Revisiting *Granite Falls*: Why the Seattle Monorail Project Requires Re-examination of Washington's Prohibition on Taxation without Representation

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I. INTRODUCTION

It has been said that the power of the state to tax is virtually limitless, and that the power to tax involves the power to destroy;[1] indeed, taxation is one of the chief tools by which tyranny can be imposed upon a nation.[2] It is for this reason that Anglo-American law has long-characterized the taxing power as legislative in character,[3] that is, it is only legitimately exercisable by the people themselves or by their duly elected representatives.[4] The rationale for lodging this awesome and potentially destructive power in the legislature is manifest: it accords with the nature of taxes themselves[5] and ensures that those imposing the tax are held accountable to the electorate who bears their burden.[6] In

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1. M'Culloch v. Maryland, 17 U.S. 316, 327 (1819).

2. *See* 1 THOMAS M. COOLEY, THE LAW OF TAXATION § 21 (4th ed. 1924). According to Cooley, the principle of self taxation is the chief security against oppression. Relying on the works of Burke, Locke, and Madison, he explains that "the chief importance of those who pay taxes to vote [for] them . . . [is that it] constitutes the only substantial and continuous check upon tyranny[.]"

3. *Id.* at § 64; *see also* Meriwether v. Garrett, 102 U.S. 472, 515, 517-18 (1880); State *ex rel.* Nettleton v. Case, 39 Wash. 177, 182, 81 P. 554, 556 (1905) (A tax is a burden or charge "imposed by legislative authority on persons or property, to raise money for public purposes").

4. 1 COOLEY, *supra* note 2, § 21.

5. *Id.* at §§ 3, 7; *see also Nettleton*, 39 Wash. at 181, 81 P. 554, 556; BLACK'S LAW DICTIONARY 1469 (7th ed. 1999) (defining tax as "[a] monetary charge imposed by the government on persons, entities, or property to yield public revenue"). Black's goes on to quote Thomas M. Cooley by explaining that taxes are "the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs." This definition, according to Black's, has been widely endorsed.

6. *See generally* 1 COOLEY, *supra* note 2, at § 21; THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 517 (1868).

short, legislative control of the taxing power avoids "taxation without representation." Washington law and its political structures reflect this fundamental principle of American democracy.[7]

A consistent and equally fundamental doctrine prohibits the legislature from delegating its legislative power, particularly in the case of taxation, to other entities.[8] Article II, section 1 of the Washington Constitution explicitly vests all legislative power in the state legislature and generally bars it from delegating that power.[9] Additionally, although municipal corporations possess no inherent power to tax,[10] article VII, section 9 and article XI, section 12 provide an exception: together, these sections permit the legislature to delegate the taxing power to the "corporate authorities" of local municipal corporations for local purposes.[11] The Seattle Monorail Project (SMP), however, raises serious questions about the extent to which the state constitution permits a municipal corporation governed by an unelected[12] board to levy local taxes.

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7. *See infra* Parts II.B–C.

8. 1 COOLEY, *supra* note 2, §§ 74, 75, 78. It is important to distinguish the difference between the delegation of authority to administrative agencies and the delegation of the taxing power. Only the latter is the focus of this article. It is widely accepted that, although the taxing power may not be delegated to an unelected and unaccountable entity over whom the electorate has no control, certain ministerial functions may be properly delegated. 1 THOMAS M. COOLEY, THE LAW OF TAXATION 99-107 (3d ed. 1903). Ministerial functions are generally those that have a specific and temporary character. Citizens for Financially Responsible Gov't v. City of Spokane, 99 Wash. 2d 339, 347, 662 P.2d 845, 850 (1983). These functions are also characterized by the application of already established rules or by the pursuit of an already established plan. *Id.* Ministerial functions do not include the more complex legislative determinations of the appropriate level at which to levy a tax or on what budgetary items such funds should be spent. Conversely, legislative actions are more permanent and general in character, and often prescribe new policy. *Id.* The legislature may delegate incidents of the taxing power to administrative bodies when the discretion of such bodies is limited by explicit legislative standards by which that power may be exercised. 1 COOLEY, *supra* at 99-107. Thus, the legislature must create the rules and determine the mode of application of the tax, and the delegatee may oversee its implementation and collection. *Id.* The purpose of this rule is to ensure that the legislature—the entity accountable to the taxpaying public and entrusted with the taxing power by the constitution—makes the decisions it is charged with, and the unaccountable agency merely implements them.

9. WASH. CONST. art. II, § 1. Many Washington cases articulate well the constitutional requirements for delegating legislative power. *See, e.g.*, Amalgamated Transit Union Local 587 v. State, 142 Wash. 2d 183, 233-34, 11 P.3d 762, 794 (2000), *amended at* 27 P.3d 608 (explaining that, "[u]nder art. II, § 1, [t]he legislative authority of the State is vested in the Legislature . . . and it is unconstitutional for the Legislature to abdicate or transfer its legislative function to others").

10. *See, e.g.*, Pacific First Fed. Sav. & Loan Ass'n v. Pierce County, 27 Wash. 2d 347, 352, 178 P.2d 351, 354 (1947).

11. WASH. CONST. art. VII, § 9; art. XI, § 12.

12. The Seattle Monorail Project Board of Directors consists of nine members, only two of whom are directly elected by the taxpaying Seattle electorate. *See infra* Part III.C. The seven other members are appointed. *See infra* Part III.C. Under *Cunningham v. Municipality of Metro. Seattle*, 751 F. Supp. 885, 891-93 (W.D. Wash. 1990), the "character" of the board should be determined by how the majority of its seats are filled. The court in *Cunningham* explained that when a majority of a

Following Seattle voter approval of an initiative to create a citywide monorail transportation system, [13] the Washington State Legislature passed Engrossed Substitute Senate Bill 6464 (the "Enabling Act" or "Enabling Legislation"), which permits cities with over 300,000 residents to create a city transportation authority (CTA) to plan, develop, and operate a citywide monorail transportation system. [14] It also authorizes CTAs to issue bonds and levy various taxes to fund such systems. [15] However, because the Enabling Act permits CTAs to be governed by unelected governing bodies[16] it created the potential for an un-elected and unaccountable board to levy taxes.

This potential became reality in November 2002 when Seattle voters approved Seattle Citizen Petition No. 1 ("Petition 1" or the "Petition"). [17] Petition 1 created a CTA called the Seattle Monorail Project (SMP) and authorized it to issue up to $1.5 billion in bonds and to levy a motor vehicle excise tax (MVET) of up to 1.4% to fund the repayment of those bonds.[18] The SMP is governed by a board consisting of seven appointed members and two members elected at large by Seattle voters.[19] Its un-elected composition notwithstanding, by its own actions

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municipality's governing board is elected, it must be characterized as an "elected body." *Id.* at 893. The SMP can be clearly characterized as either "appointed" or "unelected."

13. In November 1997, Seattle voters passed Initiative 41, which established the Elevated Transportation Company (ETC), a public corporation tasked with planning and building a 40 mile monorail mass transit system within the city. *See* Initiative 41, art. 4, *available at* http://archives.elevated.org/archives_documents/initiative_41.shtm (last visited July 10, 2005); Alyssa Burrows, *Seattle and Washington Officials Appoint the Elevated Transportation Company (ETC) Board to Comply With Initiative 41 on February 17, 1998*, *available at* http://www.historylink.org/essays/output.cfm?file_id=4285 (Mar. 26, 2004). Shortly thereafter, monorail supporters Peter Sherwin and Cleve Stockmeyer drafted Initiative 53, which required the city to provide the ETC with $6 million to develop a specific plan to build, finance, and operate the monorail. Seattle Initiative 53, ¶¶ 1-4, 2000 Seattle Election – General Election Voters' Guide, *available at* http://www.ci.seattle.wa.us/ethics/el00a/report/vpg/monorlct.htm (last visited July 24, 2005). Initiative 53 required that, once prepared, the plan would then be submitted to Seattle voters for approval. *Id.* at ¶ 4; Kery Murakami, *City Refuses to Spend More Money on Monorail Board*, SEATTLE POST-INTELLIGENCER, August 1, 2000, at B-1; Kery Murakami, *Petitions Filed for Putting Monorail Issue to a Vote*, SEATTLE POST-INTELLIGENCER, August 18, 2000, at B8; Kery Murakami, *Next Stop the Ballot?; Not for Monorail; Too Few Names*, SEATTLE POST-INTELLIGENCER, September 8, 2000, at B1. On November 7, 2000, 56.36% of Seattle voters approved Initiative 53. King County Elections Results, *available at* http://www.metrokc.gov/elections/2000nov/respage11.htm (Dec. 1, 2000).

14. 2002 Wash. Laws 248 (codified at WASH. REV. CODE § 35.95A (2005)).

15. WASH. REV. CODE §§ 35.95A.070, 080 (2002).

16. WASH. REV. CODE § 35.95A.030 (2002) (providing that a governing body may be "appointed or elected").

17. Seattle Citizen Petition No. 1, approved November 5, 2002.

18. *Id.* at §§ 6(a), (c).

19. *Id.* at § 4.

the SMP has levied the MVET at varying levels within the voter-approved 1.4% ceiling.[20]

The composition and actions of the un-elected SMP Board raise the question of whether the Washington State Constitution permits the legislature to delegate its taxing power to municipal corporations governed by unelected boards. Stated differently, the SMP Board and its actions present the question of whether the Washington State Constitution requires that local taxes be imposed only by officials who are elected by, and accountable to, the electorate burdened by the tax.[21] While Washington's Constitution, political structures, and legal doctrine are designed to prevent "taxation without representation," the recent case of *Granite Falls Library Facility Area v. Taxpayers of Granite Falls* has blurred the contours of these safeguards.

