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Casenotes: Charter Home Rule — Charter Material — Exercise of Police Power by Non-Legislative Body — Citizens' Right to Initiate Legislation — Electorate's Exercise of Police Power in Charter Amendment Form Violates Home Rule Amendment of State Constitution. *Cheeks v. Cedlair Corp.*, 287 Md. 595, 415 A.2d 255 (1980)

Martha Frisby Rasin  
*University of Baltimore School of Law*

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# CASENOTE

CHARTER HOME RULE — CHARTER MATERIAL — EXERCISE OF POLICE POWER BY NON-LEGISLATIVE BODY — CITIZENS' RIGHT TO INITIATE LEGISLATION — ELECTORATE'S EXERCISE OF POLICE POWER IN CHARTER AMENDMENT FORM VIOLATES HOME RULE AMENDMENT OF STATE CONSTITUTION. *CHEEKS v. CEDLAIR CORP.*, 287 Md. 595, 415 A.2d 255 (1980).

## I. INTRODUCTION

In the November 1979 general election, a majority of those voting in Baltimore City approved "Question K," a proposed amendment to the city charter. By creating a new article entitled "Tenant-Landlord Relations," this amendment would have established a commission within the Baltimore City government to administer the provisions of that article including, primarily, the establishment and maintenance of a system of rent control.<sup>1</sup> Eighteen days following its adoption by the electorate, the charter amendment was declared unconstitutional.<sup>2</sup> Shortly thereafter, in *Cheeks v. Cedlair Corp.*,<sup>3</sup> the Court of Appeals of Maryland affirmed the lower court's decision.

*Cheeks* is familiar to many beyond the legal community as a chapter in the political struggle over rent control in Baltimore City. The case is more significant as an analysis of charter home rule in Maryland, however, than as a case regarding rent control. This casenote examines the strengths and weaknesses of the court's opinion and addresses the possible effect of the decision on the rights of citizens of Maryland's charter home rule jurisdictions to accomplish their goals by direct participation in the legislative process.

## II. HOME RULE IN MARYLAND

When the first state constitution was adopted in Maryland in 1776, Baltimore City was a municipality of Baltimore County.<sup>4</sup> By the beginning of this century, the city had become increasingly independent, both geographically and politically,<sup>5</sup> and the citizens of Baltimore City were enjoying a relatively high degree of self-

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1. The proposed article was designated "Article 6A" and is reproduced as Appendix A of the *Cheeks* opinion. *Cheeks v. Cedlair Corp.*, 287 Md. 595, 615, 415 A.2d 255, 265 (1980).
  2. Record Extract, vol. I, at E185-91, *Cheeks v. Cedlair Corp.*, 287 Md. 595, 415 A.2d 255 (1980) [hereinafter cited as Record Extract].
  3. 287 Md. 595, 415 A.2d 255 (1980).
  4. THE CHARTER OF THE PROVINCE OF MARYLAND; THE DECLARATION OF 1776, AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND RELATING TO BALTIMORE TOWN AND CITY, FROM 1729 TO 1830, at xiii, 23-49 (Brown ed. 1879).
  5. *Pressman v. D'Alesandro*, 211 Md. 50, 56-57, 125 A.2d 35, 38 (1956); Moser, *County Home Rule — Sharing the State's Legislative Power with Maryland Counties*, 28 MD. L. REV. 327, 332 n.18 (1968) [hereinafter cited as Moser].

government under the provisions of the City Charter of 1898, granted by the General Assembly of Maryland.<sup>6</sup> By contrast, the legislature had not allowed the county citizens the same autonomy, and the county governments were considered to be "nothing more than political subdivisions of the state, . . . mere administrative instrumentalities of state government."<sup>7</sup> The individual counties were governed almost entirely by the General Assembly in Annapolis.<sup>8</sup>

By the end of the nineteenth century, a nationwide movement to allow localities to govern themselves in local matters was underway.<sup>9</sup> Marylanders found this concept appealing when considering the individual needs of their localities.<sup>10</sup> While county citizens were becoming frustrated with the insensitivity of legislators in Annapolis to local problems and needs, legislators were finding the lawmaking system increasingly inefficient as the volume of legislative work increased.<sup>11</sup> In 1914, the General Assembly proposed the Home Rule Amendment to the Constitution of Maryland,<sup>12</sup> giving the citizens of Baltimore City and the twenty-three counties of Maryland the right to draw up and adopt their own local charters setting out what form, within certain limits, their local governments would take.<sup>13</sup> The amendment was ratified by the voters the following year.<sup>14</sup>

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6. Law of Mar. 24, 1898, ch. 123, §§ 1-222, 1898 Md. Laws 241 (codified at THE NEW CHARTER OF BALTIMORE CITY (Page ed. 1898)) [hereinafter cited as THE NEW CHARTER OF BALTIMORE CITY]. The city enjoyed a variety of general powers under this charter, including the powers to acquire property, to establish a fire department, to regulate all businesses, to exercise the police power, to levy property taxes, and to exercise general welfare powers. *Id.* § 6.

7. *Ritchmount Partnership v. Board of Supervisors of Elections*, 283 Md. 48, 54-55, 388 A.2d 523, 528 (1978).

8. *Id.*

9. 1 C. ANTIEU, MUNICIPAL CORPORATION LAW § 3.00 (1981); C. BEARD, AMERICAN GOVERNMENT AND POLITICS 737 (10th ed. 1949); 1 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 1.40 (3d rev. ed. 1971).

10. See *Ritchmount Partnership v. Board of Supervisors of Elections*, 283 Md. 48, 55-56, 388 A.2d 523, 528-29 (1978). See generally CHARTER AND PUBLIC LOCAL LAWS OF BALTIMORE CITY 1927, at xiii (Flack ed. 1927).

11. *Ritchmount Partnership v. Board of Supervisors of Elections*, 283 Md. 48, 55-56, 388 A.2d 523, 528-29 (1978); Scull v. Montgomery Citizens League, 249 Md. 271, 274, 238 A.2d 92, 94 (1967); M. EPPES, HOME RULE IN MARYLAND COUNTIES 3-4 (1975) [hereinafter cited as EPPES].

12. Law of Apr. 16, 1914, ch. 416, 1914 Md. Laws 657 (ratified as MD. CONST. art. XI-A).

13. MD. CONST. art. XI-A, § 3. An interesting comparison to the few restrictions on the form of local government called for by Maryland's charter home rule plan may be made by reference to New Jersey's county charter home rule plan. Optional County Charter Law of 1972, N.J. STAT. ANN. § 40:41A (West Supp. 1981-1982). That law provides that counties desiring charter home rule may adopt one of three forms of government set out in detail in the law. *Id.* §§ 40:41A-31 to -85. If a different form is desired, the state legislature must be petitioned for special enabling legislation. *Id.* §§ 40:41A-13(b), -17.

14. MD. CONST. art. XI-A. Maryland was the second state to adopt a system of charter home rule for its counties. COMMISSION ON ADMINISTRATIVE ORGANIZATION OF THE STATE, SECOND REPORT, LOCAL LEGISLATION IN MARYLAND 14 (1952) (commission also known as The Sobeloff Commission), cited in 62 Op. Att'y Gen. 275, 280 (1977).

The Home Rule Amendment provides the means by which a locality draws up and adopts its charter.<sup>15</sup> A charter board is appointed or elected to author a charter, and if the proposed charter is approved by a majority of the voters, it becomes the local law. Amendments to the charter may be initiated by either the local legislative body or the voters and must be approved by a majority of the voters before taking effect.<sup>16</sup> Every charter must provide for an elected legislative body to assume the power to pass local laws,<sup>17</sup> but because the power to legislate on local matters is controlled by the General Assembly,<sup>18</sup> the Home Rule Amendment requires the General Assembly to pass a law transferring those legislative powers to charter home rule counties.<sup>19</sup> The General Assembly complied with this requirement in 1918 by passing the Express Powers Act.<sup>20</sup> In the case of Baltimore City, such powers had already been granted through the legislatively created municipal charter<sup>21</sup> and the Home Rule Amendment simply provided that those powers would become the city's legislative powers once charter home rule was adopted.<sup>22</sup> Thus, the counties receive a different grant of legislative powers than that made to Baltimore City. Finally, the Home Rule Amendment declares that once a locality has adopted charter home rule, the General Assembly shall also transfer to it any powers it holds relative to that locality's prior government.<sup>23</sup> In the case of the counties, the legislature's power to define the role of the county commissioners is transferred and exercisable when a home rule charter is adopted.<sup>24</sup> For Baltimore City, the constitutional power of the

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15. MD. CONST. art. XI-A, §§ 1, 1A.

16. *Id.* § 5.

17. *Id.* § 3.

18. Legislative powers in Maryland are presumed held by the General Assembly, see note 172 *infra*, which has made specific grants of its powers over local matters to local governing bodies. Counties with the traditional commissioner form of government receive their local legislative powers through MD. ANN. CODE art. 25 (1981). The legislative powers of charter home rule counties are conferred in the Express Powers Act. *Id.* art. 25A. Baltimore City receives its legislative powers under its 1898 charter. THE NEW CHARTER OF BALTIMORE CITY, *supra* note 6, § 6. Municipal home rule jurisdictions (see text accompanying notes 29-31 *infra*) receive their grant of legislative powers through MD. ANN. CODE art. 23A, § 2 (1981). The legislative powers conferred to code home rule counties (see text accompanying notes 33-38 *infra*) are via MD. ANN. CODE art. 25B, § 13 (1981). It is important to remember that these grants of power are not permanent but remain under the control of the General Assembly and that the adoption of charter home rule does not affect the elasticity and unpredictability of such powers. Moser, *supra* note 5, at 327 n.2, 342-44.

19. MD. CONST. art. XI-A, § 2.

20. Law of Apr. 10, 1918, ch. 456, 1918 Md. Laws 942 (codified at MD. ANN. CODE art. 25A (1981)).

21. THE NEW CHARTER OF BALTIMORE CITY, *supra* note 6.

22. MD. CONST. art. XI-A, § 2.

23. *Id.* § 6.

24. *Id.*

General Assembly over the city government passed directly to the city when the Home Rule Amendment was adopted.<sup>25</sup>

Baltimore City was the first locality to achieve home rule status by adopting its existing charter, with minor changes, in 1918.<sup>26</sup> Not until 1948 did the first county adopt a charter.<sup>27</sup> Since that time, seven more counties have turned to charter home rule.<sup>28</sup>

In order to allow cities and towns broader autonomy,<sup>29</sup> home rule was made available to Maryland municipalities in 1954 by the ratification of article XI-E of the Constitution of Maryland.<sup>30</sup> Because Baltimore City gains its home rule status from article XI-A, article XI-E has no practical application to that city.<sup>31</sup>

Perhaps to encourage use of the home rule concept,<sup>32</sup> the General Assembly in 1965 passed a constitutional amendment for an alternative form of home rule for Maryland counties.<sup>33</sup> The provisions of this measure, when ratified, became known as code home rule.<sup>34</sup> Under code home rule, the county retains its commissioner form of government, but the General Assembly confers upon the commissioners legislative powers similar to those of a charter

25. *Id.*

26. CHARTER AND PUBLIC LOCAL LAWS OF BALTIMORE CITY 1927, at v (Flack ed. 1927); Moser, *supra* note 5, at 332 n.18. In its May 4, 1918 report, the Charter Board explained why it proposed a charter nearly identical to the then-existing one:

[I]t has been considered best to submit a charter, the adoption of which will insure Home Rule to the people of Baltimore. This, it is believed, can be more certainly accomplished by submitting to the voters the present Baltimore City Charter with as few amendments as possible, so as to present the main question of Home Rule without confusing it with other issues, which, however, desirable, may subsequently be submitted on their own merits.

