Home Rule End Run: The Tennessee Equal Protection Clause After *Metropolitan Government of Nashville & Davidson County v. Tennessee Department of Education*

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I. INTRODUCTION

The Tennessee Supreme Court ("Supreme Court") in *Metropolitan Government of Nashville and Davidson County v. Tennessee Department of Education* moved away from long precedents holding that a law may not target only one or two counties under the equal protection clause of the Tennessee Constitution.[1] Two county governments, Metropolitan Government of Nashville and Davidson

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1. Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ., 645 S.W.3d 141, 157 (Tenn. 2022) (Lee, J., dissenting).

County ("Metro") and Shelby County, challenged the constitutionality of the Tennessee Education Savings Account Pilot Program ("ESA")[2] which would remove state and local school funding from those two counties alone to fund private school vouchers.[3] Metro and Shelby County argued that the ESA violated two state constitutional provisions—the Home Rule Amendment of Article XI, Section 9, and the equal protection clauses of Article I, Section 8 and Article XI, Section 8.[4] The Supreme Court passed over the equal protection argument simply because that issue was pending in the trial court and had not been certified to it.[5] The court proceeded to reject the Home Rule argument.[6] Reasoning that the ESA did not apply to counties at all but only to school boards, the court held that the ESA was constitutional because it merely *affected*, but did not *apply* to, the counties' authority under the Home Rule Amendment.[7] *Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 645 S.W.3d 141, 154 (Tenn. 2022).

As novel and arguable as this holding may be,[8] the court left unanswered another question that may prove vexatious for the relationship between Tennessee counties and the legislature moving forward—the question of equal protection under Article XI, Section 8 of the Tennessee Constitution.[9] By upholding the ESA, which contained a novel classification apparatus designed to target only two counties in perpetuity in defiance of precedent, the Supreme Court opened the door for future legislatures to increase their control of individual counties with or without a rational basis for doing so. Part II of this comment reviews the relevant case law outlining the Supreme Court's previously consistent interpretation of the equal protection

2. Tenn. Code Ann. §§ 49-6-2601 to -2612 (2020 & Supp. 2021).

3. *Metro. Gov't of Nashville*, 645 S.W.3d at 156–57 (Lee, J., dissenting).

4. *Id.* at 146.

5. *Id.* at 146–47.

6. *Id.* at 151–52, 154.

7. *Id.* at 153.

8. *See id.* at 157–60 (Lee, J., dissenting) ("The ESA Act . . . substantially affects the [counties] in a material way and so governs or regulates them, thereby implicating the Home Rule Amendment.").

9. *See* Civ. Serv. Merit Bd. v. Burson, 816 S.W.2d 725, 728 (Tenn. 1991) (noting that under Article XI, Section 8, "'general laws only [are] to be passed' by the Tennessee General Assembly.").

clause. Part III examines the Supreme Court's new reasoning in *Metropolitan Government of Nashville and Davidson County*. Part IV analyzes the decision's departure from precedent, and Part V notes present challenges and future concerns arising from the decision.

II. THE HISTORY OF RELEVANT CASE LAW

Cities and counties in the United States have historically been viewed as "creatures of the state," strictly controlled by their state legislatures and lacking any independent source of authority.[10] But amid the rapid urban growth of the late nineteenth century, cities began to push for "home rule" amendments to their state constitutions to gain a measure of independence from their legislatures' control.[11] Tennessee's Home Rule Amendment, Article XI, Section 9, for example, prohibits the General Assembly from passing laws "private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity."[12] This and similar amendments across the country promised to protect "local control of local affairs."[13] The historical reality, however, was somewhat different: legislatures concocted "ingenious city classification schemes" that circumvented home rule.[14] Legislatures began crafting laws general on their face but local in their application; although the laws mentioned no specific counties by name—and thus facially applied equally to all counties—the laws by their terms could only apply to a small class of targeted counties.[15] For example, the Minnesota legislature in 1918 passed a statewide law that required all cities with populations above 50,000 and without a home rule charter

10. David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2280 (2003).

11. *Id.* at 2288–90.