This Article analyzes whether the legislature has unconstitutionally permitted "taxation without representation" by delegating its legislative taxing power to the SMP. It argues that the Washington State Constitution permits the delegation of the taxing power to municipal corporations only when the legislative organs of those entities are directly elected by or otherwise accountable to the tax burdened electorate. Further, it argues that, because the SMP fulfills neither of these requirements, it is constitutionally unable to levy the MVET. Part II analyzes the Anglo-American legal system's historical prohibition on taxation without representation and analyzes Washington cases that address this prohibition. Further, it argues that Washington's prohibition on taxation without representation does not permit delegation of taxing authority to officials who are unaccountable to the electorate burdened by the tax. Part III applies this rule to the facts surrounding the composition and activities of the SMP, arguing that because it is governed by an unelected board, it is constitutionally unfit to levy the MVET. It argues further that neither voter approval of neither the MVET nor the governing structure of the SMP can cure this fundamental deficiency. Part IV concludes by recommending that the Washington Supreme Court clarify the precise boundaries of the state's prohibition on

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20. *See infra* Part III.B; *see also* Seattle Monorail Project Construction, *at* http://www.elevated.org/construction (last visited July 10, 2005).

21. In July 2005 the SMP abandoned its financing plan and two of its most vociferous board members resigned. Seattle Times Staff, *Monorail Leaders Resign*, THE SEATTLE TIMES, July 4, 2005, *available at* http://seattletimes.nwsource.com/html/monorail/2002357262_webmonorail04.html. These events have raised serious questions about whether the SMP should be dissolved and the project abandoned. Even if such actions were taken, they would not answer the fundamental question regarding how and when the taxing power may be delegated to the corporate authorities of municipal corporations in Washington State.

taxation without representation in order to preserve its continued application and ensure the continuation of the protections it affords.

II. WASHINGTON PERMITS DELEGATION OF THE TAXING POWER TO MUNICIPAL CORPORATIONS ONLY WHEN THEY ARE COMPOSED OF ELECTED OFFICIALS OVER WHOM THE TAX-BURDENED ELECTORATE RETAINS CONTROL.

In determining whether the SMP has unconstitutionally levied the MVET, it is important to first define taxes, identify entities that may impose them, and determine under what circumstances the taxing power may be delegated. Subsection A explores the historical origins of America's prohibition on taxation without representation and explains that Anglo-American law has long characterized the taxing power as one that is "legislative" in character. It describes taxes as typically being conceived of as a "grant" of the people to their government,[22] explaining that taxes may therefore be imposed only by the people themselves or by their duly elected representatives.[23] Subsection B examines Washington's legal doctrine and political structures and demonstrates how they reflect this important concept. Lastly, subsection C explains that Washington permits its legislature to delegate the taxing power to municipal corporations.[24] It argues, however, that to avoid "taxation without representation," the Washington State Constitution only permits delegation of the taxing power to municipal officials who are elected by, and accountable to, the tax-burdened electorate.

A. The Historical Origins and Justifications of the Legislative Taxing Power.

Anglo-American law has long characterized the power of taxation as one that is necessarily legislative in character.[25] This is evident from

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22. *See* Meriwether v. Garrett, 102 U.S. 472, 515, 517-18 (1880); State *ex rel.* Nettleton v. Case, 39 Wash. 177, 182, 81 P. 554, 556 (1905) (a tax is a burden or charge "imposed by legislative authority on persons or property, to raise money for public purposes"); *see generally*, 1 COOLEY, *supra* note 2, § 1.

23. "England has no written constitution, it is true; but it has an unwritten one, resting in the acknowledged, and frequently declared, privileges of Parliament and the people, to violate which in any material respect would produce a revolution in an hour. A violation of one of the fundamental principles of that constitution in the Colonies, namely, the principle that recognizes the property of the people as their own, and which, therefore, regards all taxes for the support of government as gifts of the people through their representatives, and regards taxation without representation as subversive of free government, was the origin of our own revolution." *In re* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 115 (1872) (Bradley, J. dissenting).

24. WASH. CONST. art. VII, § 9; art. XI, § 12; 1 COOLEY, *supra* note 2, § 75 n.56.

25 1 COOLEY, *supra* note 2, § 64; 1 COOLEY, *supra* note 8, at 43-45, 100. *See also Meriwether*, 102 U.S. at 515 ("[Taxation] is a high act of sovereignty, to be performed only by the legislature upon

the fact that taxation itself "is the making of rules and regulations under which the necessary revenues for all the needs of government are to be apportioned from among the people and collected from them."[26] Because taxes themselves are a "grant" of the people to their government, they must be made by the "immediate representatives of the people."[27] Stated another way, the people possess "the sole right to determine, through their chosen representatives, what grants of supplies shall be made for the support of the state and how the burden of taxation which they entail shall be distributed."[28] In our political and legal system, it is therefore axiomatic that the power of taxation belongs to the legislature.

The justification for lodging the taxing power in the legislature rests, in large part, upon the fact that doing so helps to prevent tyranny and oppression.[29] Although the notion that there can be no lawful taxation levied by the sovereign unless granted by the representatives of the people originated in England, it was in America that it took on particular significance.[30] In response to Great Britain's odious taxing of

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considerations of policy, necessity, and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the State and in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced."); Love v. King County, 181 Wash. 462, 467, 44 P.2d 175, 177 (1935) ("the power to tax necessarily falls within the legislative branch of government"); State v. Redd, 166 Wash. 132, 137, 6 P.2d 619, 622 (1932) ("the legislative branch of government has the exclusive power of taxation); *Nettleton*, 39 Wash. at 182, 81 P. at 556 (a tax is a burden or charge "imposed by legislative authority on persons or property, to raise money for public purposes").

26. 1 COOLEY, *supra* note 8, at 43.

27. *Id.*; State *ex rel.* Board of Comm'rs v. Clausen, 96 Wash. 214, 225-26, 163 P. 744, 747 (1917) (indicating that the state's power to tax is granted by the people to the state for their benefit, and is subject to their ultimate authority).

28. DAVID A. WELLS, THE THEORY AND PRACTICE OF TAXATION 116 (1900). According to the Supreme Court, "the power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and, whether exercised by the legislature itself, or delegated by it to a municipal corporation, is strictly a legislative power. New Orleans Water-Works Co. v. Louisiana Sugar Refining Co., 125 U.S. 18, 31 (1888).

29. 1 COOLEY, *supra* note 8, at 97 n.2.

30. *Id.* at 97. America's Founding Fathers were strongly influenced by English Enlightenment thinkers such as John Locke, who proposed radical new conceptions regarding the structure of government and its relationship to the citizenry. According to Locke, the legitimate exercise of legislative power required officials "to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at court, and the country man at plough. Secondly, these laws also ought to be designed for no other end ultimately, but the good of the people. Thirdly, they must not raise taxes on the property of the people, without the consent of the people, given by themselves, or their deputies. And this properly concerns only such governments where the legislative is always in being, or at least where the people have not reserved any part of the legislative to deputies, to be from time to time chosen by themselves. Fourthly, the legislative neither must nor can transfer the power of making laws to any body else, or place it any

the colonies, including imposition of the Stamp Act of 1765, colonists articulated the concept that "taxation without representation is tyranny."[31] The colonists' assertion that there could be no taxation without representation meant that local laws, particularly those relating to taxation, could not be made but by local legislatures.[32] This notion was a rejection of Great Britain's assertion that members of Parliament adequately represented the entire nation, including the colonists,[33] rather than the limited property owning constituency that had elected them. The colonists' rejection of this assertion ultimately gave rise to the American Revolution's rallying cry of "no taxation without representation."[34]

Since then, the notion that there can be no taxation without representation has become enshrined in our nation's political structures and legal doctrine. As Chief Justice Marshall stated in *M'Culloch v. Maryland*,

> [i]t is admitted, that the power of taxing the people and their property, is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituent over their representative, to guard them against its abuse.[35]

This powerful language demonstrates that principles of local tax exaction are embodied not only in our national government, but also at the state and local levels. Washington State is no exception.

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where, but where the people have." John Locke, *Second Essay Concerning Civil Government*, *in* OF THE EXTENT OF THE LEGISLATIVE POWER Chap. XI, § 142 (1690).

31. JOHN C. MILLER, ORIGINS OF THE AMERICAN REVOLUTION 31, 138, 212-13, 215, 220 (1943); Gregory C. Sisk, *Questioning Dialogue by Judicial Decree: A Different Theory of Constitutional Review and Moral Discourse*, 46 RUTGERS L. REV. 1691, 1720 n.100 (1994) (citing ROBERT MIDDLEKAUF, THE GLORIOUS CAUSE 76-93 (1982)).

32. 1 COOLEY, *supra* note 8, at 96 (noting in particular that the concept does not mean, as is commonly thought, that no person was to be subject to taxation unless someone he had a voice in electing voted on it).

33. Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 AM. BUS. L.J. 553, 571 (1994).

34. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 167-75 (1967).

35. 17 U.S. 316, 428 (1819).

accountable to, the taxpaying public. The Washington Constitution specifically provides for the election and removal of state representatives and senators by way of regularly held elections.[48] The electorate's ability to express its assent or disapproval for a particular tax (or any other law) by voting to retain or remove representatives responsible for imposing the tax is thus a hallmark of Washington's legislative branch, and one that accords with the Anglo-American tradition's longstanding principle that there can be no valid taxation without representation.[49]

In addition to vesting legislative power in the legislature, Washington's citizens have reserved certain legislative powers, including the taxing power, in themselves in the form of the initiative and referendum.[50] Article I, section 1 indicates that "the people reserve to themselves the power to propose bills, laws and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act item, section, or part of any bill, act or law passed by the legislature."[51] When approved in the manner required by the state constitution, an initiative expresses "the same power of sovereignty as that exercised by the legislature in the passage of a statute.[52] The same is true for properly passed referenda.[53] When the taxpaying electorate votes to impose a tax upon itself, such action is plainly consistent with the democratic principles of taxation.

By reserving the legitimate exercise of the taxing power to the people or their elected legislature, Washington law embraces axiomatic Anglo-American legal principles. Washington citizens may directly levy a tax upon themselves through initiative or referendum; alternatively, the legislature may, acting as elected representatives of the people, impose a tax in their name. These modes of exercising the taxing power ensure that taxes are always imposed by persons accountable to the taxpaying electorate and guarantee citizens the right to express their continuing assent or disapproval for any given tax. The constitution's allocation of the taxing power to the people and its representatives, however, would be of little use if either could easily abandon it.