CHARTER AND PUBLIC LOCAL LAWS OF BALTIMORE CITY 1927, at xv (Flack ed. 1927). Vote totals (37,330 for; 13,176 against) show Baltimoreans were enthusiastic about the charter proposed. 1919 MARYLAND ALMANAC 93 (1919).

27. Montgomery County adopted charter home rule in 1948. EPPES, *supra* note 11, at 5.
28. The seven counties are Baltimore County (1956), Anne Arundel County (1964), Wicomico County (1964), Howard County (1968), Prince George's County (1970), Harford County (1972), and Talbot County (1973). *Id.* Charter home rule has been rejected at the polls by the citizens of several of the other counties. *Id.*
29. Moser, *supra* note 5, at 334-35.
30. MD. CONST. art. XI-E. See also MARYLAND TECHNICAL ADVISORY SERVICE, UNIVERSITY OF MARYLAND, THE APPLICABILITY IN MARYLAND OF COUNTY LAW TO MUNICIPALITIES LOCATED WITHIN THE COUNTY 9 (1975) [hereinafter cited as MARYLAND TECHNICAL ADVISORY SERVICE].
31. By its own terms, article XI-E applies to all municipalities in Maryland. Although unlikely, it is not inconceivable that Baltimore City would terminate its present home rule status under article XI-A and subsequently adopt a charter pursuant to the municipal home rule amendment. Cf. EPPES, *supra* note 11, at 15 (discussing similar possibilities for Maryland counties).
32. See MARYLAND TECHNICAL ADVISORY SERVICE, *supra* note 30, at 2. The constitutional convention of 1967-1968 recommended that all Maryland counties be required to have charter home rule and would have given the localities more autonomy. Moser, *supra* note 5, at 344-45. The proposed constitution containing these recommendations was rejected by the Maryland voters in 1968. *Id.* at 344.
33. Law of Apr. 8, 1965, ch. 493, 1965 Md. Laws 694 (ratified as MD. CONST. art. XI-F).
34. Moser, *supra* note 5, at 336.

home rule government and significantly greater than those of a non-home-rule county.<sup>35</sup> The greatest difference between code home rule and charter home rule is that the citizens of charter home rule jurisdictions have exercised their constitutional right to author their charter and to set up their own form of local government,<sup>36</sup> whereas under code home rule the General Assembly has determined the form of the local government.<sup>37</sup> Three Maryland counties have chosen code home rule governments.<sup>38</sup>

Thus, there is more than one form and source for local home rule in Maryland. Municipalities derive any home rule authority they desire from article XI-E of the Constitution of Maryland, except for Baltimore City, which takes its authority from article XI-A. Counties have a choice among charter home rule under article XI-A, code home rule under article XI-F or, of course, no home rule.<sup>39</sup> The *Cheeks* opinion and this casenote are confined in relevance to Baltimore City and to the counties that have adopted or in the future may adopt charter home rule pursuant to the original home rule provision, article XI-A.

### III. CASE BACKGROUND

In 1975, the Mayor and City Council of Baltimore enacted a fairly simple and relatively mild rent control ordinance<sup>40</sup> that took effect on July 1 of that year and expired one year later. Attempts within the council to continue and expand rent control after 1976 were unsuccessful.<sup>41</sup> Failure of the council to approve a strong rent control measure led a determined group of rent control pro-

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35. See generally note 18 *supra*. There is disagreement among commentators as to which form of county home rule enjoys broader legislative powers. Compare Moser, *supra* note 5, at 340 (code home rule counties receive broader grant of legislative powers) with MARYLAND TECHNICAL ADVISORY SERVICE, UNIVERSITY OF MARYLAND, EFFECT OF LOCAL HOME RULE ON STATE LEGISLATION 7 (1979) (charter home rule counties have broader legislative powers) and with EPPES, *supra* note 11, at 25 ("[T]here seems to be no significant differences in the powers thus available to code or charter counties."). See generally 62 Op. Att'y Gen. 275 (1977).

36. See text accompanying notes 15 & 16 *supra*.

37. See Moser, *supra* note 5, at 337 & n.38.

38. The Maryland counties that have adopted code home rule are Kent County (1970), Allegany County (1974), and Worcester County (1976). EPPES, *supra* note 11, at 33; *id.* at 1 (Addendum 1978).

39. A Maryland county that does not elect either form of home rule retains a county commissioner government provided for in MD. ANN. CODE art. 25 (1981).

40. Baltimore, Md., Ordinance 949 (July 1, 1975).

41. Record Extract, *supra* note 2, vol. I, at E186.

ponents<sup>42</sup> to draft an amendment to the Baltimore City Charter<sup>43</sup> as an alternate means to their goal.<sup>44</sup>

The new article would have established a tenant-landlord commission composed of two landlords, two tenants, and one homeowner.<sup>45</sup> The commission could have appointed an executive director to carry out the administrative duties of the tenant-landlord offices.<sup>46</sup> Each landlord in the city would have been required to file an annual registration statement and to pay a fee.<sup>47</sup> Generally, landlords would have been required to seek permission of the commission to remove rental units from the market<sup>48</sup> or to raise rents beyond increases determined allowable by the commission, based on guidelines set out in the article.<sup>49</sup> Violations of these terms could have been met with fines and compensatory damages determined by the commission.<sup>50</sup> If landlords had requested rent increases greater than those generally allowable,<sup>51</sup> or if tenants had requested rent reductions,<sup>52</sup> the executive director would have been empowered to hold hearings on these issues and to make determinations.<sup>53</sup> These decisions would have been appealable to the commission.<sup>54</sup> The mayor and city council would have had the power to lift or alter the controls of the article if the commission found a vacancy rate in excess of five per cent in the total number of residential rental units.<sup>55</sup>

In accordance with the constitutional provision allowing citizens to initiate charter amendments in Baltimore City and other charter home rule jurisdictions,<sup>56</sup> the proponents circulated

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42. "Proponents" refers to the two groups of people who worked to have the charter amendment placed on the November 6, 1979 ballot, known collectively as The Peoples Campaign for Rent Control (represented in the case by Bobby Cheeks and Sharon M. Ceci) and The Baltimore City Rent Control Campaign (represented in the case by Mary V. Bennis, Maria Cristina Gutierrez, John E. Taylor, Michael Brockmeyer, and Michael Johnson). *Id.* at E62, E68.

43. The proposed article is reproduced as Appendix A of the *Cheeks v. Cedclair Corp.*, 287 Md. 595, 615, 415 A.2d 255, 265 (1980).

44. Record Extract, *supra* note 2, vol. I, at E186.

45. *Cheeks v. Cedclair Corp.*, 287 Md. 595, 617, 415 A.2d 255, 266 (1980).

46. *Id.* at 620, 415 A.2d at 268.

47. *Id.* at 620-21, 415 A.2d at 268.

48. *Id.* at 621, 415 A.2d at 268.

49. *Id.* at 622-25, 415 A.2d at 268-70.

50. All fines would have had statutory limits. *Id.* at 630-31, 415 A.2d at 272-73.

51. *Id.* at 625-27, 415 A.2d at 270-71.

52. *Id.* at 627, 415 A.2d at 271.

53. *Id.* at 628-30, 415 A.2d at 271-72. The executive director also would have had the power to issue subpoenas. *Id.* at 629, 415 A.2d at 272.

54. *Id.* at 628, 415 A.2d at 271.

55. *Id.* at 630, 415 A.2d at 272.

56. MD. CONST. art. XI-A, § 5.

petitions to have the measure placed on the November 1979 ballot.<sup>57</sup> After the Board of Supervisors of Elections for Baltimore City determined the amendment qualified for placement on the ballot,<sup>58</sup> the Cedlair Corporation, as taxpayer and landlord, and William and Lucia Goodhart, as taxpayers, filed a class action suit against the board and various city officials requesting that they be enjoined from placing the amendment before the voters and that the measure be declared null and void.<sup>59</sup> M. Albert Figinski, Esquire, was allowed to intervene as a taxpayer and landlord, and he became a party plaintiff.<sup>60</sup> The rent control proponents,<sup>61</sup> as taxpayers and tenants, were allowed to intervene as party defendants.<sup>62</sup>

The case was at issue in September but, at the court's suggestion, trial was postponed until after the election.<sup>63</sup> The election did not prove the issue moot, and trial began in November.<sup>64</sup> At the trial, much time was devoted to a debate of the validity of the petitions and of the process by which they were obtained. On those issues the rent control proponents were vindicated.<sup>65</sup> Regarding the validity of the amendment, however, the court declared it null and void, as improper charter material, as an improper exercise of the police power by the electorate, as conflicting with the Horizontal Property Act,<sup>66</sup> as vague under due process standards, and as an unconstitutional vesting of judicial authority.<sup>67</sup> An appeal was noted to the Court of Special Appeals of Maryland.<sup>68</sup> Prior to consideration by that court, the Court of Appeals of Maryland granted certiorari.<sup>69</sup>

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57. Record Extract, *supra* note 2, vol. I, at E186. The required number of signatures is 10,000 or 20% of the registered voters, whichever is less. MD. CONST. art. XI-A, § 5.

58. Record Extract, *supra* note 2, vol. I, at E188.

59. *Id.* at E7.

60. *Id.* at E49, E75.

61. See note 42 *supra*.

62. Record Extract, *supra* note 2, vol. I, at E61, E68, E74-75.

63. The court proposed postponement of trial until after the general election. When the plaintiffs expressed concern that their cause might thereby be prejudiced, the court and defendants made the following assurances: first, the case would be tried under the same strict standards as would have applied had it been heard prior to election (see note 155 *infra*); second, the defendants would not challenge the standing of any plaintiff; and third, the court would not allow further non-mandatory intervenors. Record Extract, *supra* note 2, vol. I, at E75-77. One might question the wisdom of the defendants' apparent readiness to join in these assurances when postponement was urged by the trial judge.

64. Record Extract, *supra* note 2, vol. IV, at 1044.

65. *Id.* vol. I, at E190, E196.

66. MD. REAL PROP. CODE ANN. §§ 11-101 to -127 (1974).

67. Record Extract, *supra* note 2, vol. I, at E190-91.

68. *Id.* at E198; *id.* vol. III, at 1043A.

69. *Cheeks v. Cedlair Corp.*, 287 Md. 595, 604, 415 A.2d 255, 260 (1980). Not only was the granting of certiorari an indication that the court felt the issues raised were important ones, but also the court made the unusual gesture of allowing extra time for oral argument. Interview with Ira C. Cooke, Esquire, Attorney for Appellee M. Albert Figinski, in Baltimore City (May 22, 1981).