12. TENN. CONST. art. XI, § 9; *see also* S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ., 58 S.W.3d 706, 714 (Tenn. 2001) ("The effect of the home rule amendments was to fundamentally change the relationship between the General Assembly and these types of municipalities, because such entities now derive their power from sources other than the prerogative of the legislature.").

13. *Metro. Gov't of Nashville*, 645 S.W.3d at 150 (citing Town of Black Brook v. State, 362 N.E.2d 579, 581 (N.Y. 1977)).

14. Barron, *supra* note 10, at 2288.

15. *Id.*

to establish an "auditorium commission"—but only Minneapolis could ever fit this description.[16]

The 1953 ratification of Tennessee's Home Rule Amendment purported to end such schemes. Before 1953, the Tennessee Constitution had been interpreted to allow the General Assembly to exert local control on individual counties when it affected only "their governmental or political capacities."[17] But under the Home Rule Amendment, the General Assembly could no longer pass any local act "applicable to a particular county . . . either in its governmental or its proprietary capacity" unless the act was contingent upon a two-thirds vote of a local legislative body or a majority of local voters in an election.[18]

Even before the ratification of the Home Rule Amendment, however, the Tennessee equal protection clause, Article XI, Section 8, offered complementary protections to counties seeking relief from local legislation.[19] The Home Rule Amendment prevents interference with a county "either in its governmental or its proprietary capacity" without a two-thirds majority vote of the county government or a public referendum.[20] The equal protection clause, on the other hand, forbids local legislation affecting either a county's governmental capacity or the rights of its citizens unless "there is a reasonable basis for the classification."[21] The Supreme Court in *Jones v. Haynes* set a high bar for establishing a rational basis—that any county targeted by the legislature must be "confronted with problems and circumstances

16. Marwin v. Bd. of Auditorium Comm'rs, 168 N.W. 17, 18 (Minn. 1918). The court held the act unconstitutional, noting the act's time-bound requirement could never apply anywhere but to Minneapolis. *Id.* "The commissioners are to meet and qualify 'within ninety days after the passage of this act.' . . . No provision is made for a commission to come into existence later. For future cities of the class there is no auditorium commission." *Id.*

17. Town of McMinnville v. Curtis, 192 S.W.2d 998, 999 (Tenn. 1946) ("It is, of course, settled law that special legislation affecting particular counties or municipalities in their governmental or political capacities may be enacted without violating . . . the Constitution.").

18. TENN. CONST. art. XI, § 9.

19. *See* Baker v. Milam, 231 S.W.2d 381, 383 (Tenn. 1950).

20. TENN. CONST. art. XI, § 9.

21. Jones v. Haynes, 424 S.W.2d 197, 199 (Tenn. 1968).

unique to that county."[22] Otherwise, the equal protection clause forecloses interference with county government.

The Home Rule Amendment and the equal protection clause offer similar but distinct protections, which the following facts from *Jones v. Haynes* illustrate. Before 1967, the general law of Tennessee forbade the use of fireworks statewide, except around Independence Day and New Year's Eve.[23] But the General Assembly, perhaps solicitous of the sleepless and nerve-jangled in Fentress County, passed a criminal private act completely banning fireworks year-round in that county only.[24] Because the act required a two-third vote of Fentress County's local legislative body, it appeared to implicate the Home Rule Amendment.[25] The court explained, however, that the Home Rule Amendment did not apply for two reasons: the Home Rule Amendment never abrogated the General Assembly's power to pass criminal statutes, and the regulation of fireworks did not primarily affect the county's government capacity but rather "the rights of [its] citizens."[26]

The *Jones* court then switched its analysis from the Home Rule Amendment to a two-step equal protection analysis. First, if a private act amends a general law, then the equal protection clause applies.[27] Second, if under the act the rights of the citizens of one county will differ from those of another, the court requires "a reasonable basis for the classification."[28] Here, because the Private Act changed the general law of pyrotechnics and because nothing in the act indicated "that Fentress County is in any different circumstances or condition than any other county . . . of the same size and population," the court held the act unconstitutional under the equal protection clause.[29] Thus, the equal protection clause can offer broader protections to a county

22. *Id.*

23. *Id.* at 198.