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48. WASH. CONST. art. II, §§ 1, 4-6 (vesting legislative power in the legislature and providing for regular elections of senators and representatives).

49. *See supra* Part II.A.

50. WASH. CONST. art. II, § 1, as amended by amend. 7; *Amalgamated Transit*, 142 Wash. 2d at 237-38, 11 P.3d at 796-97; Ruano v. Spellman, 81 Wash. 2d 820, 822-23, 505 P.2d 447, 449 (1973).

51. WASH. CONST. art. II, § 1.

52. Love v. King County, 181 Wash. 462, 469, 44 P.2d 175, 178 (1935).

53. Ballasiotes v. Gardner, 97 Wash. 2d 191, 195, 642 P.2d 397, 399 (1982) (explaining that the referendum power is not an inherent right of the people and must be reserved).

C. The Legislature Generally May Not Delegate its Taxing Power.

The legislature is generally barred from delegating the power to tax in order to preserve the constitution's allocation of the taxing power.[54] The justification for this prohibition is, at least in part, to prevent the evil of taxation without representation; as one learned treatise has stated, "[i]t is not competent for the legislature to delegate its power of taxation, wholly or in part, to either of the other departments of government, or to any individual, private corporation, officer, board, or commission."[55] Indeed, if the legislature were permitted to abdicate its taxing power, the constitutional protections of representative government afforded to the people would be of little meaning.

Across both time and a wide range of jurisdictions, American courts have consistently upheld the fundamental principle that prohibits the legislature from delegating the taxing power.[56] Washington courts are no exception,[57] though in Washington, this non-delegation rule is subject to at least one narrow exception.

1. The Washington Constitution Permits Delegating the Taxing Power to Municipal Corporations.

A narrow exception to the general rule barring delegation of the legislative taxing power concerns delegation to local municipal corporations. Unlike the state legislature, municipal corporations have no inherent power to tax.[58] The Washington Constitution, however, contains at least two complementary provisions that permit the legislature to delegate taxing authority to municipal corporations. The first provision, article VII, section 9, specifically empowers the legislature to vest the taxing power in municipal corporations.[59] It provides that:

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54. 1 COOLEY, *supra* note 8, at 99-100.

55. 37 CYCLOPEDIA OF LAW AND PROCEDURE, Taxation 724-25 (1911) (observing, however, that an exception exists for municipal corporations).

56. 1 COOLEY, *supra* note 8, at 45, 100; *see also* State *ex rel.* Howe v. City of Des Moines, 72 N.W. 639, 641 (Iowa 1897); Vallelly v. Bd. of Park Comm'rs of Park Dist. of Grand Forks, 111 N.W. 615, 618 (N.D. 1907); Atlantic City Casino Hotel Ass'n v. Casino Control Comm'n, 496 A.2d 714, 717 (N.J. Super. 1985); Greater Poughkeepsie Library Dist. v. Town of Poughkeepsie, 618 N.E.2d 127, 130 (N.Y. 1993); Danson v. Casey, 382 A.2d 1238, 1241 (Pa. Commw. Ct. 1978); Wilson v. Philadelphia School Dist., 195 A. 90, 94 (Pa. 1937); Weaver v. Recreation Dist., 492 S.E.2d 79, 81-82 (S.C. 1997); State *ex rel.* Ledbetter v. Duncan, 702 S.W.2d 163, 165 (Tenn. 1985).

57. *See infra* Part II.C.1 (discussing Washington cases).

58. 16 MCQUILLIN MUN. CORP. § 44.05 (3rd ed. 2005); *see also* Arborwood Idaho, L.L.C. v. City of Kennewick, 151 Wash. 2d 359, 365-66, 89 P.3d 217, 221 (2004); Pacific First Federal Sav. & Loan Ass'n. v. Pierce County, 27 Wash. 2d 347, 352-53, 178 P.2d 351, 354 (1947); Ivy Club Investors Ltd. P'ship v. City of Kennewick, 40 Wash. App. 524, 528, 699 P.2d 782, 784 (1985) ("If the legislature does not authorize a municipality to levy a tax, it is invalid no matter how necessary it might be.").

59. WASH. CONST. art. VII, § 9.

> The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same.[60]

This provision, however, is not self executing, and therefore requires that municipalities receive express authority, either constitutional or legislative, if they are to properly levy taxes.[61] The extent of a municipal corporation's taxing authority is limited to that which is expressly granted by the legislature or necessarily implied.[62]

Article XI, section 12 contains a related provision that describes the entities to which the legislature may delegate its taxing authority. That section states:

> The legislature shall have no power to impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes.[63]

This second provision is a limitation upon the legislature's power to delegate the taxing power to anyone other than the local authorities of the municipal corporation involved.[64] It effectively prevents the state from imposing taxes upon its subdivisions for local purposes, instead requiring it to vest local authorities with the power to tax for local needs.[65] This "home rule" principle is consistent with the deep-seated Anglo-American principle of keeping taxation as close to the tax-burdened electorate as possible.[66]

Together, article VII, section 9 and article XI, section 12 create an exception to the general non-delegation rule which permits delegation of the taxing authority to the "corporate authorities" of municipal corporations. However, these provisions fail to explicitly define what constitutes the "corporate authorities" of a municipality.

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60. *Id.*

61. *Arborwood*, 151 Wash. 2d at 366, 89 P.3d at 221.

62. 16 MCQUILLIN, *supra* note 58, § 44; *Pacific First*, 27 Wash. 2d at 352, 178 P.2d at 354; *Ivy Club Investors*, 40 Wash. App. at 528, 699 P.2d at 784; *see also* 37 CYCLOPEDIA OF LAW AND PROCEDURE, Taxation, *supra* note 55, at 724-25.

63. WASH. CONST. art. XI, § 12.

64. State *ex rel.* Tax Comm'n. v. Redd, 166 Wash. 132, 139, 6 P.2d 619, 622 (1932).

65. State *ex rel.* Latimer v. Henry, 28 Wash. 38, 45, 68 P. 368, 371 (1902).

66. *See supra* Part II.B.

a. In Washington, "Corporate Authorities" Refers to the Legislative Organ of a Municipality.

The Washington State Constitution prohibits the legislature from taxing counties, towns, cities and other municipalities for local purposes, but allows it to vest in the "corporate authorities" of those municipalities the power to levy such taxes.[67] In Washington, the term "corporate authorities" refers to the organ of the municipal corporation that exercises legislative authority—most commonly, the mayor and city council.[68] Washington courts, however, construe the term to include voters exercising their duly reserved powers of initiative and referendum as well.[69]

The court defined corporate authorities of municipal corporations in the context of a city, in *Citizens for Financially Responsible Government v. City of Spokane*.[70] In *Citizens*, the Washington Supreme Court was faced with a question of whether a city ordinance enacting a business and occupation tax was subject to referendum.[71] Responding to a challenge by a group of Spokane citizens,[72] the city argued that the term "corporate authorities" in article XI, section 12 referred solely to the legislative body of the city and not to the residents themselves.[73] The court rejected the city's restrictive interpretation of the term, noting that in a statutory setting, its prior holdings demonstrate that the phrase "'corporate authority,' also referred to as a 'legislative authority,' means exclusively the mayor and city council."[74] The court went on to hold, however, that

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67. "The legislature shall have no power to impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes." WASH. CONST. art. XI, § 12.

68. Citizens for Financially Responsible Gov't v. City of Spokane, 99 Wash. 2d 339, 344, 662 P.2d 845, 849 (1983) (citing State *ex rel.* Haas v. Pomeroy, 50 Wash. 2d 23, 308 P.2d 684 (1957)); State *ex rel.* Bowen v. Kruegel, 67 Wash. 2d 673, 678-79, 409 P.2d 458, 462 (1965) (construing the term "legislative body"); Neils v. Seattle, 185 Wash. 269, 280, 53 P.2d 848, 852 (1936) (construing the term "legislative authority"); State *ex rel.* Walker v. Superior Court, 87 Wash. 852, 854, 152 P. 11, 12 (1915) (also construing the term "legislative authority").

69. *Citizens for Financial Responsible Gov't*, 99 Wash. 2d at 345-47, 662 P.2d at 849-50.

70. *Id.*

71. *Id.*

72. The residents of Spokane sought a writ of mandamus to compel the City of Spokane to accept for filing certain referendum petitions that would amend or repeal the city's business and occupation tax. *Id.* at 340, 662 P.2d at 847.

73. *Id.* at 344, 622 P.2d at 848.

74. *Id.*, 622 P.2d at 849 (citing State *ex rel.* Haas v. Pomeroy, 50 Wash. 2d 23, 308 P.2d 684 (1957) (construing the term "corporate authorities")); Neils v. Seattle, 185 Wash. 269, 280, 53 P.2d 848, 852 (1968) (construing the term "legislative authority"); State *ex rel.* Bowen v. Kruegel, 67 Wash. 2d 673, 678-79, 409 P.2d 458, 462 (1965) (construing the term "legislative body"); State ex rel. Walker v. Superior Court, 87 Wash. at 854, 152 P. 11, 12 (1915) (also construing the term "legislative authority"). Interestingly, the court also notes that other states, including California, have

in a constitutional context, the term "corporate authorities" must be read more expansively to include not only the mayor and city council, but also the direct legislative power of the people acting through the initiative and referendum processes.[75] In Washington, this means that the "corporate authorities" of a municipal corporation consists of its legislative organ, including the people acting through initiative and referendum.

In addition to being a good common sense construction, *Citizens'* explanation of the term "corporate authorities" is also consistent with the constitution's allocation of legislative power on the state level. Like state representatives and senators, the elected officials of municipal corporations are directly elected by and are accountable to city residents burdened by city taxes, so it makes sense that these officers are also referred to as "legislative authority." Given Washington's view that all legislative power flows from the people, it is logical that elected officials compose legislative power at the local level as well.[76]

The definition of "corporate authorities" in *Citizens* is of limited utility, however; *Citizens* was applied in the limited context of a city and relied primarily on identifying the proper authorities of the city. As a result, it does not provide a comprehensive working definition of the term "for purposes of other types of municipal corporations." Hence, the question of precisely how the corporate authorities of municipal corporations must be constituted in order for a delegation of taxing power to be constitutional requires looking elsewhere.

b. The Taxing Power May Be Delegated to the "Corporate Authorities" of a Municipal Corporation when the Tax-Burdened Electorate Retains Electoral Control Over it.