IV. THE *CHEEKS* OPINION

In *Cheeks v. Cedclair Corp.*,<sup>70</sup> the Court of Appeals of Maryland upheld the lower court's decision, basing its affirmance on two of the many issues presented to the trial court.<sup>71</sup> First, the court of appeals held that the proposed amendment was legislative in character, did not relate to the form and structure of the local government, and therefore was not proper charter material.<sup>72</sup> Second, the court declared that the voters of Baltimore City do not have authority under the Home Rule Amendment to establish a system of rent control because the power to do so, the police power, belongs exclusively to the City Council of Baltimore.<sup>73</sup> It ruled that for the electorate, and not the legislature, to exercise the police power constituted an expansion or enlargement of that power in contravention of the Home Rule Amendment.<sup>74</sup> Finally, the court hypothesized that, had the Baltimore City Charter contained a reservation of the power to initiate legislation and had the rent control measure been formulated as legislation rather than as a charter amendment, such initiation of legislation by the people would have been unconstitutional.<sup>75</sup>

A. *The Amendment was not Charter Material*

Under the Home Rule Amendment, the citizens of each eligible jurisdiction may, by means of a charter board, draw a charter to be approved by the jurisdiction's electorate.<sup>76</sup> The purposes and contents of a home rule charter have seldom been at issue in Maryland courts, and it has been only within recent years that the court of appeals has had occasion to give some judicial definition to the meaning of a home rule charter.<sup>77</sup>

In 1978, the court of appeals reaffirmed its earlier analogy of a home rule charter as a local constitution<sup>78</sup> and further defined it as a document which allocates power among the agencies in whatever fashion the locality chooses, within the constraints of state and federal constitutions.<sup>79</sup> In *Cheeks*, the court further defined the home rule charter, stating that it is in the charter that the

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70. 287 Md. 595, 415 A.2d 255 (1980).

71. For issues decided at the trial level, see text accompanying notes 64-67 *supra*.

72. 287 Md. 595, 606-08, 415 A.2d 255, 261-62 (1980).

73. *Id.* at 608-09, 415 A.2d at 262.

74. *Id.* at 609-10, 415 A.2d at 262.

75. *Id.* at 610-14, 415 A.2d at 263-65.

76. MD. CONST. art. XI-A, §§ 1, 1A.

77. See, e.g., *Ritchmount Partnership v. Board of Supervisors of Elections*, 283 Md. 48, 58-59, 388 A.2d 523, 530 (1978); *Anne Arundel County v. Moushabek*, 269 Md. 419, 422, 306 A.2d 517, 519 (1973).

78. *Ritchmount Partnership v. Board of Supervisors of Elections*, 283 Md. 48, 58, 388 A.2d 523, 530 (1978).

79. *Id.* at 59, 388 A.2d at 530. For further discussion of *Ritchmount*, see text accompanying notes 129-34, 183-94 *infra*.

powers of the municipality or county are defined and distributed and the governmental organization takes form.<sup>80</sup> The charter, it said, relates to the form and structure of government; it is the fundamental law that describes the relationships between the government and the citizens and among the branches and bodies within the government. The court concluded that the subject matter of an amendment to such a charter would necessarily be limited to the form and structure of the government set out in the charter.<sup>81</sup>

Measuring the proposed rent control amendment against the foregoing definition, the court held that a rent control scheme is not proper charter material because it does not relate merely to the form and structure of local government.<sup>82</sup> Furthermore, the court held that the proposed charter amendment was not proper charter material because it was an exercise of a legislative power.<sup>83</sup> It was not the establishment of the Tenant-Landlord Commission or the detailed description of its functions, powers, and duties that was offensive to the court's definition of charter material, but rather it was the actual implementation of the controls on rents, an exercise of the police power which is inherently legislative,<sup>84</sup>

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80. 287 Md. 595, 607, 415 A.2d 255, 261 (1980). The court cited here 2 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 9.03 (3d rev. ed. 1979), which actually describes the charter of a municipality created by the legislative body and not one created by the people in a home rule jurisdiction. It is only in the home rule context that the analogy of the charter to a constitution is appropriate. See *id.* § 9.07.

81. 287 Md. 595, 607, 415 A.2d 255, 261 (1980).

82. *Id.* at 607-08, 415 A.2d at 261-62.

83. *Id.* The court stated that "[a] charter amendment . . . differs in its fundamental character from a simple legislative enactment. Its content cannot transcend its limited office and be made to serve or function as a vehicle through which to adopt local legislation." *Id.* at 607, 415 A.2d at 261.

84. *State Roads Comm'n v. Jones*, 241 Md. 246, 249, 216 A.2d 563, 564 (1966); *Stevens v. City of Salisbury*, 240 Md. 556, 564, 214 A.2d 775, 779 (1965); 16 C.J.S. *Constitutional Law* § 177 (1956). The police power is one of the powers granted to charter home rule jurisdictions by the General Assembly of Maryland pursuant to § 2 of the Home Rule Amendment. MD. CONST. art. XI-A, § 2; see notes 17-22 and accompanying text *supra*. For the counties, it is transferred by the Express Powers Act. MD. ANN. CODE art. 25A (1981). Although the Express Powers Act does not expressly transfer the police power to charter counties, the courts have broadly construed § 5(S) of the Express Powers Act to embody the police power. *Prince George's County v. Chillum-Adelphi Volunteer Fire Dep't*, 275 Md. 374, 382, 340 A.2d 265, 270 (1975); *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 159-62, 252 A.2d 242, 246-47 (1969). The Court of Appeals of Maryland has specifically held that § 5(S) of the Express Powers Act grants to charter counties the right to regulate landlord-tenant relationships and the apartment rental business. *County Council for Montgomery County v. Investors Funding Corp.*, 270 Md. 403, 412-15, 312 A.2d 225, 230-32 (1973). In Baltimore City, the legislative grant of the police power was an express one made in the 1898 charter. THE NEW CHARTER OF BALTIMORE CITY, *supra* note 6, § 6. Pursuant to § 2 of the Home Rule Amendment, it became a power exercisable under charter home rule. See text accompanying note 21 *supra*. Today the police power remains among the legislative powers held by the city. CHARTER OF BALTIMORE CITY art. II, § 27.

that the court found incongruous with its definition.<sup>85</sup> This implication that charter material and legislative material are mutually exclusive<sup>86</sup> gives further definition to the term "home rule charter."

The court of appeals was bound by little prior case law as it set out to define the proper contents of an article XI-A home rule charter, and the definition of charter material that emerges from *Cheeks* fits comfortably with the earlier cases.<sup>87</sup> The problem with the court's definition is not that it violates the rule of *stare decisis* or that it is unworkable for future application but that it is unrealistically discordant with material currently in the charters of charter home rule jurisdictions. The court drew a distinction between legislative material and material that relates to "the form or structure of government in [a] fundamental sense,"<sup>88</sup> and stated that charter amendments are necessarily limited in subject matter to the latter.<sup>89</sup> The distinction, however, is one not easily made. For example, the power to require Baltimore City to submit to binding arbitration regarding municipal employees is a legislative power granted to Baltimore City by the General Assembly,<sup>90</sup> but

85. 287 Md. 595, 608, 415 A.2d 255, 262 (1980). An interesting aspect of this case is the severability of the portion of the proposed amendment that the court implied was proper charter material (the establishment of a tenant-landlord commission with wide new powers over the relationship between tenants and landlords in the community) from that portion of the amendment it found offensive to the definition of charter material (the imposition of controls on rents). An *amicus curiae* brief was filed on that issue alone, urging severance, but neither of the interested parties urged severance. *Id.* at 614, 415 A.2d at 265. In light of the admitted purpose of the amendment — to establish rent control — the proponents most likely saw little value in establishing a mere framework. It may be questioned, however, whether the court had authority to reject the entire amendment considering the rule of construction that "[i]f a portion [of a statute] be unconstitutional, the Court is not authorized, for that reason, to declare the whole void." *Anne Arundel County v. Moushabek*, 269 Md. 419, 429, 306 A.2d 517, 522 (1973) (quoting *Mayor of Hagerstown v. Dechert*, 32 Md. 369, 384 (1870)). In simply stating the portions were integrated beyond severability, 287 Md. at 614, 415 A.2d at 265, the court gave but cursory attention to a worthy issue.

86. 287 Md. 595, 608, 415 A.2d 255, 262 (1980). It appears that Judge Cole, in his dissent, assumed the majority meant that charter material and legislative material are entirely separate concepts. *Id.* at 632-33, 415 A.2d at 273-74 (Cole, J., dissenting).

87. See text accompanying notes 77-79 *supra*. In his dissent, Judge Cole employed impressive authority from other states and from the United States Supreme Court to illustrate his position that a home rule charter properly consists of whatever the citizens wish to include that is not otherwise illegal or unconstitutional. 287 Md. 595, 633-35, 415 A.2d 255, 274-75 (1980) (Cole, J., dissenting). Such authority is, however, merely persuasive and not binding on the Maryland courts in interpreting the provisions of their own state constitution. *Wood v. Tawes*, 181 Md. 155, 165, 28 A.2d 850, 855 (1942) ("The State's construction of its own Constitution is binding, in the absence of any conflict with the United States Constitution."), *cert. denied*, 318 U.S. 788 (1943); *Douglas v. Safe Deposit & Trust Co.*, 159 Md. 81, 92, 150 A. 37, 42 (1930) (the Maryland courts are not bound by decisions of other state courts).

88. 287 Md. 595, 608, 415 A.2d 255, 262 (1980).

89. See note 83 and accompanying text *supra*.

90. Law of May 25, 1976, ch. 924, 1976 Md. Laws 2617 (codified at CHARTER OF BALTIMORE CITY art. II, § 51).

in 1978 an amendment was made to the city charter which requires the city to submit to binding arbitration with its fire-fighters.<sup>91</sup> Another example of the crossover of legislative powers into home rule charters is in the area of ethics regulation of governmental employees. The Express Powers Act grants to the charter counties the legislative power to

enact local laws designed to prevent conflicts between the private interests and public duties of any county officers, . . . and to govern the conduct and actions of all such county officers in the performance of their public duties, and to provide for penalties . . . for violation of any such laws or the regulations adopted thereunder.<sup>92</sup>

Despite the fact that such powers are clearly legislative, six of the eight<sup>93</sup> charter home rule counties in Maryland set out a fairly specific prohibition against conflicts of interests for their county employees in their county charters,<sup>94</sup> and five provide specific penalties for violations of such laws.<sup>95</sup>

*Cheeks* also dictates that charter material is limited to that which establishes the form and structure of local government and allocates power among agencies.<sup>96</sup> One questions, then, the con-

91. CHARTER OF BALTIMORE CITY art. VII, § 46A. A similar amendment was made to the Prince George's County Charter in 1980 requiring the county executive to submit to binding arbitration with county employees under specified circumstances. CHARTER OF PRINCE GEORGE'S COUNTY, MARYLAND art. IX, § 908. The language of the charter amendment ("in order to prevent strikes, job actions and other disruptions that might impede the protection of the public health, safety, and general welfare") indicates that the authors intended to exercise the police power or general welfare power. The police and general welfare powers are, however, legislative powers, which were granted to the charter counties in the Express Powers Act. MD. ANN. CODE art. 25A (1981); see *Steimel v. Board of Election Supervisors*, 278 Md. 1, 9, 357 A.2d 386, 390 (1976); *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 161-62, 252 A.2d 242, 247 (1969). See also note 84 *supra*.