24. *See id.*

25. *Id.*

26. *Id.* at 199 ("[If an act] primarily affects the rights of the citizens, without affecting others in like condition elsewhere in the state, it is invalid." (quoting State *ex rel.* Hamby v. Cummings, 63 S.W.2d 515, 516 (Tenn. 1933))).

27. *See id.*

28. *Id.*

29. *Id.*

affected by local legislation even when the Home Rule Amendment does not apply.

The equal protection clause bars even private acts targeted at county governments when they "amend or abrogate a *prior* general statute in its application to a particular county or class of counties" without a "reasonable basis."[30] In *State ex rel. Bales v. Hamilton County*, for example, the Supreme Court explained that it had previously approved of two local statutes—one establishing a teacher pension in Knox County, the other increasing firefighter pay in Memphis—because these laws did not amend a statute already on the books.[31] In contrast, the court would not accept a third statute that set a minimum wage for teachers in Hamilton County because the statute made an exception to a previously general law without a rational basis for doing so.[32] Notably, the court emphasized in the case of the Hamilton County teacher pay statute that population figures alone do not furnish a rational basis.[33]

Decades later, the court in *Leech v. Wayne County* reaffirmed that local legislation cannot carve out an exception to a statewide law, but this time against a law affecting not one but two counties.[34] Although the majority couched its opinion in the Home Rule Amendment, the dissent pointed out that the law was equally unconstitutional under the equal protection clause because it applied to only two counties without a "reasonable basis."[35] In contrast, the court in *Baker v. Milam* upheld a statute in which the legislature compelled only one county to pay for a new school building because of the "urgent

30. Leech v. Wayne Cnty., 588 S.W.2d 270, 280 (Tenn. 1979) (Henry, J., dissenting) (emphasis added) (quoting Sandford v. Pearson, 231 S.W.2d 336, 338 (Tenn. 1950)).

31. 95 S.W.2d 618, 619 (Tenn. 1935).

32. *Id.*

33. *Id.* ("Unless the act relates to a matter in respect of which a difference in population would furnish a rational basis for diversity of laws, classification on such a basis will not be upheld.").

34. 588 S.W.2d at 274 (When "the General Assembly has made a permanent, general provision, applicable in nearly ninety of the counties[,] . . . we do not think it could properly make different provisions in two of the counties, by population bracket, in the manner attempted here.").

35. *Id.* at 280 (Henry, J., dissenting).

necessity" of an extreme fire risk to students—a clearly rational basis.[36] Thus, the Supreme Court has consistently read the equal protection clause to prohibit changes to general laws that discriminate against a small number of counties without a valid rationale.[37]

Generally, in the absence of contrary evidence, the court presumes the reasonableness of legislation.[38] Indeed, the use of population brackets to target a class of counties is relatively common and "is not *per se* a pernicious practice."[39] However, the dissent in *Leech v. Wayne County* pointed to one factor that cuts against the presumption of a law's reasonableness: "when general bills are modified by floor amendments."[40] In other words, although the court found presumptively reasonable a bill requiring one county to address the "urgent necessity" of a school building's fire risk,[41] it might not find reasonable another bill whose local effect arose, not out of necessity, but out of political bargaining over multiple amendments until the bill applied to one or two counties only.[42] Thus, the legislative history of an enactment, including the manner of its amendments, can color the reasonableness of a classification in the absence of clearly objective criteria.

The court has even upheld local laws targeted at specific population brackets without a clear rational basis as long as in future years they will be "potentially applicable throughout the state . . . even though at the time of its passage it might have applied to [one county]

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36. 231 S.W.2d 381, 383 (Tenn. 1950) (citing *McMinnville*, 192 S.W.2d at 998).