Although the Washington Constitution does not explicitly define how the corporate authorities of a municipal corporation must be composed in order for it to use the taxing power, close analysis of a handful of cases demonstrates that the authorities must be elected by, and accountable to, their tax-burdened electorate.[77] Washington cases have

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adopted similar interpretations. *Citizens for Financial Responsible Gov't*, 99 Wash. 2d at 346, 662 P.2d 845 at 849-50.

75. *Citizens for Financial Responsible Gov't*, 99 Wash. 2d at 345-47, 662 P.2d 845 at 849-50.

76. *See supra* Part II.B.

77. Few Washington cases appear to deal directly with the issue of whether taxation without representation has occurred, presumably because the concept is so axiomatic that it actually occurs infrequently. In cases where the issue has arisen, the context typically involves a municipal corporation taxing citizens beyond its borders. *See* Granite Falls Library Capital Facility Area v. Taxpayers of Granite Falls Library Capital Facility Area, 134 Wash. 2d 825, 953 P.2d 1150 (1998); Sunnyside Irrigation Dist. v. Foster, 102 Wash. 2d 395, 687 P.2d 841 (1984); Municipality of Metropolitan Seattle, v. City of Seattle, 57 Wash. 2d 446, 357 P.2d 863 (1960); State *ex rel.* Tax

long prohibited taxing schemes that permit "taxation without representation," and modern state courts continue to show fidelity to the doctrine.

Malim v. Benthien is one of the first reported Washington cases to stand for the proposition that the taxing power may not be vested in persons over whom taxpayers have no direct control.[78] In *Malim*, a diking district sought to assess benefited properties lying outside the district with taxes to fund its projects, even though those outlying properties could not participate in the election of diking district officers who would make the assessments.[79] Appellant taxpayers brought suit to enjoin the assessments, arguing, among other things, that the assessments violated article I, section 12 of the state constitution as well as the privileges and immunities clauses of both the federal and state constitutions.[80] Drawing also upon article I, section 19 of the Washington Constitution,[81] the Washington Supreme Court agreed.[82]

The absence of accountability of those imposing the tax to those who bore its burden was of overwhelming importance to the *Malim* court. In particular, the court stated that the taxation of residents outside the diking district "denie[d] the principle of self government, as it existed from our earliest history and as it is preserved in our Constitution taken as a whole."[83] The court went on to emphasize that the tax-burdened landowners had no "voice" in the election of the diking district commissioners,[84] that is, the respondents lacked the ability to elect the commissioners and had no other viable mechanism by which their voice could be heard. The court found the absence of these mechanisms to be wholly incompatible with "the principle upon which our government is founded, and that as a nation we have always maintained is the only true principle upon which a free government can be founded and maintained."[85]

Comm'n. v. Redd, 166 Wash. 132, 6 P.2d 619 (1932); Malim v. Benthien, 144 Wash. 533, 196 P. 7 (1921).

78. 114 Wash. 533, 196 P. 7 (1921).

79. *Id.*

80. *Id.* at 534-35, 196 P. at 8.

81. That section provides that that "[a]ll [e]lections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." WASH. CONST. art. I, §19.

82. The court also implicitly rested its decision on the privileges and immunities clause in article I, § 12 of the state constitution. *See Foster*, 102 Wash. 2d at 405-06, 687 P.2d at 847 (discussing *Malim*).

83. *Malim*, 114 Wash. at 537-38, 196 P. at 9; *see also supra* Parts II.A–B (discussing the constitutional origins and justifications of the taxing power).

84. *Malim*, 114 Wash. at 537-38, 196 P. at 9.

85. *Id.* at 539, 196 P. at 9.

Additionally, the court noted that the unrepresented taxpayers would essentially be subject to the diking district assessments in perpetuity.[86] Not only could taxpayers not hold those imposing the tax accountable, but they could not "escape" from the tax either. The *Malim* court's analysis thus focused on the tax-burdened electorate's ability to use its political power to hold those imposing taxes upon them accountable for their tax-related actions. *Malim*, therefore, stands for the proposition that taxing power may not be exercised by municipal officials who are neither directly elected by nor otherwise accountable to the taxpaying electorate.

State v. Redd, a later Washington Supreme Court case, reiterates the *Malim* holding.[87] In *Redd*, the state tax commission acted pursuant to state law to reassess lands in Franklin County in an amount greater than the value assigned by the local assessor.[88] The county treasurer-assessor then appealed a lower court order requiring him to use the state commission's valuation, arguing, among other things, that the state statute empowering the commission violated article XI, section 12 by empowering state officials—whom Franklin County residents had no voice in electing—to reassess taxes imposed for local purposes.[89] This, appellants argued, denied them their constitutionally secured right of self government.[90]

In an opinion relying heavily on sources from other jurisdictions, the Washington Supreme Court found the statute unconstitutional.[91] The court quoted an Illinois case construing a similar provision in the Illinois Constitution as being designed "to prevent the legislature from granting the power of local taxation to persons over whom the population to be taxed could exercise no control,"[92] and observed that its purpose is to

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86. *Id.*

87. State *ex rel.* Tax Comm'n. v. Redd, 166 Wash. 132, 6 P.2d 619 (1932).

88. *Id.* at 133, 6 P.2d at 620.

89. *Id.* at 134-35, 6 P.2d at 620-21.

90. *Id.* at 135-36, 6 P.2d at 621.

91. *Id.* at 135, 6 P.2d at 621.

92. *Id.* at 141, 6 P.2d at 623 (quoting Harward v. St. Clair & Monroe Levee & Drainage Co., 1869 WL 5283 (Ill. Sup. Ct. Jan. Term, 1869)). This quote continues that ". . . it is evident that, by the phrase "corporate authorities," must be understood those municipal officers who are either directly elected by such population, or appointed in some mode to which they give their assent." This language appears to permit the electors of a particular municipality to consent to the delegation of taxing power, but this cannot be the case. First, the Washington court did not explicitly incorporate this language into its holding. Secondly, the context of the Illinois case was "who" constituted the corporate authorities of the entity, not how they must be constituted. Moreover, even if it was intended to permit the electors of a particular municipality to consent to the delegation of taxing power, it is an unwise rule. The electors of any particular generation should not be able to forfeit their constitutional rights to elect and hold accountable those that impose a tax, nor should they be permitted to forfeit the same rights of future generations. A rule that enabled such acts would

"give force and effect to the principle of local self government which has always been regarded as fundamental in our political institutions, and to be the very essence of every republican form of government."[93] The court concluded that enabling the state tax commission to revalue local property for local tax purposes was fundamentally incompatible with this "home rule" principle.[94] Thus, like *Malim*, *Redd* found the total absence of a meaningful electoral "voice" that could remove or retain officials empowered to tax to be inconsistent with the constitution.

The Washington courts waited more than fifty years after *Redd* before again addressing whether the electorate had to be provided with a voice in electing officials empowered to levy taxes.[95] In *Sunnyside Irrigation District v. Foster,*[96] residential landowners were assessed a tax by a local irrigation district, even though they were barred by state statute from voting for members of the district's board.[97] Appellant taxpayers brought suit, arguing, among other things,[98] that the state statute[99] violated article I, section 19 of the Washington Constitution.[100]

The *Foster* court's analysis affirms and elaborates the principles relied upon in both *Malim* and *Redd*. Employing an equal protection analysis, it first recognized that "the right to vote is fundamental to our representative form of government[101] under both the United States and Washington Constitutions."[102] It then determined that article I, section 19 requires that constitutionally qualified electors "significantly affected by the [government's] decisions [must] be given an opportunity to vote for the representatives of their choice,"[103] and acknowledged that article I, section 19 permits, in certain situations, restricting the right to vote on an

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surely be repugnant to the constitution and the principles of self government upon which it is based. Certain states with similar constitutional provisions that permit the vesting of the taxing power in the "corporate authorities" of municipal corporations have construed that term to mean either officers that have been elected by the people or who have been appointed in some manner assented to by the people. 16 MCQUILLIN, *supra* note 58, § 44.24.

93. *Redd*, 166 Wash. at 144, 6 P.2d at 624 (quoting Rathbone v. Wirth, 150 N.Y. 459, 468, 45 N.E. 15, 17 (1896)).

94. *Id.* at 147, 6 P.2d at 625.

95. This is probably because of the widespread understanding and acceptance of the doctrine.

96. 102 Wash. 2d 395, 687 P.2d 841 (1984).

97. *Id.* at 398, 687 P.2d at 843.

98. Appellants also alleged violations of the federal and state equal protection clauses. *Id.* at 403, 687 P.2d at 846.

99. WASH. REV. CODE § 87.03.045 (1996).

100. Appellants also charged a violation of the equal protection clauses of the United States and Washington Constitutions. The court, however, did not address the equal protection argument in its opinion. *Foster*, 102 Wash. 2d at 403, 687 P.2d at 846.

101. *Id.* at 407, 687 P.2d at 848.

102. *Id.* at 404, 687 P.2d at 846 (citing Reynolds v. Sims, 377 U.S. 533 (1964); Malim v. Benthien, 114 Wash. 533, 196 P. 7 (1921)).

103. *Id.* at 410, 687 P.2d at 849.

issue or for a representative to persons directly affected by them.[104] The court held, however, that those qualified electors significantly affected by local taxing decisions must be given an opportunity to vote for representatives who impose them.[105] Like in *Malim*, the court in *Foster* found justifications for excluding appellants from the voting scheme unconstitutional, and confirmed that Washington law requires that voters who are significantly affected by a municipality's taxing decisions be given a voice in the election of its representatives.[106]

Together, *Malim*, *Redd*, and *Foster* make clear that Washington prohibits the taxing power from being exercised by the corporate authorities of municipalities over which the tax burdened electorate has no control. Each case emphasizes that the tax burdened electorate must have a "voice" in electing those who impose taxes on them. These cases, however, afford little instruction as to what types of "control" must exist over corporate authorities to ensure that the electorate's "voice" is meaningfully heard. However, three Washington cases—*Municipality of Metropolitan Seattle v. City of Seattle*, *Cunningham v. Municipality of Metropolitan Seattle* (the "Metro Cases"), and *Granite Falls Library Capital Facility Area v. Taxpayers of Granite Falls Library Capital Facility Area*—suggest an answer to this constitutional question.

c. Electoral "Voice" Requires Corporate Authorities to be Directly Elected by, and Accountable to, the Tax-Burdened Electorate.

