came very quickly in the case of Knight vs. Salisbury. Ironically, the object of that particular court suit was a special purpose district. These things are going to cause us trouble. Let me point out one of the problems. In the home rule bill there is talk about special purpose districts and how you dissolve them and how you maintain them and what you do with them. There is also a 1974 act on the books that talks about the very same thing and gives a great deal of power to county governing bodies to expand, restrict or actually abolish special purpose districts. But there is a conflict in the language between how you go about doing it. So we have some problems there and they are going to continue to be a thorn in our side.

The unfortunate thing about Knight vs. Salisbury was that the Supreme Court was not unanimous. The vote was something like a basketball defense 1-2-2, although it was a 3-2 majority. The opinion of the court written by Judge Littlejohn was concurred in by Justice Lewis and Justice Moss, but they reached their decision through a completely different avenue. Then you had Judge Butsey and Judge
Brailsford on the other hand in the dissent so that it didn’t really pro-
vide us with a lot except that it scared us to death. We thought we
better hurry up and get this act passed. So it took about two years
for us to get around to doing that.

During the debate on home rule the latter part of this year, came
the Horry County decision. It involves several questions. One is the
constitutionality of the supply bill, based on the fact that the Horry
delegation was partly composed of people outside Horry County. One
member lived in Georgetown County and that was a result of the re-
apportionment problem again. Judge Larson issued a very detailed order
in which he struck down the supply bill, but by the time it got to the
Supreme Court they decided not to rule on the point because it was
already moot. So we don’t have any real clear cut decisions to this
date on the question of supply bills. Judge Morrison’s order is still in
effect. The Supreme Court did not reverse that decision, they just
chose not to hear it.

Now that’s the history. I would like to change gears and propose
several questions for you. A lot of it is going to need litigation. Some
of it is going to need corrective litigation, and some of it’s just
going to need a good election next year to clear it up, but the questions
are going to be the same.

First of all, what did Amcle VIII do to the 1895 constitution? It
repealed old Article VII which was an article dealing with county gov-
ernment (specifically with the merger and consolidation and disillusion
of counties). By constitutional interpretation, I think the latter will of
the people overrides the first, but nevertheless it is still there and
it could cause some problems in terms of some of the provisions that
are in there. For example, the eight mile courthouse limit is still on
the book. So what happens as a result of that? I don’t know.

What do we do about the general law already on the books dealing
with the merger of counties, when it says in Article VIII that the General
Assembly shall provide, and we haven’t? Under the preliminary power
of the legislature, probably that general law is still good, but there is
a question about that. In repealing old Article VIII here is a very interest-
ing question for the municipal people. In Section 7 of old Article VIII
there was an 8% debt ceiling limitation. That same limitation can
be found in Article X, Section 5. But the Knight vs. Salisbury case and
other cases, in terms of constructing constitution, says that any old
Article must be harmonized and construed in light of the last will of
the people – which is new Article VIII. Now does that mean that the
8% debt limitation does not apply to municipalities, notwithstanding
that the provision is still in the constitution in Article X? So there's a constitutional problem. And that's a serious problem in terms of the impact of the financial structure of municipalities in particular. The county provision is still in Article X.

Another question. What do you do about Article III, Section 34 and its impact on Article VIII? That particular section is the local act, or special act, prohibition. The general assembly and the courts have winked at this thing from time immemorial. That is the way we run things, by local act. There are a number of laws on the books that are nothing but special acts and local acts and in my opinion unconstitutional and subject to challenge. This is going to be one of the critical problems in the future. The Supreme Court is going to have to come down very clearly and very hard on the question of local acts.

What are the provisions that are in the actual bill? Everywhere that it says "the General Assembly shall provide for" something that can reasonably be interpreted to be a power of the local governing bodies, there is a constitutional cloud. For example, in selecting the terms of office, 2 or 4 years (both in the county provision), to actually draw the district lines if you choose to go the single member districts, to select the number of members on the council, all this is provided in "the General Assembly shall provide for this." Thank goodness the petition method is in there so that if the will of the people is abrogated by action of legislative members, then they can overcome that. But all those things raise constitutional questions and we argued about it and argued about it in the General Assembly, but we still passed it anyway.

Now what about some other constitutional questions that need to be considered? Article V provides for a uniform judicial system. Yet the legislature provided for municipal courts in the implementing legislation to Article VIII. So we've got a problem there.

One of the big questions for municipal people is the question of annexation. Municipalities wanted to maintain the right to choose the electric supplier in their area in case of annexation. The private power companies agreed because they have control over most of the municipal areas. The cooperatives, on the other hand, said no, we want to maintain the areas that have been assigned to us by the public service commission. There is a serious question of annexation in terms of the franchising rights of municipalities. And apparently it will have to be litigated. We have spent two years trying to argue this thing out and iron it out in conference committees and could not. There is a division between the house and the senate over that matter. And so apparently it will have to be litigated. How far does municipal franchise
right go in light of Article VIII? Some say it goes all the way. Others say that provisions have taken exception to that. Others say that the General Assembly can provide for conditions and requirements of annexation, and so therefore can decide who's going to serve in the area. And as I said, that's a big problem.

The last thing I think I would like to address myself to is education. We have a lot of talk about education. What effect does home rule have on education? Now we can argue about this but in my opinion if you'll read Article XI, Section 3, it says the General Assembly shall provide for a three system public education. That is a newly enacted provision in the constitution. I take that to mean that the General Assembly will provide for the educational system in this state and it has nothing to do with home rule. But school board people have gone out and advocated, we want home rule too. Maybe they ought to have it, but it doesn't belong in Article VIII. It doesn't belong in this implementing legislation. In my personal opinion it is subject to Article XI, Section 3 and if the General Assembly decides that home rule for school districts is in their best interests then that's the way it ought to be. But its not a part of this discussion — there is no mention of education in Article VIII, it is in Article XI.

Finally, on the question of the constitutional aspects, there are two articles that greatly affect home rule that are still outstanding, but have not been submitted to the people. One is Article III, the legislative article, and the other is Article X which is the finance article. If we give you all these powers and we don't give you the financial wherewithall to do it, and at the same time provide safe-guards (make sure that the state's credit is not damaged) then we're going to have a serious problem. Article X is old and it needs to be looked at not only in terms of protecting the people from municipal and county governments who choose not to balance their budgets and spend unwisely, but also in terms of providing local governments with the ability to meet those needs that are demanded by the people.