37. *See* Brentwood Liquors Corp. v. Fox, 496 S.W.2d 454, 456–57 (Tenn. 1973) ("[T]he Legislature may constitutionally enact a special act affecting one particular county or municipality alone in its political or governmental capacity, provided such special act is not contrary to the provisions of a general law, applicable to all the counties or municipalities. . . . The discrimination must be upon a reasonable basis. Otherwise, it is void." (quoting *McMinnville*, 192 S.W.2d at 1000)).

38. Civ. Serv. Merit Bd. of Knoxville v. Burson, 816 S.W.2d 725, 731 (Tenn. 1991) ("If any possible reason can be conceived to justify the classification, it will be upheld and deemed reasonable." (quoting Stalcup v. City of Gatlinburg, 577 S.W.2d 439, 442 (Tenn. 1978))).

39. *Leech*, 588 S.W.2d at 280 (Henry, J., dissenting) (emphasis added).

40. *Id.* (Henry, J., dissenting).

41. *Baker*, 231 S.W.2d at 383.

42. *See Leech*, 588 S.W.2d at 280 (Henry, J., dissenting).

only."[43] For example, in *Civil Service Merit Board of Knoxville v. Burson*, the court added that even when a law applies by very narrow population brackets to only one large county it need not offend Article XI, Section 8 because that same law in time can "become applicable to many other counties depending on subsequent population growth."[44] This analysis accords with the text of the Tennessee equal protection clause that "[t]he Legislature shall have no power . . . to pass any law" unless it "extend[s] to any member of the community, who may be able to bring [itself] within the provisions of such law."[45] If by future population growth a county may "bring [itself] within the provisions of such law," then that law does not violate the equal protection clause.[46] The Supreme Court reiterated this analysis twenty-eight years later in *Coffee County Board of Education v. City of Tullahoma*, upholding a liquor-by-the-drink law that specified such a narrow population range that it effectively exempted only one county.[47] Yet again, the law passed muster because it measured population "according to the 1980 federal census or any subsequent federal census," leaving open the possibility that it would affect more municipalities over time.[48] Thus, the Supreme Court has consistently upheld substantively local legislation aimed at one or two counties as long as those counties are not targeted in perpetuity.

III. METRO. GOV'T OF NASHVILLE & DAVIDSON CNTY. V. TENN. DEP'T OF EDUC.

The 2022 Supreme Court case *Metropolitan Government of Nashville and Davidson County v. Tennessee Department of Education* was a constitutional challenge brought by Metro and Shelby County against the ESA on the grounds that it violated several constitutional provisions including the Home Rule Amendment of Article XI, Section 9 and the equal protection clauses of Article I, Section 8 and Article

43. Farris v. Blanton, 528 S.W.2d 549, 552 (Tenn. 1975).

44. 816 S.W.2d at 730 (quoting Bozeman v. Barker, 571 S.W.2d 279, 282 (Tenn. 1978)).

45. TENN. CONST. art. XI, § 8.

46. *See Burson*, 816 S.W.2d at 730 (quoting TENN. CONST. art. XI, § 8).

47. 574 S.W.3d 832, 842 n.18 (Tenn. 2019).

48. *Id.*

XI, Section 8.[49] At trial, the court held the ESA unconstitutional under the Home Rule Amendment, enjoining the State from enforcing it, and the Court of Appeals affirmed.[50] The case went before the Supreme Court on an interlocutory appeal to evaluate the ESA's constitutionality.[51]

The ESA is a school voucher pilot program that removes state and local funding initially for 5,000 students—rising incrementally to 15,000—from public school districts and reallocates those funds to private school tuition instead.[52] The plaintiff municipalities argued that the ESA violated the Home Rule Amendment because it overstepped the counties' "local control of local affairs" by redistributing these funds.[53] Although the ESA facially applied to school districts and not to counties, argued plaintiffs Metro and Shelby County, counties and school districts operate in an "inseparable partnership" such that a law regulating the budget of a school district necessarily regulates the budget of a county.[54] For example, the ESA's "counting requirement" bound school districts to continue counting former students in their enrollment numbers even after they had left for private schools and to continue raising taxes according to that inflated figure.[55] The State countered that, although the Home Rule Amendment proscribes any statute that is both "local in form or *effect*" and "*applicable* to a particular county or municipality," the ESA merely *affected* Metro and Shelby County but did not *apply* to them.[56] The argument hinged on a narrow definition equating the word "apply" with the word "regulate": because the ESA did not *regulate* Metro and Shelby County, therefore, it could not *apply* to them.[57] The Supreme Court accepted this

49. Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ., 645 S.W.3d 141, 146 (Tenn. 2022). The trial court dismissed additional plaintiff Metropolitan Nashville Board of Public Education for lack of standing. *Id.* The question of the equal protections claims was not certified to the Supreme Court. *Id.* at 147 n.8 ("These claims are not before this Court on appeal.").

50. *Id.* at 145.

51. *Id.*

52. *Id.* at 156 (Lee, J., dissenting).

53. *Id.* at 150 (majority opinion).

54. *Id.* at 151.

55. *Id.*; *see also* TENN. CODE ANN. § 49-6-2605(b)(1) (2020).

56. *Metro. Gov't of Nashville*, 645 S.W.3d at 151–52 (emphasis in original).

57. *Id.*

argument, reversing the Court of Appeals and holding that the ESA did not violate the Home Rule Amendment because it did not apply to the counties in the first place.[58]

In her dissent, Justice Sharon Lee pointed out a unique feature of the ESA with respect to the Home Rule Amendment: that, instead of applying generally to all counties above a certain population level, the ESA by its terms applied only to counties with school "districts with ten or more priority schools in 2015 and 2018 and that were among the bottom ten percent of schools in 2017."[59] These highly wrought criteria ensured that the ESA "could only ever apply to Metro and Shelby County without further legislation."[60] The original bill, by contrast, had applied broadly to the state's five largest municipalities—Metro, Shelby, Knox, Hamilton, and Madison.[61] First, Madison County was removed by amendment;[62] then, in order to secure a narrow passage in the House, the Speaker promised that even more of the representatives' constituent school districts would be excised from the Senate bill, leaving at last only Metro and Shelby County.[63]

IV. A NEW METHOD FOR CLASSIFYING COUNTIES UNDER METRO. GOV'T OF NASHVILLE

The one issue the Supreme Court did not address—the issue of equal protection under Article XI, Section 8 of the Tennessee Constitution—may yet prove to be a vexing legacy for Tennessee. Although the ESA began as general legislation affecting the five largest counties, it was negotiated down to only two.[64] Because the equal protection clause mandates that "'general laws only [are] to be passed'

58. *Id.* at 154.

59. *Id.* at 157 (Lee, J., dissenting) (citing S.B. 0795, Amend. No. 5, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019) (S. Amend. 0417) (as adopted by the Senate Apr. 25, 2019)).

60. *Id.*

61. *Id.* (citing H.B. 0939, Amend. No. 1, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019) (H. Amend. 0188) (withdrawn Apr. 23, 2019)).

62. *Id.* (citing H.B. 0939, Amend. No. 2, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019) (H. Amend. 0445) (as adopted by the House Apr. 23, 2019)).

63. *Id.* (citing S.B. 0795, Amend. No. 5, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019) (S. Amend. 0417) (as adopted by the Senate Apr. 25, 2019)).

64. *Id.*

by the Tennessee General Assembly,"[65] the Supreme Court has historically struck down laws that apply to one county by use of creative classifications that are facially general but substantively local.[66] But not only have laws aimed at one county been held unconstitutional, but also those aimed at two.[67] Thus, the ESA presents just the sort of scenario to trigger the equal protection clause.