Washington law requires that corporate authorities who exercise the taxing power remain subject to the "voice" of the electorate.[107] Stated differently, officials must be elected by, and remain accountable to, those residents burdened by the tax. For constitutional purposes, electoral "voice" requires that tax burdened voters have a direct say in the election or removal of taxing officials.

i. Appointed Officials May Levy Taxes if They are Directly Accountable to the Tax-Burdened Electorate.

Washington cases that bear directly on how the corporate authorities of a municipal corporation must be composed in order for the tax-paying electorate to retain control over it indicate that the electorate

104. *Id.* at 408, 687 P.2d at 848-49. The specific provision involved here was article I, section 19 (Freedom of Elections), which provides that "All Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." *Id.* at 404, 687 P.2d at 847; WASH. CONST. art. I, § 19.

105. *Foster*, 102 Wash. 2d at 410, 687 P.2d at 850.

106. *Id.*

107. *See supra* Part II.C.1.b.

must have a means of expressing its voice by directly or indirectly removing those responsible for levying a tax.[108] The case of *Municipality of Metropolitan Seattle v. City of Seattle* illustrates this requirement well.[109] In *Municipality of Metropolitan Seattle*, the Washington Supreme Court upheld a state statute authorizing the creation of metropolitan municipal corporations, finding it consistent with the representative form of government.[110]

Pursuant to state law, the cities of the Lake Washington Drainage Basin voted to form a regional municipal corporation ("Metro") that possessed certain tax powers.[111] The City of Renton, however, requested to be excluded from Metro's boundaries and ultimately voted against forming Metro.[112] In an action brought under the Declaratory Judgment Act, appellants contended, among other things, that the statute permitted taxation without representation in violation of the Due Process Clauses of the state and federal constitutions.[113] More specifically, appellants argued that Metro was unconstitutionally empowered to tax the citizens of Renton because it was governed by a board consisting of fifteen appointed members who were not "entirely elected by the people of Renton."[114]

The court, however, disagreed. It reasoned that, even though the residents of Renton voted against being included in Metro, they did have

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108. *See supra* Part II.C.1.b–c.

109. Municipality of Metropolitan Seattle v. City of Seattle, 57 Wash. 2d 446, 357 P.2d 863 (1960).

110. *Id.*

111. *Id.* at 449, 357 P.2d at 866.

112. *Id.* at 448, 357 P.2d at 866.

113. *Id.* at 453-54, 357 P.2d at 868-69. In a related argument, appellants also contended that the corporation's ability to tax violated article XI, section 12, and that it imposed upon the citizens of Renton taxation without representation. *Id.* at 453, 357 P.2d at 868. The court, however, rejected appellants' article XI, section 12 claim. Instead, it found that article XI, section 12 had not been violated because, in voting to create the metropolitan municipal corporation, local voters had voted to impose whatever taxes would be necessary to fund it. *Id.* In other words, when voters in Metro voted to create it, they "acquiesce[d] to the imposition of the tax which is necessary to carry out [its] purposes[.]" Because the voters had implicitly approved the taxes necessary to fund metro when the approved metro's creation, the state could not be fairly considered the entity imposing the tax. Quoting itself, the court reiterated that as long ". . . as the tax is imposed by the corporate authorities [of Metro] the evil sought to be avoided by [article XI, section 12] is not incurred. In this case, the burden being self-imposed, there is no room to exclaim against legislative power." *Id.* The court's analysis here demonstrates that article XI, section 12 analyses necessarily focus on who/what entity is imposing the tax. This is an inquiry distinct from how the entity imposing the tax is constituted. In *Metro*, the question the court sought to address was whether metro or the state was imposing taxes for metro's local operations, not whether article XI, section 12 implicitly required metro's governing body to be composed of elected officials if it is to impose a tax. *Id.* (indicating that the taxation without representation argument rests on article I, section 3 of the state constitution and the fourteenth amendment of the United States Constitution).

114. *Id.* at 453, 357 P.2d at 868-69.

a voice in its creation.[115] The court also noted that Renton was ensured a continuing voice on the council by a provision in Metro's governing statute that required the automatic appointment of Renton's mayor or one of its city councilmen to a Metro Council position.[116] Thus, unlike the taxpayers in *Malim*, *Redd*, and *Foster*, the taxpaying voters of Renton were able to directly exercise their approval or rejection of Metro's tax policy vis-à-vis the statutory appointment of their elected city official to the Metro Council. Therefore, Renton residents retained their political "voice" in a meaningful fashion.

The language in *Municipality of Metropolitan Seattle* underscores the importance of the fact that Metro's governing council consisted entirely of *elected* officials that were automatically appointed to the council by statute from Metro's constituent counties and cities.[117] According to the court, it was that relationship that ensured that Metro was consistent "with the representative form of government which the constitution demands."[118] In other words, because Metro council members were all appointed from "the ranks of elected officers residing within the region[,]" they were sufficiently accountable to their constituents to employ the taxing power.[119] Hence, even though Metro's board was entirely appointed, the court considered it to be accountable to and removable by taxpaying constituencies of Metro's electorate because its members all held concurrent offices elected by the local constituent municipalities.[120] *Municipality of Metropolitan Seattle* therefore stands for the proposition that taxpayers have a sufficient "voice" over appointed officials who exercise the taxing power when those officials concurrently hold an elected office directly accountable to the tax-burdened electorate and are automatically appointed by statute.

Cunningham v. Municipality of Metropolitan Seattle confirms this interpretation.[121] Though *Cunningham* dealt chiefly with an equal protection challenge to Metro's voting scheme, the opinion included an analysis of whether the Metro board should be characterized as appointed or elected.[122] The court determined that the automatic statutory appointment of local elected officials—who were accountable to Metro's

115. *Id.* at 453-54, 357 P.2d at 868-69.

116. *Id.* at 454, 357 P.2d at 869.

117. *Id.*

118. *Id.* at 454, 357 P.2d at 869; *but see* Cunningham v. Municipality of Metropolitan Seattle, 751 F. Supp 885, 892-93 (W.D. Wash. 1990) (indicating that only a majority of appointed members were elected from constituencies of Metro at that time).

119. Municipality of Metropolitan Seattle v. City of Seattle, 57 Wash. 2d 446, 454, 357 P.2d 863, 869 (1960).

120. *Id.*

121. *Cunningham*, 751 F. Supp. at 891.

122. *Id.* at 891-93.

local taxpaying electorate by virtue of their locally elected positions—should be characterized as elected, rather than appointed, officials.[123] According to the court, "while a candidate for [local office] is not listed on the ballot as a candidate for the Metro Council, he is in fact running for both offices. The result is exactly the same as if the ballot title read "[local office]/Member of Metro Council."[124] The *Cunningham* court found that, because a majority of Metro Council seats were elected, the council as a whole must be considered elected in character.[125] Thus, under the *Metro Cases*, the taxing authority may be delegated to municipal corporations governed by appointed boards when those boards are composed of at least a majority of members who concurrently hold an elective office directly accountable to the tax burdened public and are automatically appointed by statute. Since officials appointed to such positions remain directly accountable to tax-paying voters, their voices are preserved, and taxation without representation is avoided.

Though the rule from the *Metro Cases* is consistent with Washington's constitutional requirements, the Washington Supreme Court has unnecessarily blurred its "no taxation without representation" jurisprudence and has raised new questions about the malleability of its boundaries.

ii. Granite Falls Affirms the Washington Rule, but Obscures the Boundaries of Accountability.

The most recent Washington case to address the boundaries of citizen voice and control over officials using the taxing power is *Granite Falls Library Facility Area v. Taxpayers of Granite Falls Library Capital Facility Area*.[126] While the decision affirms Washington's ban on taxation without representation, the analysis obscures the boundaries of what constitutes sufficient control over taxing officials for purposes of avoiding taxation without representation. In *Granite Falls*, Snohomish county voters approved a ballot measure calling for the formation of a library facility area to be constructed in Snohomish County Council districts one and five.[127] No portion of the area would exist in districts two, three, or four.[128] The vote also authorized the area to issue up to $1.6 million in bonds, and approved the levy of annual excess property

123. *Id.* at 891.

124. *Id.*

125. *Id.* at 893.

126. Granite Falls Library Capital Facility Area v. Taxpayers of Granite Falls Library Capital Facility Area, 134 Wash. 2d 825, 953 P.2d 1150 (1998).

127. *Id.* at 829-31, 953 P.2d at 1152-53. Snohomish County is organized under the home rule charter and is governed by a five member county council elected from five districts.

128. *Id.* at 831, 953 P.2d at 1153.

taxes necessary to pay for and retire those bonds.[129] The governing body of the area was to consist of three Snohomish County Council members appointed by the council's full five members,[130] and was then empowered to levy excess property taxes at a rate sufficient to pay the bonds.[131] Appellant taxpayers argued that this arrangement permitted taxation without representation, and that it denied them their right to suffrage in violation of article I, section 19 of the Washington Constitution.[132] They also argued that, because the governing body was not elected by the taxpayers and thus not subject to their control, its powers violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.[133]

In a cursory analysis comprising just two sentences, the court found the governing body to be sufficiently representative to avoid constitutional infirmity, and in doing so implicitly affirmed the rule in the *Metro Cases*.[134] To the extent that the court's reiteration of the respondent's arguments evidence its reasoning, the governing board "adequately represent[ed] the interests of the taxpayers because designation of the county council members for the governing body [wa]s a result of the election process."[135] Hence, like the *Metro Cases*, the fact that the governing board consisted of County Council members elected by local taxpayers and appointed to the governing board ensured that taxation without representation was avoided.[136]

If the *Metro Cases*' rationale is the basis of the decision, however, *Granite Falls* implies a more permissive approach to the boundaries of electoral control than do its predecessors. Because it is a home rule charter county, the five members of the Snohomish County Council are

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129. *Id.* at 830, 953 P.2d at 1152.