92. MD. ANN. CODE art. 25A, § 5(Q) (1981).

93. See notes 27-28 and accompanying text *supra*.

94. CHARTER OF ANNE ARUNDEL COUNTY, MARYLAND art. X, § 1001; CHARTER OF BALTIMORE COUNTY, MARYLAND art. X, § 1001 (§ 1010 dictates that if the county council enacts conflict of interest legislation, the provisions of the county charter on that subject shall prevail over such enacted laws); CHARTER OF HARFORD COUNTY, MARYLAND art. IX, § 901; CHARTER OF HOWARD COUNTY art. IX, § 901; CHARTER OF PRINCE GEORGE'S COUNTY, MARYLAND art. X, § 1001; CHARTER OF WICOMICO COUNTY, MARYLAND art. VI, § 607. The Montgomery County charter does not set out its own conflict of interest prohibition but directs that the county council *must* enact such legislation. CHARTER OF MONTGOMERY COUNTY, MARYLAND art. 4, § 410. Talbot County makes no reference in its charter to conflicts of interest. See CHARTER OF TALBOT COUNTY, MARYLAND.

95. CHARTER OF ANNE ARUNDEL COUNTY, MARYLAND art. X, § 1001; CHARTER OF BALTIMORE COUNTY, MARYLAND art. X, § 1001; CHARTER OF HARFORD COUNTY, MARYLAND art. IX, § 901; CHARTER OF HOWARD COUNTY art. IX, § 901; CHARTER OF PRINCE GEORGE'S COUNTY, MARYLAND art. X, § 1001. Wicomico County directs that penalties be determined by the county council. CHARTER OF WICOMICO COUNTY, MARYLAND art. VI, § 614.

96. 287 Md. 595, 607-08, 415 A.2d 255, 261-62 (1980).

stitutionality of the 1974 amendment to the Baltimore City Charter, which the court considered "a textbook example"<sup>97</sup> of a home rule charter, requiring that no public funds shall be used to build a stadium for professional football, soccer or baseball<sup>98</sup> — a charter amendment that, it appears, bears no relation to the form or structure of the city government.

Although the court's definition of charter material makes questionable the inclusion of many matters already in the home rule charters, present and future charter home rule jurisdictions will undoubtedly benefit from the guidelines of *Cheeks* as to what is proper charter material. This analysis merely points to the simplistic nature of the definition in light of existing charters and the fact that it may therefore have created some problems as well as solving others.

*B. Adopting the Amendment was an Unconstitutional Expansion of the City's Express Powers*

After holding that the proposed charter amendment was not proper charter material, the *Cheeks* court found that the exercise of the police power by the citizens of Baltimore City was an unconstitutional enlargement or expansion of the express powers granted to the city.<sup>99</sup> The court employed the following sections of the Home Rule Amendment in its ruling on this issue: first, section three, which requires that the local charter establish an elected legislative body with full legislative powers;<sup>100</sup> and second, sections two and six, which prohibit citizens in charter home rule jurisdictions from expanding or enlarging the legislative powers possessed by the locality.<sup>101</sup> Using these sections, the court reasoned that under charter home rule only the local legislative body has the power to legislate, and if any other entity exercises that power, the power is thereby expanded or enlarged in contravention of the constitution.<sup>102</sup> Consequently, the court held the exercise of the police power by Baltimore City citizens, and not by the

97. *Id.* at 607, 415 A.2d at 261.

98. CHARTER OF BALTIMORE CITY art. I, § 9. In *Wilson v. Board of Supervisors of Elections*, 273 Md. 296, 328 A.2d 305 (1974), the court of appeals upheld this proposed charter amendment against a challenge that it conflicts with a public general law and was therefore inoperative. The court made no mention of the fact that the amendment does not directly relate to the form and structure of government; rather, in affirming the lower court's decision, it stated:

In a comprehensive and well-reasoned opinion the chancellor . . . held that "if a majority of the voters of the City of Baltimore wish to limit the expenditure of public funds for recreational facilities to those existing on 33rd Street, there seems to be no valid reason in law to forbid them through referendum from so doing."

*Id.* at 299, 328 A.2d at 308.

99. 287 Md. 595, 608-10, 415 A.2d 255, 262 (1980).

100. *Id.* at 608-09, 415 A.2d at 262; *see* MD. CONST. art. XI-A, § 3.

101. 287 Md. 595, 609-10, 415 A.2d 255, 262 (1980); *see* MD. CONST. art. XI-A, §§ 2, 6.

102. 287 Md. 595, 608-10, 415 A.2d 255, 262 (1980).

Mayor and City Council of Baltimore, unconstitutionally expanded that power.

The issue before the court was whether the citizens of Baltimore City have the right to exercise the police power.<sup>103</sup> In resolving this issue, the court reached the proper conclusion but by unnecessary and questionable means.

The mayor and city council are the only entities in Baltimore City authorized to exercise legislative powers. As discussed, the court attributed this fact to the state constitution. Actually it is the Baltimore City Charter that commands that all legislative power be exercised by the mayor and city council. To illustrate this fully, it is necessary to trace the development of home rule in Baltimore City which, it should be remembered, is not synonymous with charter home rule development in the counties.<sup>104</sup>

In 1898, the General Assembly granted the City of Baltimore a charter<sup>105</sup> under which the inhabitants of the city were incorporated as "Mayor and City Council of Baltimore."<sup>106</sup> In that charter, the legislature made an express grant of numerous legislative powers to the city<sup>107</sup> and established the city council as the local legislative body<sup>108</sup> which, with the mayor, held the authority to exercise the express powers through the passage of ordinances.<sup>109</sup> No provision was made by the General Assembly at that time for any other means of enacting local laws and, because the charter was legislatively granted, no power was vested in the people to vary its form. Consequently, an ordinance of the city council was the only means possible for exercising the legislative powers transferred.<sup>110</sup>

In 1915, the Home Rule Amendment granted to the citizens of Baltimore City the power to change the existing form of government, with certain limitations,<sup>111</sup> but the provisions of an earlier

103. *Id.* at 608, 415 A.2d at 262.

104. See generally text accompanying notes 4-25 *supra*.

105. THE NEW CHARTER OF BALTIMORE CITY, *supra* note 6. For a general discussion of the circumstances leading to the 1898 charter, see *id.* at i-vii.

106. *Id.* § 1.

107. The General Assembly made its grant of powers to "The Mayor and City Council of Baltimore." *Id.* § 6. Although those words would appear to mean that the grant was made directly to the mayor and the city's legislative body, it must be remembered that "Mayor and City Council of Baltimore" was the name under which the citizens of the city were incorporated. *Id.* § 1. It was by other terms of the charter that the General Assembly restricted the exercise of legislative powers to the mayor and council. See notes 108 & 109 and accompanying text *infra*.

108. THE NEW CHARTER OF BALTIMORE CITY, *supra* note 6, § 209.

109. *Id.* §§ 218, 221. The charter granted the mayor the veto power, but it provided the council with the power to override. *Id.* § 23.

110. This concept was evident in the cases both prior to and succeeding the adoption of charter home rule in Baltimore City. See generally *Tighe v. Osborne*, 150 Md. 452, 457, 133 A. 465, 466-67 (1926); *Osborne v. Brauel*, 136 Md. 88, 92, 110 A. 199, 200 (1913); *Rosberg v. State*, 111 Md. 394, 412, 74 A. 581, 585 (1909).

111. See *Ritchmount Partnership v. Board of Supervisors of Elections*, 283 Md. 48, 59, 388 A.2d 523, 530 (1978); MD. CONST. art. XI-A, § 3.

constitutional provision, article XI, prevented Baltimoreans from fully exercising that power.<sup>112</sup> In 1867, article XI provided to the city its first independent local government in the form of a mayor and a bicameral legislative body.<sup>113</sup> By the terms of that article, the General Assembly retained control over the form of that government and the powers and duties of its officials.<sup>114</sup> Therefore, when Baltimore's citizens chose to adopt charter home rule, article XI presented a conflict with the intent of the Home Rule Amendment that the local citizenry determine its own form of government.<sup>115</sup> The drafters of the Home Rule Amendment apparently anticipated this conflict and addressed it by directing the General Assembly to transfer its article XI powers over the form of the Baltimore City government to the citizens of the city in the event they adopted charter home rule.<sup>116</sup> Such enabling legislation was not passed, however, until 1920,<sup>117</sup> two years after Baltimore City adopted its home rule charter.<sup>118</sup> When the charter board drafted Baltimore's first home rule charter in 1918, its members recognized that the General Assembly retained article XI powers over the form of the city government and that, consequently, the board was limited in its authority to vary the then-existing form.<sup>119</sup> The charter proposed by the 1918 charter board and

112. MD. CONST. art. XI. Article XI first appeared in the 1867 document that still serves as Maryland's constitution. THE CONSTITUTION OF THE STATE OF MARYLAND app. 133 (Hinkley ed. 1868). It was a continuation of the gradual legislative trend toward recognizing Baltimore City as an independent political entity. See notes 4-6 and accompanying text *supra*.

113. MD. CONST. art. XI, §§ 1, 2.

114. *Id.* §§ 1, 2, 9.

115. *Ritchmount Partnership v. Board of Supervisors of Elections*, 283 Md. 48, 59, 388 A.2d 523, 530 (1978). See also notes 10-13 and accompanying text *supra*.

116. MD. CONST. art. XI-A, § 6.

117. Law of Apr. 9, 1920, ch. 555, 1920 Md. Laws 1141.

118. See text accompanying note 26 *supra*.

119. This is reflected in the Report of the Charter Board, May 4, 1918:

It is the opinion of this Committee, in view of the difficulty of determining what is to be regarded at present as constituting Sections 1 to 6 of Article XI of the Constitution, that until an express grant of power to do so is obtained from the legislature, it is beyond the power of this Charter Board to include in any Charter submitted by it, any changes in the manner or time of electing or in the term of office, of the Mayor as now prescribed by law, or to make any changes in Charter to be submitted in the bicameral character of the City Council or in the manner or time of electing, or term of office of its members. But subject to these limitations it is within the power of this Charter Board, if it shall deem it wise or expedient, so long as it does not enlarge or extend the powers heretofore granted to the City of Baltimore by Article IV, Section 6 of the Public Local Laws of Baltimore, to report a Charter or Form of Government which shall create different departments of government from those now in existence . . . This affords quite a wide scope for changes in the present Charter. It would not seem to be within the power of this Charter Board to present a Charter, providing a Commission Form of Government or providing for initiative and referendum legislation, or for the recall of the Mayor or members of the City Council.

CHARTER AND PUBLIC LOCAL LAWS OF BALTIMORE CITY 1927, at xiv (Flack ed. 1927). Another reason given by the charter board for proposing a charter nearly identical to the existing one was that the members were anxious to ensure passage of the proposed charter. See note 26 *supra*.

adopted by the people essentially continued the existing mayor and council government, with all legislative power in the council.<sup>120</sup> After the General Assembly transferred its article XI powers in 1920, the voters of the city were empowered to change their form of government, but they have never done so. Therefore, it remains by the terms of the charter that the city council is the city's legislative department<sup>121</sup> and that the legislative powers are exercised only by the passage of ordinances or resolutions of the mayor and council.<sup>122</sup> Because this is true, exercise of the legislative powers by the electorate is not allowed, and the rent control amendment at issue in *Cheeks* was, for that simple reason, null and void *ab initio*.