And yet the ESA, displaying the creativity of bygone legislatures who crafted "ingenious city classification schemes" in the early twentieth century,[68] was allowed to use facially neutral criteria to target only two counties in perpetuity.[69] For half a century before this, and as late as 2019, the Supreme Court had upheld legislation that applied to single counties by neutral population figures as long as those figures were not time-bound to one particular year.[70] But the ESA does not pretend to expand its application in future years.[71]

Nor can the ESA claim a rational basis for classifying Metro and Shelby Counties for its special attention because, like the Hamilton County minimum wage statute in *State ex rel. Bales v. Hamilton*

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65. Civ. Serv. Merit Bd. of Knoxville v. Burson, 816 S.W.2d 725, 728 (Tenn. 1991) (alteration in original) (quoting TENN. CONST. art. XI, § 8).

66. *Id.* at 731 ("[A] legislatively-created classification within a statute that is 'natural and reasonable is constitutional and valid, but class legislation whose classification is arbitrary and capricious is unconstitutional and invalid.'" (quoting City of Chattanooga v. Harris, 442 S.W.2d 602, 604 (Tenn. 1969))).

67. Leech v. Wayne Cnty., 588 S.W.2d 270, 274 (Tenn. 1979) ("[W]e do not think [the General Assembly] could properly make different provisions in two of the counties, by population bracket, in the manner attempted here."); *see also* Nolichuckey Sand Co., Inc. v. Huddleston, 896 S.W.2d 782, 790–91 (Tenn. Ct. App. 1994) (holding that population exclusion brackets which excluded "a total of only five Tennessee counties" from a severance tax were unconstitutional).

68. *See supra* Part II.

69. *Metro. Gov't of Nashville*, 645 S.W.3d at 157 (Lee, J., dissenting) (citing S.B. 0795, Amend. No. 5, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019) (S. Amend. 0417) (as adopted by the Senate Apr. 25, 2019)).

70. *See supra* Part II; *see also, e.g.*, Farris v. Blanton, 528 S.W.2d 549, 552 (Tenn. 1975) ("[Legislation] is not local in effect even though at the time of its passage it might have applied to Shelby County only."); Coffee Cnty. Bd. of Educ. v. City of Tullahoma, 574 S.W.3d 832, 842 n.18 (Tenn. 2019) (approving of a statute that applied to only one county but could someday apply to more "according to the 1980 federal census or any subsequent federal census").

71. *Metro. Gov't of Nashville*, 645 S.W.3d at 157 (Lee, J., dissenting).

County,[72] the ESA excepts only two counties by amending a general school funding scheme that was already in place and that had previously applied to all counties.[73] Further, despite the presumption of reasonableness afforded the General Assembly, political maneuvering by floor amendment casts a pall over the reasonableness of the discrimination.[74]

These concerns are not allayed by the 2023 amendment to the ESA that expanded the law's application from two counties to three. Although the ESA now includes Hamilton County, the law rests upon the same constitutional innovation—time-bound qualifications that will permit no future expansion without amendment. The ESA by its terms now affects counties with five or more schools "[i]dentified as priority schools in 2015" and five or more schools "[a]mong the bottom ten percent (10%) of schools . . . in 2017"—instead of ten priority schools as previously enacted.[75] The qualifications nevertheless remain pegged to figures ossified in 2015 and 2017.[76]

Further, this result is the product of additional last-minute negotiations that color the reasonableness of the classification of only three counties.[77] The original 2023 amendment was meant to include Knox and Madison Counties as well,[78] by lowering the qualifying

72. 95 S.W.2d 618, 619 (Tenn. 1936).

73. *See Metro. Gov't of Nashville*, 645 S.W.3d at 159 (Lee, J., dissenting) ("Only in Metro and Shelby County are state and local education funds deposited in eligible students' savings accounts to pay for private education.").

74. *See* Leech v. Wayne Cnty., 588 S.W.2d 270, 280 (Tenn. 1979) (Henry, J., dissenting); *see also* Melissa Brown, *Tennessee Senate Passes School Voucher Expansion Bill*, TENNESSEAN (Feb. 16, 2023, 9:37 AM), https://www.tennessean.com/story/news/politics/2023/02/16/tennessee-senate-passes-school-voucher-expansion-bill/69910221007 ("The original legislation only passed after several Republicans were assured the program would not expand to their home districts.").