130. Snohomish County has five districts that each elect one resident to serve as a councilmember. Only registered voters in a particular council district are permitted to vote for candidates nominated from such districts and may not vote for candidates from other districts. *Id.* at 832, 953 P.2d at 1153. While it is not clear how many appointed board members in *Granite Falls* were accountable to the taxpaying voters of the districts comprising the library facility area, at least one and as many as two (a majority) were. In both cases, all appointed board members concurrently held some kind of elected office.

131. The rate was a direct function of the interest rate established by the governing body. *Id.* 831, 953 P.2d at 1153.

132. *Id.* at 839, 953 P.2d at 1157.

133. *Id.*

134. *Id.* at 842, 953 P.2d at 1158.

135. Presumably, this language refers to the fact that the governing board consisted of elected Snohomish County Council members who were appointed as governing body members by the enabling statute. *Id.*

136. This interpretation is consistent with the *Metro Cases* under the rationale that the appointed governing board members' ability to levy taxes was legitimized by the fact that they concurrently held elected office accountable to library facility area voters.

elected from its five county districts.[137] Since the facility area embraced only two districts, a maximum of two—and as little as none—of the three governing body members could have been elected from the districts that composed the facility area. As a result, the statute permitted a scenario in which the governing board could have had no members who were elected by taxpaying voters in the facility area.

The court, however, refused to find this potential fatal. It recognized that it was possible that council members from districts not included in the library facility area could potentially comprise the entire board (and thereby not be directly accountable to the taxpaying electorate of the area), but concluded that such a risk rested "solely upon conjecture."[138] By failing to find unconstitutional a statutory framework which permits a taxing authority to potentially consist of officials who are not directly elected by taxpaying voters, the court left open the possibility that there may be scenarios in which such an arrangement is constitutional.[139]

Granite Falls' approval of the manner in which library facility area governing board members were appointed raises similar concerns. Unlike *Municipality of Metropolitan Seattle*, where all Metro Council members were automatically appointed by statute, and *Cunningham*, where a majority were, the five members of the full Snohomish County Council themselves appointed three of its members to govern the library facility area.[140] Permitting the council to appoint every governing board member raises the possibility that it could insulate the board from the electoral voice of the public by appointing council members not elected by taxpayers. It also severs the electorate's ability to directly select and remove a majority of the officials who have the power to tax—an ability that was essential to sustain the constitutionality of similar schemes in the *Metro Cases*.[141] As a result, *Granite Falls*' failure to find this appointment procedure unconstitutional also raises the possibility that taxing officials can, in some cases, be appointed without being elected: a condition state courts have required for almost a century.

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137. *Granite Falls*, 134 Wash. 2d at 831, 953 P.2d at 1153.

138. The board's actual composition is not clear from the text of the opinion or from the briefs submitted to the court. *Id.* at 840, 953 P.2d at 1157.

139. Such a rule would stand in contrast to *Municipality of Metropolitan Seattle*, where all members held concurrently elected positions, and to *Cunningham*, where at least a majority did. Another framework in which to view the decision would be to consider it in a "practical" light wherein the court merely considered precisely what was before it.

140. *Granite Falls*, 134 Wash. 2d at 840, 953 P.2d at 1157.

141. Under the *Metro Cases*, the automatic appointment of elected officials is acceptable precisely because voters retain the direct ability to exercise their voice by voting to appoint or remove a majority of elected persons who will automatically ascend to an appointed seat. Such a rule ensures that taxpaying voters retain direct control over at least a simple majority of taxing officials.

Ultimately, *Granite Falls* is consistent with Washington's prohibition on taxation without representation. There can be no doubt that it implicitly affirms the *Metro Cases* and upholds Washington's longstanding prohibition on taxation without representation, but it nevertheless failed to strike down statutory provisions that could give rise to a scenario in which taxing officials are neither elected by nor unaccountable to the taxpaying public. Therefore, *Granite Falls* left unanswered how far certain other provisions could be used to insulate a municipal board empowered to tax. The composition and activities of the SMP Board, however, clearly demonstrate that the court's silence does not intimate its approval.

III. THE SMP HAS UNCONSTITUTIONALLY LEVIED THE MVET.

Because the SMP is un-elected and unaccountable to Seattle taxpayers, its levy of the MVET is unconstitutional. The SMP is a municipal corporation governed by a nine-member board of directors, all but two of whom are appointed.[142] Since the SMP is a municipal corporation, it possesses no inherent power to levy a tax unless two conditions are met. First, the legislature must delegate to it specific taxing power.[143] Second, the corporate authorities of the SMP must be directly elected by Seattle voters subject to the MVET or, if appointed, must concurrently hold elective office directly accountable to the Seattle electorate.[144] Alternatively, the voters of Seattle, acting in their legislative capacity, could levy the MVET themselves.[145] Here, the SMP cannot be fairly said to satisfy any of these requirements.

Nevertheless, by its own terms, the SMP has levied the MVET at varying levels within the voter-approved statutory maximum of 1.4%.[146] Because the SMP is governed by a board of directors consisting overwhelmingly of appointed officials who do not concurrently hold elective offices accountable to Seattle voters,[147] its levy of the MVET is unconstitutional. Voter approval of Petition 1 cannot cure this

142. Initially, all members of the SMP board were appointed. Petition 1, § 4(b). Two elected positions, however, were added in 2003. *Id.* at § (4)(d)(2). A non-voting ex officio member has also been added. *See* SMP Bylaws 2.10, *available at* http://www.elevated.org/_downloads/board/bylaws.pdf (Feb. 2, 2003); *see also*, SMP Board of Director Members and Bios, *at* http://www.elevated.org/project/board/members (last visited July 17, 2005).

143. *See supra* Part II.C.

144. *See supra* Part II.C.

145. *See supra* Part II.C.

146. *See, e.g.*, SMP Board, Meeting Minutes, January 24, 2004; SMP Board, Meeting Minutes, March 5, 2003; SMP Executive Committee, Meeting Minutes, February 26, 2003, at 2; SMP Finance Committee, Meeting Minutes, Item 3, February 24, 2003.

147. Petition 1, § 4.

unconstitutionality because it was an authorization for a properly representative CTA to levy the MVET within the statutory maximum.

A. The SMP is a Municipal Corporation.

The SMP is a municipal corporation created pursuant to both the Enabling Legislation and Petition 1.[148] Petition 1 proposed creation of a CTA called the SMP,[149] which, according to the Enabling Legislation, "is a municipal corporation, an independent taxing 'authority' within the meaning of article VII, section 1 of the state constitution, and a 'taxing district' within the meaning of Article VII, section 2 of the state Constitution."[150] Petition 1 also defined the boundaries of the SMP as being coextensive with the boundaries of Seattle.[151] The SMP is therefore a municipal corporation that embraces the geographic boundaries of the City of Seattle.

B. The SMP Has Levied the MVET.

The statutory framework establishing and governing the SMP authorizes the delegation of specific taxing power. The Enabling Legislation permits CTAs like the SMP to levy an MVET of up to 2.5%,[152] and Petition 1 authorizes the SMP to "levy and collect a special excise tax not to exceed 1.4% on the value of every motor vehicle owned by a resident of the [city] for the privilege of using a motor vehicle."[153] Petition 1 therefore expressly authorizes the SMP to levy an MVET at the level the SMP deems appropriate, subject to a statutory maximum tax of 1.4%.

The SMP has acted consistently with this interpretation of Petition 1, levying the MVET at at least two different levels over the course of the past two years. As early as February 2003, Finance Committee members engaged in discussions concerning the rate at which to levy the MVET, considering factors such as the duration of construction and the rate at which bonds could be repaid.[154] Realizing that they needed to "take action to *levy* the tax"[155] and that doing so at the maximum rate would not preclude them from adjusting it in the future, the Finance

148. WASH. REV. CODE § 35.95A.020 (2002); Petition 1, Introduction and § 1.

149. Petition 1, § 2(a).

150. WASH. REV. CODE § 35.95A.020 (2002).

151. Petition 1, § 1 (providing a definition of "authority area").

152. WASH. REV. CODE § 35.95A.080(1) (2002).

153. Petition 1, § 6(a). The Petition's explanatory statement consistently states that the SMP "could levy and collect a 1.4% motor vehicle excise tax."

154. SMP Finance Committee, Meeting Minutes, Item 3, February 24, 2003, *available at* http://www.elevated.org/_downloads/meetings/02-24-03_FC_Minutes.pdf (Feb. 24, 2003).

155. *Id.* (emphasis added).

Committee recommended levying the MVET at the full 1.4%.[156] Minutes of the board's Executive Committee reveal a similar understanding of the SMP's ability to levy the MVET at varying levels.[157] At its February 26, 2003 meeting, the Executive Committee analyzed evidence addressing the direction of interest rates, how various interest rates would affect costs of debt service, and how to obtain the best possible credit rating.[158] Evidence presented by Mr. Malarkey suggested that the maximum 1.4% MVET was needed in order to obtain the best possible credit rating.[159] Like the Finance Committee before it, the Executive Committee unanimously resolved to recommend the maximum levy to the full board.[160]

Resolutions passed by the full SMP Board confirm its understanding that it possessed the power to levy the MVET. The March 5, 2003 SMP Board meeting included discussions over whether to levy the MVET at .85% or at the full 1.4%.[161] While the board observed that SMP is authorized to levy the MVET up to the 1.4% maximum, it determined that less funding was needed at the time and that the tax should therefore first be levied at the lower rate of .85%.[162] When asked when the full 1.4% would need to be levied, then Finance Director Mr. Malarkey responded that the board had "flexibility to decide when to levy the full amount" and that it might be necessary when there was more "cost certainty."[163] The board then resolved to "lev[y] a special motor vehicle excise tax of 0.85% on the value of all motor vehicles owned by residents of the City."[164]

Just ten months later, the board resumed discussions about levying the tax at a higher rate.[165] Minutes of the January 24, 2004 meeting demonstrate that the board considered that raising the MVET from .85% to the full 1.4% might be seen as a tax increase, but determined that the maximum 1.4% was "what the voters approved and expect."[166] Using language identical to the March 27, 2003 resolution, the board "levie[d] a special motor vehicle excise tax of 1.4% on the value of all motor

156. *Id.*

157. SMP Executive Committee, Meeting Minutes, ¶ 5, February 26, 2003.

158. *Id.*

159. *Id.*

160. *Id.*

161. SMP Board of Directors, Meeting Minutes, March 5, 2003, *available at* http://www.elevated.org/_downloads/meetings/03-05-03_First_Board_Minutes.pdf (Mar. 5, 2003).