The court in *Cheeks*, however, reasoned differently by looking to the Home Rule Amendment and not to the city charter to determine whether Baltimore's citizens hold any legislative powers.<sup>123</sup> It looked first to section three, which requires that in establishing charter home rule, each locality provide for "an elective legislative body in which shall be vested the law-making power."<sup>124</sup> Section three further states that, if Baltimore City chooses to have a mayor, the mayor and city council "shall have full power to enact local laws . . . upon all matters covered by the express powers granted [by the General Assembly]."<sup>125</sup> The court read section three as a mandate which restricts all exercise of legislative power in charter home rule jurisdictions to the legislative body.<sup>126</sup> The court stated that "[u]nder § 3, the City Council, and not the City electorate, is specifically given 'full power' to enact local laws upon 'all matters covered by the express powers granted,'" <sup>127</sup> and later referred to "the constitutional requirement that . . . [the express] powers be exercised by ordinance enacted by the City Council."<sup>128</sup>

This reasoning is impossible to reconcile with the court's 1978 decision, *Ritchmount Partnership v. Board of Supervisors of Elections*,<sup>129</sup> which also addressed section three. In that case, the court

120. CHARTER OF BALTIMORE CITY of 1918, art. I, §§ 209, 218, 221 (published in CHARTER AND PUBLIC LOCAL LAWS OF BALTIMORE CITY 1927, at 1 (Flack ed. 1927)). In the 1918 charter the legislative body was, however, no longer bicameral. *Id.* § 209.

121. See CHARTER OF BALTIMORE CITY art. III, § 1.

122. See *id.* §§ 12, 15.

123. 287 Md. 595, 608-09, 415 A.2d 255, 262 (1980).

124. MD. CONST. art. XI-A, § 3.

125. *Id.*

126. 287 Md. 595, 608-09, 415 A.2d 255, 262 (1980).

127. *Id.*

128. *Id.* at 609, 415 A.2d at 262. In a footnote to this statement, the court made the remark that "[a]lthough the City is authorized under its grant of express powers to adopt, in its charter, a method for exercising the express powers other than by ordinance, it has not done so." *Id.* at 609 n.8, 415 A.2d at 262 n.8. Obviously, if there were a constitutional requirement that the express powers be exercised only by city council ordinance (as the court stated in text), the city would have no such option.

129. 283 Md. 48, 388 A.2d 523 (1978).



determined whether citizens in charter home rule jurisdictions may share the legislative powers by exercising the right of referendum.<sup>130</sup> The court said in *Ritchmount* that, although the constitution "undoubtedly requires that the council be the primary legislative organ; it does not altogether preclude the existence of other entities with coordinate legislative powers."<sup>131</sup> The *Ritchmount* court recognized that the referendum power, which it found to be constitutionally available to the citizens of charter home rule jurisdictions for incorporation in their charters,<sup>132</sup> is a legislative power that can coexist with the legislative powers of the local legislative body.<sup>133</sup> In reaching this conclusion, the *Ritchmount* court construed section three to mean that, although the section directs that lawmaking powers be vested in the legislative body and that that body have "full power to enact local laws," the language was meant to describe the quality of legislative power to be held by the legislative body, not the exclusivity of that power.<sup>134</sup> *Ritchmount* clearly stands for the proposition that legislative powers may, to an extent, be exercised by entities of charter governments other than the traditional legislative body<sup>135</sup> and is therefore in conflict with the *Cheeks* court's interpretation of section three. This inconsistency would not be so disturbing but for the court's statement in *Cheeks* that no inconsistency exists.<sup>136</sup>

The impossibility of reconciling *Cheeks* with *Ritchmount* gives further reason why the court should have analyzed the case using only the Baltimore City Charter. There was no need to construe the Home Rule Amendment or to address any constitutional limitations. The same result would have been reached by analyzing the facts under the city charter. Furthermore, by invoking the constitution rather than the local charter as its basis, the court

130. *Id.* at 50-51, 388 A.2d at 526.

131. *Id.* at 63, 388 A.2d at 533. *Ritchmount's* holding is limited to a finding that section one of the Home Rule Amendment allows citizens to exercise legislative powers to the extent that they have "the right to reserve unto themselves by express charter provision the power to refer legislation enacted by the [legislative body]." *Id.* (emphasis added).

132. *Id.* at 61, 388 A.2d at 532.

133. *Id.* at 62-63, 388 A.2d at 532-33.

134. *Id.* at 63, 388 A.2d at 533.

135. See note 131 *supra*.

136. In reviewing its holding in *Ritchmount*, the court stated:

We found [in *Ritchmount*] that the effect of § 308 of the Anne Arundel County Charter, in placing a portion of the lawmaking power in the people, was not in derogation of the plenary powers of the County Council. We observe that § 3 of Art. XI-A did not confine "the power to legislate exclusively to the council," nor did it "prohibit the exercise of some portion of this power by the people."

287 Md. 595, 611, 415 A.2d 255, 263 (1980) (quoting *Ritchmount Partnership v. Board of Supervisors of Elections*, 283 Md. 48, 62, 388 A.2d 523, 532 (1978)). Later, referring to *Ritchmount*, the court in *Cheeks* stated: "Nothing in that case is even remotely at odds with our conclusion that the [rent control] amendment violates § 2 [of the Home Rule Amendment] . . ." 287 Md. at 612, 415 A.2d at 264.

made its holding applicable to all charter home rule localities, not just to Baltimore City. Whether this jeopardizes the referendum provisions of county charters,<sup>137</sup> in which a certain degree of legislative power is exercised by the electorate,<sup>138</sup> is not clear. Although *Cheeks* appears to be saying that legislative powers are vested solely in the legislative body,<sup>139</sup> surely it did not intend to jeopardize the right to local referendum, for later in the opinion the court enthusiastically reaffirmed the *Ritchmount* holding that referendum on the charter home rule level is consistent with the language of section three.<sup>140</sup>

The court in *Cheeks* next considered whether section six of the Home Rule Amendment affords citizens any power to legislate. By its terms, the General Assembly is directed to transfer to the local voters its powers over local authorities.<sup>141</sup> The court held that any powers transferred directly to the citizens by this section cannot operate to take away the legislative power the court had found to reside exclusively with the legislative body.<sup>142</sup> It was at this point that the court began to confuse the breadth or scope of legislative powers with the issue of who may exercise those powers. There is no wording in section six which directly prohibits the electorate from exercising legislative powers; it merely states that its terms do not "authorize the exercise of any powers *in excess of* those conferred [upon the locality] by the legislature."<sup>143</sup> In paraphrasing this language, the court changed the meaning of the words by saying that the limitation on the exercise of powers by the voters was that "such authority may not be exercised *in violation of* other powers vested in the City under Art. XI-A."<sup>144</sup> Using its paraphrase as the measure, the court reasoned that because the legislative body of the locality has been given the exclusive power to establish a system of rent control,<sup>145</sup> for any other body (such as the electorate) to exercise the same power would somehow

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137. All charter counties in Maryland provide for the referendum. See note 179 *infra*.

138. See *Ritchmount Partnership v. Board of Supervisors of Elections*, 283 Md. 48, 60-64, 388 A.2d 523, 531-33 (1978).

139. *Cheeks v. Cedlair Corp.*, 287 Md. 595, 608-10, 415 A.2d 255, 262 (1980).

140. *Id.* at 612-13, 415 A.2d at 264.

141. MD. CONST. art. XI-A, § 6.

142. 287 Md. 595, 609, 415 A.2d 255, 262 (1980).

143. MD. CONST. art. XI-A, § 6 (emphasis added).

144. 287 Md. 595, 609, 415 A.2d 255, 262 (1980) (emphasis added). In his dissent, Judge Cole notes this change of meaning. *Id.* at 636, 415 A.2d at 275 (Cole, J., dissenting).

145. There was no question in the case that the power to establish a system of rent control was within the scope of the legislative powers granted by the General Assembly, namely, part of the police power. *Id.* at 609, 415 A.2d at 262. See generally *Westchester West No. 2 Ltd. Partnership v. Montgomery County*, 276 Md. 448, 348 A.2d 856 (1975); CHARTER OF BALTIMORE CITY art. II, § 27.

“divest the Council of its acknowledged police power to legislate on the subject of rent control”<sup>146</sup> and thereby violate section six of the Home Rule Amendment.

This reasoning is questionable for two reasons. First, a more reasonable interpretation of the original language of section six would be that the restriction on the voters’ exercise of powers is merely that they not exercise any power not granted to the locality by the General Assembly. As Judge Cole stated in his dissenting opinion in *Cheeks*, “[Section] 6 merely forbids the use of the amendment power by the political subdivision to grant unto itself more power than has been granted by the State. It has nothing to do with who within the subdivision the people may designate or permit to exercise that power.”<sup>147</sup> Second, if the voters choose to exercise, albeit wrongfully, one of the legislative powers the General Assembly has conferred, the local legislative body is not thereby divested of that power. Merely because one political entity enters the area of rent control does not mean that others are thereby excluded.

Finally, the court analyzed citizens’ exercise of the police power under the terms of section two of the Home Rule Amendment. That section directs the General Assembly to make a grant of legislative powers to the counties at its first session after the amendment was adopted.<sup>148</sup> Section two further provides that Baltimore City, which when the Home Rule Amendment was adopted was in the unique position of already having received certain legislative powers by virtue of an earlier charter,<sup>149</sup> receive those powers already granted in the legislatively created charter if and when it adopts a home rule charter.<sup>150</sup> Referring to the legislative powers transferred to the locality pursuant to its direction, section two prohibits the locality from enlarging or extending those powers.<sup>151</sup> The *Cheeks* court held that for an unauthorized body, the electorate, to exercise those powers would expand the powers contrary to this section.<sup>152</sup>

146. 287 Md. 595, 609, 415 A.2d 255, 262 (1980).

147. *Id.* at 636, 415 A.2d at 275 (Cole, J., dissenting).

148. MD. CONST. art. XI-A, § 2.

149. See notes 105-09 and accompanying text *supra*.

150. Although § 2 does not explicitly make this point, it must be deduced from its language:

The General Assembly shall by public general law provide a grant of express powers for such County or Counties as may thereafter form a charter under the provisions of this Article. Such express powers granted to the Counties and the powers heretofore granted to the City of Baltimore . . . shall not be enlarged or extended by any charter . . .

MD. CONST. art. XI-A, § 2.

151. See *id.*

152. 287 Md. 595, 609-10, 415 A.2d 255, 262 (1980).

Again, the court confused the range or scope of the express powers with who may exercise them. It is submitted that the court here construed "enlarge or extend" beyond the plain meaning of the words. When the General Assembly grants to a home rule locality a certain power, the power itself is not enlarged or extended according to which body exercises it.<sup>153</sup> The scope of a legislative power, to which these words can only refer, becomes no larger or smaller when exercised by one without authority to do so. Judge Cole noted that "[t]he majority agrees that the adoption of a system of rent control is within the police power expressly granted to the City. They should agree also that therefore the amendment in question does not represent an extension or enlargement of the powers granted the City."<sup>154</sup>

Clearly the court could have ended its opinion upon a finding that the rent control amendment was not proper charter material. If necessary to establish that the voters were not empowered to exercise legislative powers, the court could and should have done so by analyzing the rights of Baltimore City voters under the terms of the city charter. The court's analysis of the case under the Home Rule Amendment was unnecessary. Similar to the court's construction of the term "charter material," its construction of section three was not unreasonable when standing alone, but in light of the realities of its prior clear holding in *Ritchmount* that the electorate may share some legislative powers with the local legislative body, the analysis is subject to criticism. The contortions of the terms of sections six and two, like the construction of section three, are doubly offensive when one realizes there was no need even to address them.

Furthermore, in its decision to analyze the case under the terms of the constitution, the court of appeals apparently failed to apply the rule of construction that if a charter provision can be

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153. Appellee Figinski reasoned that the citizens of Baltimore City are prevented by their city charter from exercising the police power. Brief of Appellee M. Albert Figinski at 16-17, *Cheeks v. Cedlair Corp.*, 287 Md. 595, 415 A.2d 255 (1980). He did not argue that the constitution prohibits such an exercise. He theorized, however, that the citizens' exercise of the police power by ballot,

is doubtlessly the enlargement or extension of powers or the excessive exercise of the powers expressly granted by the General Assembly prohibited by Sections 2 and 6 of Article XI-A, Md. Const. It would be an enlargement or extension simply because the grant of express powers clearly commands that the City's executive and legislature "shall have power by ordinance or such other method as may be provided in [the City's] charter" to exercise all police power; no other method having been provided, only an ordinance would be a consonant with the express grant from the General Assembly.

*Id.* at 17.

154. 287 Md. 595, 637, 415 A.2d 255, 276 (1980) (Cole, J., dissenting).

construed so that it does not conflict with the constitution, the court should so construe it and avoid any conflict.<sup>155</sup> Prior to trial, the defendants and the trial judge had assured the plaintiffs that, although trial would be postponed until after the election, the rent control amendment would be reviewed by the trial court as though not yet adopted.<sup>156</sup> There is no indication in the *Cheeks* opinion whether the appellate court considered this as a reason for not applying the presumption of constitutionality in reaching its decision.<sup>157</sup> That presumption is, however, applicable to proposed charter amendments as well as to adopted ones. In *Wilson v. Board of Supervisors of Elections*,<sup>158</sup> the Court of Appeals of Maryland explained that the presumption of constitutionality applies to proposed charter amendments because the court is determining "whether the charter amendment would be valid if adopted."<sup>159</sup> Therefore, although *Cheeks* called for application of the rule, when the court of appeals decided to entertain the constitutional issues, it held that conflict existed between the proposed amendment and the constitution in five distinct instances<sup>160</sup> and made no apparent attempt to avoid finding conflict.

*C. Citizens of Charter Home Rule Jurisdictions do not have the Right of Statutory Initiative*

Ostensibly, the court based its decision in *Cheeks* on the finding that the proposed amendment was legislative rather than

155. In *Kirkwood v. Provident Sav. Bank of Baltimore*, the court stated the rule clearly:

It is a fundamental rule that there is always a presumption in favor of the constitutionality of a legislative enactment. When the Court is called upon to review an act of the Legislature, a coordinate branch of the government, its duty is of the gravest character. The Court will not denounce a statute as void on the ground that the lawmaking power has violated the Constitution, except when such violation is clear and unmistakable. Consequently the Court will always so construe a statute as to avoid a conflict with the Constitution and give it full force and effect whenever reasonably possible.

205 Md. 48, 59, 106 A.2d 103, 109 (1953). In *Wilson v. Board of Supervisors of Elections*, the court of appeals extended the application of this rule to the construction of charter amendments. 273 Md. 296, 300-01, 328 A.2d 305, 308 (1974). Although in *Ritchmount* the construction was of the constitution (section three of the Home Rule Amendment) and not of the challenged charter provision, the case exemplifies what the doctrine intends, i.e., that, when possible, laws and charter amendments should not be held unconstitutional. The *Ritchmount* court employed the presumption of constitutionality to arrive at its final holding that the referendum provision in the Anne Arundel County Charter is constitutional. 283 Md. 48, 64, 388 A.2d 523, 533 (1978).

156. Record Extract, *supra* note 2, vol. I, at E75-77; see note 63 *supra*.

157. Had the court indicated the assurances of the trial court and defendants binding, an interesting issue would have been presented as to whether parties or trial judges have the power to determine standards of appellate review.

158. 273 Md. 296, 328 A.2d 305 (1974).

159. *Id.* at 301, 328 A.2d at 308 (emphasis in original); accord, *Stevens v. City of Salisbury*, 240 Md. 556, 566, 214 A.2d 775, 781 (1965).

160. The court held that the amendment contravened sections one, two, three, five and six of the Home Rule Amendment. 287 Md. 595, 606-14, 415 A.2d 255, 261-65 (1980).

charter material and that the voters of Baltimore City are precluded by existing constitutional provisions from validly exercising the police power. The fact remained, however, that a majority of Baltimore's voters had expressed their desire that the city adopt rent control,<sup>161</sup> which indicated that the city council's refusal to enact such a system was not reflective of the wishes of the people. The final portion of the *Cheeks* opinion, addressing this apparently undemocratic quirk, discusses the right of citizens in charter home rule jurisdictions to initiate legislation.<sup>162</sup> Having decided the case before it, the court added a final segment to its opinion, the effect of which was to extinguish any idea that citizens of home rule jurisdictions possess the right to initiate legislation.<sup>163</sup> It is to this aspect of the opinion that the final section of this casenote speaks.

### 1. The Rights of Direct Democracy

Before analyzing the *Cheeks* court's assessment of the rights of statutory initiative in Maryland home rule jurisdictions, a brief review of the history and theories of direct democracy, as well as what direct democracy rights Marylanders now have, is in order.

In the late nineteenth and early twentieth centuries, one of the goals of the then-popular Populist (or People's) and Progressive

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161. The unofficial tally, representing a 36% turnout, was 72,559 for rent control and 67,439 against. The victory for rent control proponents was considered an upset because a large expensive campaign was waged against rent control. The Sun (Baltimore), Nov. 7, 1979, at A1, col. 6.

162. 287 Md. 595, 610-13, 415 A.2d 255, 263-64 (1980).

163. Perhaps the court anticipated that the rent control proponents (or future citizen groups) would propose a charter amendment giving the citizens the power to initiate legislation, then use that amendment as a stepping stone to achieve their goals by circumventing the traditional legislative process. Consider, however, this remark of the Court of Appeals of New York:

A court performs its essential function when it decides the rights of parties before it. Its decisions of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private litigation is decided. But this is normally an incident to the court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court.

*Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 222, 257 N.E.2d 870, 871, 309 N.Y.S.2d 312, 314 (1970).

movements was direct democracy.<sup>164</sup> Loosely defined, direct democracy is the concept of citizen participation in the process of government to provide a check on the actions of the elected representative group when that group fails to respond to the desires of the citizenry.<sup>165</sup> Initiative and referendum are the two means of direct democracy by which citizens exercise legislative powers in conjunction with or independent of their elected legislative body. By initiative, the electorate proposes legislation (statutes or con-

164. *Ritchmount Partnership v. Board of Supervisors of Elections*, 283 Md. 48, 60 n.8, 388 A.2d 523, 531 n.8 (1978) (citing H. NASH, *THIRD PARTIES IN AMERICAN POLITICS* 230 (1959); E. OBERHOLTZER, *THE REFERENDUM IN AMERICA* (3d ed. 1912); K. PORTER & D. JOHNSON, *NATIONAL PARTY PLATFORMS 1840-1960*, at 105, 118, 135-36, 155, 176 (2d ed. 1961); Comment, *Judicial Review of Laws Enacted by Popular Vote*, 55 WASH. L. REV. 175, 177-78 (1979)). Perhaps because the Populist-Progressive movement coincided with the formation of state and local governments in the western United States, the rights of initiative and referendum are found much more frequently in those states. D. BUTLER & A. RANNEY, *REFERENDUMS* 73 (1978). For example, in 1978, of the 26 states east of the Mississippi, only 5 had statewide statutory initiative and all required the proposed bill to pass the legislature before going to the voters. In contrast, 17 of the 24 states west of the Mississippi had statewide statutory initiative, 15 providing for the more liberal method which totally circumvents the legislative body. *Id.* at 71-72. The theories of direct democracy have enjoyed renewed popularity in recent years. See *id.* at 73-74, 80; Comment, *The Direct Initiative Process: Have Unconstitutional Methods of Presenting the Issues Prejudiced Its Future?*, 27 U.C.L.A. L. REV. 433 (1979); Comment, *Judicial Review of Laws Enacted by Popular Vote*, 55 WASH. L. REV. 175, 179-80 (1979); Note, *Constitutional Constraints on Initiative and Referendum*, 32 VAND. L. REV. 1143 (1979); accord, Washington Post, May 14, 1978, at A17, col. 3 (Gallup Poll reflected 57% adults surveyed favored passage of a constitutional amendment providing for national statutory initiative).

165. In a speech describing how direct democracy works, Representative John E. Raker stated:

[T]he initiative, the referendum, and the recall are closely connected parts of the [direct democracy] theory. The people elect their representatives. If those representatives do not carry out the will of the people, then the people initiate legislation. If their representatives transgress the will of the people, then the people, through the referendum, repeal the laws which their representatives have made.

47 CONG. REC. app., at 67 (1911). The concept of direct democracy and the exercise by the electorate of initiative, referendum, and recall has withstood attack charging that it violates the constitutional guarantee to a republican form of government. See *Baker v. Carr*, 369 U.S. 186 (1962); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *Kaddery v. City of Portland*, 44 Or. 118, 74 P. 710 (1903); Comment, *The Direct Initiative Process: Have Unconstitutional Methods of Presenting the Issues Prejudiced Its Future?*, 27 U.C.L.A. L. REV. 433, 439 n.37 (1979); Comment, *Judicial Review of Laws Enacted by Popular Vote*, 55 WASH. L. REV. 175, 193 (1979). See also 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed. 1911), quoted in Comment, *Judicial Review of Laws Enacted by Popular Vote*, 55 WASH. L. REV. 175, 186 (1979) ("Give all the power to the many, they will oppress the few. Give all the power to the few, they will oppress the many. Both therefore ought to have power, that each may defend itself against the other."). But see Comment, *Judicial Review of Laws Enacted by Popular Vote*, 55 WASH. L. REV. 175, 184-89 (1979) (direct democracy was an evil foreseen by the founding fathers as a threat to individual liberties and minority rights). Of course, there is no federal constitutional guarantee to a republican form of government at the municipal or county level; therefore, such an argument under those circumstances would be without basis unless the state constitution provided one. Fordham & Prendergast, *The Initiative and Referendum at the Municipal Level in Ohio*, 20 U. CIN. L. REV. 313, 314 (1951).

stitutional amendments) to be acted on by the voters or by the legislature.<sup>166</sup> Those citizens who are empowered to originate constitutional amendments are said to have the right of constitutional initiative. Those who reserve the right to propose statutes have the right of statutory initiative. Citizens may reserve one, both, or neither of these rights. Referendum, the most popular form of direct democracy,<sup>167</sup> is the means by which laws or constitutional amendments proposed by the elected representative body are required to be presented to the citizens for approval before becoming effective.<sup>168</sup> When the legislative body directs that a measure must have voter approval before taking effect, that mandate is called compulsory referendum, but because it does not come from the people directly, it is not truly a referendum in a direct-democracy sense.<sup>169</sup> Facultative referendum is the power of the people to demand that a measure be placed on the ballot and that its enactment be conditioned on approval by the electorate.<sup>170</sup> This latter form comes clearly within the ambit of direct democracy because it is the citizens who determine that the referendum shall take place, and it is the facultative referendum which this discussion concerns.

In a democratic society, the people collectively possess sovereign powers, including the power to make laws.<sup>171</sup> Probably

166. *City of Litchfield v. Hart*, 306 Ill. App. 621, 624, 29 N.E.2d 678, 679 (1940); BLACK'S LAW DICTIONARY 705 (5th ed. 1979); 82 C.J.S. *Statutes* § 115 (1953).