162. *Id.*

163. *Id.*

164. *Id.*

165. SMP Board, Meeting Minutes, January 24, 2004.

166. *Id.*

vehicles owned by residents of the City."[167] Together, the discussions on the part of the SMP and the resolutions that followed clearly show a board who both believed and acted in a manner consistent with the understanding that the SMP possessed the power to levy the MVET at any level within the voter-approved 1.4%. Indeed, the board did levy the MVET on at least two occasions.

1. The Voters Did Not Levy the MVET.

Seattle voter approval of Petition 1 does not constitute the people's levying of the MVET. Petition 1's authorization of up to a 1.4% MVET was an authorization to the SMP to tax,[168] not an actual levy of that tax. Commonly, the state legislature will authorize a local municipal corporation to levy a specific species of local taxation. This is a "first level authorization." That municipality can then, through its duly elected legislative body, pass a "second level authorization" (in the form of an ordinance or resolution), which in fact levies the tax upon the local voters. This scenario is consistent with constitutional tax principles because local representatives of the tax-paying electorate have actually levied the tax. In other words, the legislature's delegation of the taxing power to the municipality presumes that the municipality's properly elected legislative organ will properly levy the tax.

For instance, in the same 1997 election in which Initiative 41 was presented to voters, Proposition 2 was on the ballot.[169] Pursuant to state legislation that empowers the city to levy taxes and issue bonds to fund infrastructure improvements, Proposition 2 "authorize[d] the City to sell up to $90,000,000 in general obligation bonds to pay for . . . transportation improvements, and to levy annual excess property taxes necessary to pay for the bonds."[170] This language therefore authorized Seattle's elected City Council to pass a local ordinance that would issue the specific amount of debt and levy the specific property tax.

Here, the Enabling Act and Petition 1 similarly act as first and second level authorizations to the SMP to levy the MVET. The Enabling Act delegates to cities the authority to create CTAs, such as the SMP,

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167. SMP Board of Directors, Resolution 04-06 Regarding Levy of Special Motor Vehicle Excise Tax, January 24, 2004, *available at* http://www.elevated.org/_downloads/meetings/01-24-04_Board_Minutes.pdf (Jan. 24, 2004).

168. This term is used to mean the legislature's delegation/authorization of specific local taxes as a first level authorization. The local government's delegation/authorization of certain taxation by another local government can then be considered second level authorization.

169. *See* Voters Pamphlet Statement of City of Seattle Proposition 2, *available at* http://www.ci.seattle.wa.us/seattle/ethics/el97a/vp/vp971104/p2_bt.htm (last visited July 16, 2005).

170. *See id.*

with the power to levy specific types of taxes, including the MVET.[171] Either the city's "legislative body" or its citizens must then approve formation of the CTA, as well as the taxes proposed to fund it.[172]

In the case of Petition 1, however, voters did not levy a specific tax. Instead, Petition 1 provided that the "[SMP] may levy and collect an [MVET] not to exceed 1.4%,"[173] it did not say that "the people hereby levy an MVET of 1.4%";[174] voters therefore authorized the SMP to levy the tax at the appropriate level to fund the project within the 0% to 1.4% range. This "not to exceed" language should be read as a second level authorization that requires the SMP Board to levy the tax at the appropriate level to fund the project, not as the actual levy of any tax up to that amount by the voters. Here again, the SMP Board's own actions and language support this reading of Petition 1. Because the SMP Board is not directly elected by the Seattle voters, it is unable to levy that tax in a manner consistent with the constitution.[175]

C. Seattle Taxpayers Do Not Have Sufficient Electoral Control Over the SMP for it to Constitutionally Levy the MVET.

The second condition necessary for the SMP to constitutionally levy the MVET is for it to be subject to control of the electorate burdened by the tax.[176] On this point, the SMP Board's unelected and unaccountable composition plainly renders it constitutionally unfit to levy the MVET. The Enabling Legislation enables CTAs to be governed by appointed or elected persons,[177] and Petition 1 provides that the SMP shall be governed by a nine member board.[178] Initially, the nine appointed members of the ETC served as the SMP Interim Board, but within fourteen months of voter approval, a new board was nominated and appointed.[179] A majority of the first SMP Board members were nominated by the Interim Board, with the remaining four seats appointed by the Mayor and the Seattle City Council.[180] Thus, from its inception,

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171. WASH. REV. CODE §§ 35.95A.020, 030 (2002).

172. WASH. REV. CODE § 35.95A.030 (2002); *see supra* Part II.A.

173. Proposed Seattle Monorail Authority, Seattle Citizen Petition No. 1, § 6, *available at* http://www.elevated.org/_downloads/board/petition1.pdf (Apr. 28, 2003).

174. *Id.*

175. If Petition 1 had levied a 1.4% excise tax, the tax would be constitutional, because the SMP would merely be administering ministerial collection and disbursement of the funds for the project.

176. *See supra* Part II.C.

177. WASH. REV. CODE § 35.95A.030(1)(a) (2002).

178. Proposed Seattle Monorail Authority, Seattle Citizen Petition No. 1, § 4, *available at* http://www.elevated.org/_downloads/board/petition1.pdf (Apr. 28, 2003).

179. *Id.* at § 4(b).

180. *Id.* at § 4(b)(1).

the SMP Board consisted entirely of un-elected members. Currently, only two out of nine board members are elected, while seven are appointed.[181] Because a mere two members are presently elected at large by Seattle voters,[182] under neither *Granite Falls* or the *Metro Cases* can it be fairly argued that the SMP Board is "elected": it has been, and continues to be, overwhelmingly appointed in character, and thus is not directly accountable to Seattle taxpayers.

Moreover, the mode of members' appointment severely limits any sort of indirect accountability. Petition 1 provides that all appointed SMP Board seats (seats one through seven) shall be nominated and appointed by a combination of the SMP Board, City Council, and Mayor.[183] Positions one through three are nominated by the SMP Board and appointed by the City Council.[184] Positions four and five are nominated by the City Council and approved by the SMP Board, and positions six and seven are nominated by the Mayor and appointed by the SMP Board.[185] Thus, through its power of nomination and appointment, the current SMP Board, not the tax-paying residents of Seattle, effectively controls who fills seven out of nine SMP Board seats. In *Granite Falls*, at least 33% and as many as 66% of the governing body seats were held by appointed Snohomish County Council members, but here only 22% of SMP seats are elected.[186] Therefore, the SMP's percentage of members unaccountable to the electorate is far lower than it was on the board in *Granite Falls*, and it should not be considered consistent with Washington State's ban on taxation without representation.

Moreover, Petition 1's terms further limit the taxpaying public's indirect control over the SMP Board, rendering it even more unaccountable. Petition 1 explicitly prohibits anyone elected to a city office from concurrently holding a board seat.[187] While no statutory provision in the Enabling Legislation, Petition 1, or the SMP's bylaws expressly bars board members from concurrently holding elected offices in the King County government, the federal government, or other government entity sharing jurisdiction with Seattle, no members

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181 . Seattle Monorail Project, Board of Director Members and Bios, *at* http://www.elevated.org/board/members (last visited July 16, 2005).

182. Petition 1, § 4.

183. *Id.* at § 4(d)(1). Positions 1 through 3 are to be nominated by the SMP Board and appointed by the City Council, positions 4 and 5 nominated by the City Council and approved by the SMP Board, and positions 6 and 7 nominated by the Mayor and appointed by the SMP Board.

184. *Id.*

185. *Id.*

186. These calculations assume as few as one and as many as two out of three governing body members were elected, whereas here there are only two out of seven members elected.

187. Petition 1, § 4(f)(3).

presently hold such office.[188] Thus, unlike in *Granite Falls* and the *Metro Cases*, Seattle voters cannot indirectly hold the overwhelming majority of board members accountable for their actions by voting to retain or remove them in some other concurrently elected office. The residents of Seattle therefore have no meaningful voice in the appointment, retention, or removal of the SMP Board members levying the MVET, which is a plain violation of Washington law.

No viable alternative means for holding SMP Board members accountable for their tax related actions actually exists. Petition 1 provides for removal of appointed board members only by a two thirds vote of the *other board members* for reasons of "malfeasance, misfeasance, or nonfeasance," as well as for felonies, "crimes of moral turpitude," and "gross neglect of duties."[189] Therefore, board members are left primarily to police themselves and can only be removed on these limited grounds. These grounds provide a much narrower range of accountability than does the common democratic mechanism by which elected officials are subject to electoral scrutiny for their legislative, policy, and tax-related choices. The tiny group of persons empowered to remove board members and the narrow grounds for doing so creates a situation analogous to a runaway stagecoach: voters initially approve a project but retain virtually no way of stopping it.[190] Such an abdication of electoral control is not advisable and neither, importantly, is it consistent with our state's prohibition on taxation without representation.

Language in the Enabling Legislation that provides very limited circumstances under which a CTA may be dissolved reinforces this view.[191] It provides that a CTA may only "be dissolved by a vote of the people residing within the boundaries of the authority if the authority is faced with *significant financial problems*."[192] While the definition of

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188. Seattle Monorail Project, Board of Directors, *at* http://www.elevated.org/project/board (last visited July 16, 2005).

189. Petition 1, § (4)(g)(1).

190. Recent events suggest that this "runaway stagecoach" that is not subject to sufficient public oversight has made a number of management blunders that could cost the public. *See, e.g.*, Deirdre Gregg, *Daring Ride: Monorail Risk*, PUGET SOUND BUS. J., May 13, 2005 (analyzing the SMP's revenue and cost projections and arguing that the project's finances are "giving transportation officials, finance experts, and lawmakers a great deal of concern"), *available at* http://seattle.bizjournals.com/seattle/stories/2005/05/16/story1.html.