167. As of 1978, all states except Delaware allowed constitutional referendum and 39 states provided for statutory referendum. D. BUTLER & A. RANNEY, REFERENDUMS 68, 71-72 (1978).

168. *Ritchmount Partnership v. Board of Supervisors of Elections*, 283 Md. 48, 60, 388 A.2d 523, 531 (1978); *Beall v. State*, 131 Md. 669, 678, 103 A. 99, 102 (1917); 42 AM. JUR. 2d *Initiative and Referendum* § 1 (1969).

169. The Court of Appeals of Maryland has held that for the General Assembly to employ the compulsory referendum would be an unconstitutional delegation of legislative power. *Steimel v. Board of Election Supervisors*, 278 Md. 1, 5, 357 A.2d 386, 388 (1976); *Brawner v. Supervisors of Elections*, 141 Md. 586, 595, 119 A. 250, 253-54 (1922); *Bradshaw v. Lankford*, 73 Md. 428, 430, 21 A. 66, 66 (1891). The authority must come from the people in the form of a constitutional provision, and the Constitution of Maryland provides none for statutory materials. The referendum amendment, MD. CONST. art. XVI, provides for facultative referendum only. See 63 Op. Att'y Gen. 291, 294 (1978). For constitutional amendments, compulsory referendum is authorized in MD. CONST. art. XIV.

170. *Ritchmount Partnership v. Board of Supervisors of Elections*, 283 Md. 48, 60, 388 A.2d 523, 531 (1978).

171. For discussion of this concept, see H. BONE, THE INITIATIVE AND THE REFERENDUM 1-3 (2d ed. 1975) ("Our government rests upon the premise that all sovereignty rests on the people. In turn, the people delegate certain powers to the government. If a sovereign can grant a power then it most certainly has the right to exercise that power.").



because it is traditional for the people to vest their legislative powers in an elected body by a constitutional provision,<sup>172</sup> the general rule is that any reservation of such powers (initiative and referendum) by the people must be expressly stated.<sup>173</sup> Maryland follows this general rule.<sup>174</sup>

In Maryland, the statewide referendum amendment<sup>175</sup> to the constitution was approved in 1915, giving Marylanders the right of facultative referendum. Maryland citizens do not have the right to propose amendments to the state constitution (constitutional initiative), but their approval is required for implementation of such an amendment, once it is proposed by the legislature (compulsory constitutional referendum).<sup>176</sup> There is no express provision in the state constitution or statutes allowing Marylanders to propose legislation directly. In sum, on the statewide level, Marylanders have the rights of constitutional and statutory referendum, but they have reserved no constitutional or statutory initiative rights.

## 2. Direct Democracy under Charter Home Rule

Under charter home rule, government at the local level is in many ways a reduced mirror image of the state government, because powers of a sovereign nature are returned to the people of the home rule jurisdiction. Under the Home Rule Amendment, citizens have the power to structure their own government in their charter, hence the analogy of charter and constitution.<sup>177</sup> From

172. See U.S. CONST. art. I, § 1. *But see* MD. CONST. art. III, which makes no express delegation of legislative powers to the General Assembly. Maryland case law, however, has always reflected the presumption that legislative powers are constitutionally vested in the General Assembly. See *Bradshaw v. Lankford*, 73 Md. 428, 21 A. 66 (1891); *Hammond v. Haines*, 25 Md. 541 (1886).

173. Fordham & Prendergast, *The Initiative and Referendum at the Municipal Level in Ohio*, 20 U. CIN. L. REV. 313, 314 (1951) (an express constitutional provision is necessary); Note, *The Legislative/Administrative Dichotomy and the Use of the Initiative and Referendum in a North Dakota Home Rule City*, 51 N.D. L. REV. 855, 858 (1975) (normally provisions for initiative and referendum in home rule jurisdictions are found in the state constitution, the state statutes, or the municipal charter) (citing Olson, *Limitations and Litigation Approaches: The Local Power of Referendum in Federal and State Courts — A Michigan Model*, 50 J. URB. L. 209, 210 (1972)).

174. *Cheeks v. Cedlair Corp.*, 287 Md. 595, 613, 415 A.2d 255, 264 (1980) (powers of direct democracy on the charter home rule level must be expressly reserved in the charter); *accord*, *Ritchmount Partnership v. Board of Supervisors of Elections*, 283 Md. 48, 60-61 n.9, 388 A.2d 523, 580 n.9 (1978); *Cole v. Secretary of State*, 249 Md. 425, 434, 240 A.2d 272, 277 (1968); *Hammond v. Haines*, 25 Md. 541, 562 (1886).

175. MD. CONST. art. XVI. For discussion of the background and scope of the referendum amendment, see *Bayne v. Secretary of State*, 283 Md. 560, 563-65, 392 A.2d 67, 70 (1978).

176. MD. CONST. art XIV.

177. *Cheeks v. Cedlair Corp.*, 287 Md. 595, 606, 415 A.2d 255, 261 (1980); *Ritchmount Partnership v. Board of Supervisors of Elections*, 283 Md. 48, 58, 388 A.2d 523, 530 (1978); *Anne Arundel County v. Moushabek*, 269 Md. 419, 422, 306 A.2d 517, 519 (1973); 2 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 9.03 (3d rev. ed. 1979).

this return of sovereign powers to the people to create a local government arises the possibility of direct democracy rights at the local level. In fact, the Home Rule Amendment expressly provides for charter initiative and charter referendum,<sup>178</sup> which would be comparable to constitutional initiative and constitutional referendum. The amendment is silent, however, as to whether the citizenry may, in its charter, reserve the powers of statutory referendum or statutory initiative.

In 1978, the Court of Appeals of Maryland addressed the issue of whether citizens of charter home rule jurisdictions have the right to reserve the statutory referendum despite the lack of express constitutional authority.<sup>179</sup> The home rule charter ratified by the voters of Anne Arundel County in 1964 contains a provision for statutory referendum by which, upon the filing of a petition signed by ten per cent of the qualified voters of the county, a measure passed by the county council must be approved by the electorate before becoming law.<sup>180</sup> In *Ritchmount Partnership v. Board of Supervisors of Elections*,<sup>181</sup> the court addressed a challenge to this provision which claimed the citizens of the county had received no authority, from either the Home Rule Amendment or the General Assembly by the Express Powers Act, to exercise any legislative powers directly. The court upheld the charter provision and the right of the county citizens to participate in the legislative process by reserving the statutory referendum power. The *Ritchmount* opinion is indispensable to an understanding of direct democracy under charter home rule. When *Cheeks* came before the courts, *Ritchmount* comprised virtually the entire body of case law on the subject and it is on the theories and law handed down therein that *Cheeks*, in its final segment, is precariously based.<sup>182</sup>

a. *The Ritchmount Precedent*

Appellants in *Ritchmount* first asserted that because the referendum power was not expressly granted to the county by the

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178. MD. CONST. art. XI-A, § 5.

179. *Ritchmount Partnership v. Board of Supervisors of Elections*, 283 Md. 48, 388 A.2d 523 (1978). This question was a very real one because every county charter then had and still does have a provision for statutory referendum. CHARTER OF ANNE ARUNDEL COUNTY, MARYLAND § 308; CHARTER OF BALTIMORE COUNTY, MARYLAND § 309; CHARTER OF HARFORD COUNTY, MARYLAND § 220; CHARTER OF HOWARD COUNTY § 211; CHARTER OF MONTGOMERY COUNTY, MARYLAND § 114; CHARTER OF PRINCE GEORGE'S COUNTY, MARYLAND § 309. The Charter of Baltimore City does not provide for statutory referendum. It has been said that it is unlikely voters would pass a charter unless it included the protection of the statutory referendum. EPPES, *supra* note 11, at 23.

180. CHARTER OF ANNE ARUNDEL COUNTY, MARYLAND § 308.

181. 283 Md. 48, 388 A.2d 523 (1978).

182. *Cheeks v. Cedlair Corp.*, 287 Md. 595, 610-14, 415 A.2d 255, 263-64 (1980).

General Assembly, the locality had no authority to exercise it.<sup>183</sup> In response, the court distinguished between two classes of home rule powers which it said are conferred on charter home rule citizens. The first is the power to establish the form of government, which comes directly to the citizens from the Home Rule Amendment.<sup>184</sup> The second is the power to legislate for the locality, which, although provided for under section two of the Home Rule Amendment, requires enabling legislation from the General Assembly.<sup>185</sup> The court found the power of referendum to be of the first type.<sup>186</sup> The criterion used by the court in its determination was that it "directly affects the distribution of political power between the people of . . . [the] [c]ounty and their elected legislative representative body, the County Council, and thus is a fundamental feature of the overall structure of county government."<sup>187</sup> Because the statutory referendum is of the type of home rule powers relative to the form and structure of government, the court held the lack of authority from the General Assembly to be irrelevant.<sup>188</sup>

Appellants then charged that the referendum power was twice prohibited by the provisions of the Home Rule Amendment itself. It was argued that section three of the amendment expressly states that only the legislative body of the locality is given the power to pass laws so that any exercise of the legislative powers by the citizenry would be unconstitutional.<sup>189</sup> Here the court construed the language of section three to mean that, although law-making powers are generally presumed to rest entirely with the legislative body, there is no requirement in the constitutional amendment to that effect.<sup>190</sup> The only requirement of section three, said the court, is that the legislative body be the "primary legislative organ."<sup>191</sup>

Appellants' next challenge on section three grounds was that the language granting the legislative body "full power" to enact

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183. 283 Md. 48, 54, 388 A.2d 523, 527 (1978).

184. *Id.* at 58, 388 A.2d at 530.

185. *Id.* at 57-58, 388 A.2d at 529.

186. *Id.* at 61, 388 A.2d at 532.

187. *Id.*

188. *Id.* at 61-62, 388 A.2d at 532.

189. *Id.* at 62, 388 A.2d at 532.

190. *Id.* at 62-63, 388 A.2d at 532-33. The relevant sentence of § 3 the court was construing reads: "Every charter so formed shall provide for an elective legislative body in which shall be vested the law-making power of said City or County." MD. CONST. art. XI-A, § 3 (emphasis added).

191. 283 Md. 48, 62-63, 388 A.2d 523, 532-33 (1978).

local laws meant that the council had exclusive power to exercise the legislative powers granted.<sup>192</sup> The court disagreed and found "full power" to mean that where the local legislative body has powers granted by the General Assembly, those powers are as complete and full as they were when possessed by the General Assembly. "Full power," the court said, refers not to the exclusivity but to the quality of the power granted.<sup>193</sup>

The holding of *Ritchmount* was, therefore, that while there is no express constitutional provision that the citizens of charter home rule jurisdictions may reserve the power of statutory referendum, the express reservation of the statutory referendum in the charter is nonetheless legitimate because, by the terms of the Home Rule Amendment, such power is in fact directly granted to the people and there is no prohibition in the constitution against its exercise.<sup>194</sup>

After *Ritchmount*, citizens of Maryland in charter home rule jurisdictions were secure in their ability to exercise three of the four standard direct democracy techniques on the local level. The remaining right, the right to statutory initiative, was not addressed in the Home Rule Amendment and was not discussed by the courts until *Cheeks*.

192. *Id.* at 63, 388 A.2d at 533. The relevant language of § 3 the court was construing reads:

From and after the adoption of a charter by the City of Baltimore, or any County of this State, . . . the Mayor of Baltimore and City Council of the City of Baltimore or the County Council of said County, subject to the Constitution and Public General Laws of this State, shall have *full power* to enact local laws of said City or County. . . .

MD. CONST. art. XI-A, § 3 (emphasis added).

193. 283 Md. 48, 63, 388 A.2d 523, 533 (1978).

194. *Ritchmount* approved the express inclusion of the referendum in the county charter, *id.* at 64, 388 A.2d at 533, and indicated that an express reservation of such power is normally required to be effective. *Id.* at 60, 388 A.2d at 531. The *Cheeks* court reaffirmed this requirement, stating, "Such reserved powers, however, can only be exercised if they are incorporated into the charter by express charter provision." *Cheeks v. Cedlair Corp.*, 287 Md. 595, 613, 415 A.2d 255, 264 (1980). The absence of an express reservation of the power of legislative initiative in the Baltimore City Charter would, therefore, appear to be a valid basis for determining that the city's citizens do not have the right to initiate legislation. The *Cheeks* court determined that no such express reservation had been made, *id.* at 613-14, 415 A.2d at 264-65, but failed to employ this finding as its basis for denying the citizens the right to initiate legislation. Instead, the court chose to make its analysis under the terms of section 3 of the Home Rule Amendment of the constitution. *Id.* at 611-13, 415 A.2d at 263-64.

b. *The Cheeks Opinion*

Although not specifically faced with a case in which the statutory initiative had been attempted,<sup>195</sup> the court of appeals took the opportunity in *Cheeks v. Cedclair Corp.*<sup>196</sup> to make plain that the statutory initiative under charter home rule would not, in all likelihood, withstand judicial scrutiny. The court held that the terms of section three of the Home Rule Amendment prohibit the reservation of statutory initiative powers in home rule charters because if the people reserved to themselves the right to initiate legislation, the local legislative body would be denied its required status of "primary legislative organ."<sup>197</sup> In *Ritchmount*, the court stated that section three requires the local council to be the "primary legislative organ,"<sup>198</sup> but it did not begin to define that term until *Cheeks*, when it stated that the elected body acts as primary legislative organ by formulating and approving bills.<sup>199</sup>

If it is the exclusive role of the elected legislative body to formulate and approve bills, then, reasoned the court, the statutory initiative would interfere with the council's required role of formulating bills and would thereby be unconstitutional.<sup>200</sup> It would seem, however, that the statutory referendum would interfere with the council's required role of approving legislation and would, therefore, also be unconstitutional. The court's means of upholding the right of referendum and *Ritchmount* in the face of this reasoning was to redefine referendum essentially as an after-

195. Without specifically formulating it as such, the court posed this hypothetical issue: Whether, if the Baltimore City Charter had provided for statutory initiative, and if the rent control proponents had framed their proposition as legislation, such legislation, when passed, would have been constitutional. In his dissent, Judge Cole noted the failure of the majority to acknowledge clearly that the issue before the court in *Cheeks* related to constitutional or charter initiative, not statutory initiative. He remarked:

The majority, in its analysis, appears to lump together the question of whether the people may use the Charter Amendment process to enact material which is legislative in character with the question of whether the people may provide in their charter for a mechanism by which they may exercise the initiative over local laws. In doing so, the distinction between charter initiative (the power to amend the charter) and the power to initiate local laws (ordinances) has slipped between the cracks. In any event, the second question is not before the court.

287 Md. 595, 640, 415 A.2d 255, 277 (1980) (Cole, J., dissenting).

196. 287 Md. 595, 415 A.2d 255 (1980).

197. *Id.* at 613, 415 A.2d at 264. The court essentially conceded that statutory initiative, like statutory referendum, would be a power granted directly to the electorate through § 1 of the Home Rule Amendment and would thus not require legislative permission to be included in a home rule charter. *Id.*

198. 283 Md. 48, 62-63, 388 A.2d 523, 532-33 (1978).

199. 287 Md. 595, 613, 415 A.2d 255, 264 (1980).

200. *Id.*

the-fact veto power, rather than as an integral part of the legislative process, and to thereby distinguish it from initiative.<sup>201</sup> This definition is directly contrary to that given two years earlier in *Ritchmount*.<sup>202</sup>

Why the court chose to include this discussion in the *Cheeks* opinion can only be left to speculation, but the means and effect of doing so are fair subjects of analysis. It is not the intention of this casenote to disagree with the court's finding that citizens of charter home rule jurisdictions may not reserve the power to initiate legislation or that there are substantial differences between referendum and initiative.<sup>203</sup> It is submitted, however, that in this segment of its opinion the court far exceeded the requirements of the facts before it and in doing so played havoc with the logical and illuminating contribution made by *Ritchmount* to the subject of charter home rule.

This portion of the *Cheeks* opinion is also unfortunate for its effect on the possible future rights of citizens in charter home rule jurisdictions. The *Cheeks* court set precedent by declaring statutory initiative unconstitutional under the Home Rule Amendment without weighting into its considerations the extra ingredient of the presumption of constitutionality. Prior to *Cheeks*, if a locality had adopted a charter amendment reserving the statutory initiative, it would have been presumed constitutional, just as statutes and constitutional amendments are.<sup>204</sup> Had the court omitted this dicta from *Cheeks*, later consideration of an actual issue of statutory initiative under charter home rule would have been decided on an appropriately clean slate. Given full briefs from both sides, a constitutional presumption in favor of charter amendments, and

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201. In reviewing the *Ritchmount* holding, the *Cheeks* court acknowledged that it had recognized the referendum power to be "an integral part of the legislative process and that it establishes, in effect, a 'coordinate legislative entity,' i.e., the county electorate." *Id.* at 611, 415 A.2d at 263. In summarizing the rationale of the *Ritchmount* holding, the *Cheeks* majority stated, "Because the referendum power is a power exercised by the voters after a law has been enacted, rather than a power to enact the law itself, we found [in *Ritchmount*] that the referendum power was not constitutionally inconsistent with the primacy of the County Council . . ." *Id.* at 612, 415 A.2d at 264 (emphasis added). This summary is not, however, an accurate statement of the *Ritchmount* rationale. The *Ritchmount* opinion reflects that the issue argued was whether the referendum is actually part of the legislative process. 283 Md. 48, 62 n.10, 388 A.2d 523, 532 n.10 (1978). The court in *Ritchmount* clearly adopted the view that the referendum is part of the process and that the electorate acts much as a coordinate legislative body. *Id.*

202. 283 Md. 48, 62 n.10, 388 A.2d 523, 532 n.10 (1978).

203. The elected legislative body plays some role in the legislative process when the referendum power is exercised. It may play no role, however, if the initiative power is exercised. This distinction would have made a strong basis for the court's opinion. Although the *Cheeks* court recognized this distinction, 287 Md. 595, 613, 415 A.2d 255, 264 (1980), the basis of this portion of the opinion was its definition of "primary legislative organ" and its interpretation of *Ritchmount*. *Id.* at 610-12, 415 A.2d at 263-64.

204. See note 155 *supra*.

the absence of the *Cheeks* dicta, a future court of appeals might have found reservations of statutory initiative powers constitutional and harmonious with the concept of home rule and with *Ritchmount*. *Cheeks*, however, may have armed future opponents of statutory initiative with an undeserved advantage strong enough to prevent such a finding.

*Cheeks* may also inhibit present or future charter home rule jurisdictions from merely attempting to reserve the power of statutory initiative, because it is unlikely that such a charter amendment would survive a suit to enjoin the locality from placing it on the ballot. County attorneys and other advisors will certainly be reluctant to suggest that a locality incur the expense of placing such a measure before the voters when all indications from the judiciary are that it would be held unconstitutional. *Cheeks* might have foreclosed the issue of statutory initiative from ever appearing in the courts but for the existence of an initiative provision in the Talbot County Charter.<sup>205</sup> Consequently, it is possible the issue may appear in the courts either by way of challenge to the one ordinance passed by the initiative process<sup>206</sup> or to the citizen proposal of another ordinance in the future. Until such time, however, the court has most likely sufficiently chilled future activity in current or would-be charter home rule localities so as to preclude the opportunity for reconsideration of this dicta.

The citizens' remedy, should they wish one, would be for their elected representatives to pass, and for them to adopt, a statewide constitutional amendment to the charter home rule section of the constitution expressly reserving the right to provide for the statutory initiative in their charters.<sup>207</sup> In view of the new definition the *Cheeks* court has given referendum, such an amendment should include as well a provision that citizens may reserve the legislative powers of statutory referendum. Another apparent means of avoiding the prohibition in *Cheeks* against a direct citizen exercise of legislative powers is for the citizens to exercise them indirectly by initiating a charter amendment which requires the legislative

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205. CHARTER OF TALBOT COUNTY, MARYLAND § 216.

206. In 1978, the efforts of the Talbot County Taxpayers Association resulted in the passage, by the statutory initiative, of a county ordinance limiting the power of the court to increase the "piggyback" tax on the state income. It is interesting that although county officials consider this ordinance to have the same effect as measures passed by the county council, it does not appear in the codified version of the county ordinances. Telephone interview with Mrs. Foster, Clerk to the County Council of Talbot County, Maryland (Dec. 15, 1980).

207. This course of action has been attempted in past years without success. See, e.g., H.B. 37, 1980 HOUSE BILLS vol. 1 (received an unfavorable committee report, MARYLAND DEP'T OF LEGISLATIVE REFERENCE, SUBJECT INDEX TO BILLS INTRODUCED IN THE 1980 SESSION OF THE GENERAL ASSEMBLY OF MARYLAND 184 (1980)); H.B. 547, 1979 HOUSE BILLS vol. 3 (received an unfavorable committee report, MARYLAND DEP'T OF LEGISLATIVE REFERENCE, SUBJECT INDEX TO BILLS INTRODUCED IN THE 1980 SESSION OF THE GENERAL ASSEMBLY OF MARYLAND 137 (1980)).

body to enact specific legislation. Although such tactics, if challenged, would probably be seriously questioned by the courts, current charters would provide precedent in favor of their use.<sup>208</sup>

## V. CONCLUSION

It would be a fair characterization of the rent control proponents to say that they were an enthusiastic group seeking legitimate ends, but by improper means. Ironically, the same characterization may be made of the court itself. No doubt there was pressure on the court to issue an opinion, the *vox populi* having spoken. Perhaps it is for this reason that the court's rationale on this very technical topic lacks clarity and understanding and is overly broad. Maryland courts seldom have an opportunity to address issues relating to the system of charter home rule, which has been available to Maryland localities for over sixty years and which authorizes and defines the system of local government under which many Maryland citizens live. The facts presented to the Court of Appeals of Maryland in *Cheeks v. Cedlair Corp.*<sup>209</sup> provided an opportunity for discussion of certain well-defined issues under the terms of the Baltimore City Charter and the Home Rule Amendment. Unfortunately, the court did not confine its opinion to these valid points but rather swept broadly, hiding valuable guidelines and precedents. Most regrettable is the court's dicta declaring that citizens of charter home rule jurisdictions have no right to reserve the power of statutory initiative. The precedent contravenes prior case law in its rationale, and it has the likely effect of preventing future resolution of the issue under proper circumstances.

*Martha Frisby Rasin*

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208. See, e.g., CHARTER OF MONTGOMERY COUNTY, MARYLAND art. 4, § 410; CHARTER OF WICOMICO COUNTY, MARYLAND art. VI, § 614. See generally notes 92-95 and accompanying text *supra*.

209. 287 Md. 595, 415 A.2d 255 (1980).