191. Petition 1 has similar language: language in Petition 1 provides for the dissolution of the SMP in limited circumstances. It states that the SMP "may be dissolved by a vote of the people residing within the Authority Area, for the reasons stated in, and pursuant to, the Enabling Legislation." *Compare* WASH. REV. CODE § 35.95A.120 (2002) *with* Petition 1, § 7.

192. WASH. REV. CODE § 35.95A.120 (2002) (emphasis added). The SMP's abandoning of its financing plan in the wake of criticism by the state treasurer and city officials may be a sign that the SMP is facing "significant financial problems." *See* Seattle Times Staff, *Monorail Leaders Resign*,

"significant financial problems" is unclear, it is clear that the SMP cannot be dissolved simply because Seattle voters disapprove of the project, lose faith in its management, or determine that other taxing strategies are more favorable. Surely, such limited oversight does not constitute the meaningful voice of the people that is required by the state constitution.

Moreover, the lack of direct and indirect accountability that characterizes the SMP is likely to persist. In the unlikely event that a board member is removed by his peers, board vacancies are filled in the same manner and by the same person or entity as they were originally, subject to "automatic reduction to five members in the event of disqualification or vacancy of any board member."[193] The SMP Board is therefore designed to continue its appointive character, even if members are removed.

Similarly, the Enabling Act provides no fixed duration for which the MVET may be collected. In fact, the Enabling Act provides that a CTA may covenant with its bondholders so that it "may not be dissolved and shall continue to exist solely for the purpose of continuing to levy and collect any taxes or assessments levied by it and pledged to the repayment of debt."[194] While it is true that the SMP Board is charged with submitting a proposal to Seattle voters no earlier than November 2005 and no later than November 2009 that would make a majority of the board seats elected by Seattle voters,[195] there is no guarantee that Seattle voters would approve the measure. Hence, these provisions have little real value.

It is true that the SMP Board is imbued with certain attributes that create a modicum of accountability, but they are minor provisions that are no substitute for the electoral accountability required by Washington's Constitution. For instance, board members are required to be registered voters of the authority area at the time of their appointment and throughout their term, and are to be immediately removed from office if they cease to be so registered.[196] Although this provision ensures that SMP Board members are at least subject to the taxes they impose, it does nothing to give the taxpaying electorate a "voice" in their retention or removal. Elected officials from city council members to congressional representatives share similar residential requirements, but are also

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THE SEATTLE TIMES, July 4, 2005, *available at* http://seattletimes.nwsource.com/html/monorail/2002357262_webmonorail04.html.

193. Petition 1, § 4(g).

194. WASH. REV. CODE § 35.95A.120 (2002).

195. Petition 1, § 4(i)(2).

196. Petition 1, § 4(f)(1).

subject to regular elections so that the electorate can approve or reject their ongoing decisions. Similarly, the fact that SMP Board member terms are limited to nine consecutive years does not provide voters with a sufficiently meaningful voice, nor does it significantly ensure the board's accountability to the public.[197]

Requiring a modicum of public involvement is similarly insufficient. Petition 1 requires board members to seek public input before making replacement nominations to the board[198] and, pursuant to the Enabling Legislation, the SMP itself is "subject to all standard requirements of a governmental entity pursuant to RCW 35.21.759."[199] Together, these requirements provide for a minimum of public involvement and impose a basic level of oversight with respect to the SMP's activities. They do not, however, cure the fact that the SMP Board itself cannot be directly or indirectly held responsible for its actions in any meaningful fashion. Indeed, no Washington case has upheld an otherwise unconstitutional taxing scheme merely because these factors have been present. Ultimately, the absence of direct electoral accountability effectively shears the public of its meaningful "voice," and should render the SMP Board's levy of the MVET unconstitutional.

D. Voter Approval of Petition 1's Delegation of the Taxing Power to the Unaccountable SMP Board Cannot Cure its Unconstitutionality.

Despite voter approval of Petition 1, the Washington State Constitution does not permit the forfeiture of fundamental voting rights effectuated by the Enabling Act and Petition 1. Subject to the powers of initiative and referendum, the sovereign people of Washington have vested the tax power in the state legislature.[200] The legislature may only

197. *Id.* at § 4(f)(2). This is particularly true of costs that are already locked in and/or construction that is completed by 2009, well within the 9 year period.

198. *Id.* at § 4(e)(1)(B).

199. WASH. REV. CODE § 35.95A.040 (2002). The referenced provision requires a basic level of transparency for public officials. It provides that

> [a] public corporation, commission, or authority created under this chapter, and officers and multimember governing body thereof, are subject to general laws regulating local governments, multimember governing bodies, and local governmental officials, including, but not limited to, the requirement to be audited by the state auditor and various accounting requirements provided under chapter 43.09 RCW, the open public record requirements of chapter 42.17 RCW, the prohibition on using its facilities for campaign purposes under RCW 42.17.130, the open public meetings law of chapter 42.30 RCW, the code of ethics for municipal officers under chapter 42.23 RCW, and the local government whistleblower law under chapter 42.41 RCW.

200. WASH. CONST. art. II, § 1; Amalgamated Transit Union Local 587 v. State, 142 Wash. 2d 183, 238, 11 P.3d 762, 796-97 (2000).

delegate that power to the legislative bodies of municipal corporations that are accountable to the electorate subject to their tax-related decisions.[201] Case law construing Washington's Constitution plainly prohibits the delegation of the taxing authority to unelected municipal bodies that are unaccountable to the taxpaying public.[202] This fundamental doctrine ensures protection from oppressive taxation and tyranny, and is guaranteed to each generation.

Allowing voters to approve the delegation of taxing power to municipal corporations governed by unaccountable appointed leaders not only violates the fundamental principles upon which our representative government is based, but would enable the exigencies of present voters to forfeit the democratic rights of future generations. The legislation that creates the SMP creates just such a scenario. The Enabling Legislation provides very limited circumstances under which the SMP can be dissolved.[203] The people of Seattle may only vote to dissolve the SMP if it "is faced with significant financial problems,"[204] but even if these significant problems and corresponding vote occur, the SMP is entitled to covenant with its bondholders so that it "may not be dissolved and shall continue to exist solely for the purpose of continuing to levy and collect any taxes or assessments levied by it and pledged to the repayment of debt."[205] Moreover, the Enabling Act provides no maximum duration for which the MVET may be collected: once approved, Seattle voters effectively forfeited all meaningful mechanisms by which they, and future voters, could stop or even reign in the taxes imposed by the SMP. Because Petition 1 provides no definite end to Seattle residents' MVET obligations, future voters will be saddled with monorail debt obligations and MVET taxes for many years to come. Allowing this arrangement to stand would affirm a policy that permits voters of the current generation to effectively forfeit the democratic principles and constitutional protections of future generations, a policy that is surely incompatible with Washington's Constitution.

V. CONCLUSION

Few can doubt the ambition of the SMP or deny the continued support given to the project by Seattle voters for almost a decade.[206] If it

201. *See supra* Part II.C.1.

202. *See supra* Part II.C.1.

203. WASH. REV. CODE § 35.95A.120 (2002); *see supra* Part III.C.

204. WASH. REV. CODE § 35.95A.120 (2002); *see supra* Part III.C.

205. WASH. REV. CODE § 35.95A.120 (2002); *see supra* Part III.C.

206. Even after two of the SMP's leading board members resigned and the board publicly abandoned its financing plan, almost half of all Seattle residents appear to continue to support the

is half the project that its proponents suggest, it could truly provide the City of Seattle with the traffic relief the city requires and could revolutionize the way Seattlites live, work, and commute.[207] Its popular support and potential benefits, however, do not relieve it from the requirements of Washington's Constitution.

Consistent with the Anglo-American legal canon, Washington law broadly prohibits taxation without representation. Cases from *Malim* to *Granite Falls* affirm this principle and demonstrate that Washington's Constitution permits the delegation of the taxing power to the corporate authorities of local municipal corporations only when such authorities consist of the duly elected representatives of the local tax-burdened electorate, or when appointed officials concurrently hold elected office accountable to districts of taxpayers subject to their taxes. This rule ensures that the tax-burdened electorate retains a meaningful voice over elected officials who levy taxes.

The SMP, however, falls short of this constitutional requirement. Through the Enabling Act, the legislature has delegated to the SMP the power to levy the MVET. Consistent with the Enabling Act's authorization, Petition 1 authorized the SMP to levy up to a 1.4% MVET, which it has done. In fact, the SMP has levied the MVET at both .85% and 1.4%. Because the corporate authority of the SMP—the board of directors—is composed overwhelmingly of appointed officials who concurrently hold no office directly accountable to Seattle voters, however, the SMP is constitutionally unable to levy the MVET. Permitting the SMP to levy the MVET would effectively allow taxation without representation since Seattle's voters have no way to express their collective voice to retain, remove, or replace board members.

Although Washington courts should find that the SMP's levy of the MVET is unconstitutional under current law, the facts surrounding the project present an ideal opportunity for the Washington Supreme Court to reaffirm and clarify its "no taxation without representation" doctrine. While the Washington Supreme Court has spoken clearly in the past, *Granite Falls* has muddied the application of this doctrine, leaving questions about the extent to which the doctrine applies to appointed boards. Washington courts should explicitly require the corporate authorities of municipal corporations who exercise the taxing power to be directly elected by the taxpaying electorate or appointed from among

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SMP. Susan Gilmore, *52% of Voters Would Scrub the Monorail, New Poll Says*, THE SEATTLE TIMES, July 10, 2005, at A1.

207. *See generally* SMP Final Alignment and Station Location Report, Mar. 30, 2004, *available at* http://www.elevated.org/_downloads/project/updates/FinalAlignmentStations.pdf (Mar. 30, 2004).

the elected officials therein. Application of a clear rule to that effect will ensure the preservation of the democratic principles upon which our nation and state were founded, and will ensure the accountability of local government.