75. Tenn. Code Ann. § 49-6-2602 (3)(C)(i) (2023).

76. *See id.*

77. Shannon Coan, *Private School Vouchers Have Arrived in Hamilton County*, CHATTANOOGA TIMES FREE PRESS (Aug. 7, 2023, 9:00 PM), https://www.timesfreepress.com/news/2023/aug/07/private-school-vouchers-have-arrived-in-hamilton.

78. Leslie Dominique, *Tennessee Bill Expanding School Vouchers to Hamilton County Passes House Wednesday*, ABC: NEWS CHANNEL 9 (Apr. 19, 2023, 1:49 PM), https://newschannel9.com/news/local/tennessee-bill-that-gives-taxpayer-dollars-for-

number of priority schools within a county to only three—instead of five—until the Senate refused to concur on the broader amendment.[79] Once again, the General Assembly released Knox and Madison counties at the last minute, undermining a presumption of a rational basis to the law.[80]

The equal-protection innovation in *Metropolitan Government of Nashville and Davidson County* is that a law with local effect may be upheld even though it affects only two counties and will never affect any other.[81] The court has departed from long precedent. It had previously held in *Jones v. Haynes* that no law could target a county's governmental capacity or the rights of its citizens without "a reasonable basis for the classification."[82] In *Leech v. Wayne County*, the dissent explained that the equal protection clause is offended when a prior law is amended to target the population brackets of one or even two counties.[83] And in *Civil Service Merit Board v. Burson*, the court approved of even a narrowly targeted population bracket when the law could still "become applicable to many other counties depending on subsequent population growth."[84] The court moved aside these consistent principles to make way for the ESA. Although the court generally presumes a rational reason for a law's discrimination,[85] the fact that the ESA was originally intended to apply to five counties before it was whittled down by floor amendment to only two casts a shadow on the statedly broad intentions of the act.[86]

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students-to-attend-private-schools-advances ("Students in Hamilton County stand to [receive] ESA eligibility, along with students in Madison and Knox Counties.").

79. H.B. 0433, Amend. No. 1, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023) (H. Amend. 0427) (as adopted by the House Apr. 19, 2023).

80. *See supra* notes 38–42 and accompanying text.

81. Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ., 645 S.W.3d 141, 157 (Tenn. 2022) (Lee, J., dissenting) ("[T]he ESA Act could only ever apply to Metro and Shelby County without further legislation.").

82. 424 S.W.2d 197, 199 (Tenn. 1968).

83. 588 S.W.2d 270, 280–81 (Tenn. 1979) (Henry, J., dissenting).

84. 816 S.W.2d 725, 730 (Tenn. 1991) (quoting Bozeman v. Barker, 571 S.W.2d 279, 282 (Tenn. 1978)).

85. *Id.* at 731 (citing Stalcup v. City of Gatlinburg, 577 S.W.2d 439, 442 (Tenn. 1978)).

86. *See Leech*, 588 S.W.2d at 280 (Henry, J., dissenting).

V. FUTURE CONCERNS FOLLOWING METRO. GOV'T OF NASHVILLE

This apparent innovation is a rebirth of the old "ingenious city classification schemes" wielded by state legislatures at the turn of the twentieth century.[87] Bygone legislatures attempted to skirt their states' home rule amendments by enacting laws of local effect clothed in facially neutral population brackets and other arbitrary criteria.[88] Now the Tennessee General Assembly, armed with a new interpretation of the word "applicable," is empowered to skirt the Home Rule Amendment, potentially precipitating a swing in power back toward the legislature and away from counties.[89] At the same time, by weakening the precedent that laws with local effect should at least "become applicable" by future changes in population,[90] the court also emboldens the General Assembly to skirt the equal protection clause of the Tennessee Constitution.

The General Assembly is already finding useful applications for these maneuvers. In May 2023, for example, the legislature amended a statewide law to take control of the airport authority of only one county, the Metro Nashville Airport Authority, using a facially neutral classification that applies to all counties "having a metropolitan form of government with a population of more than five hundred thousand."[91] In reality, although three Tennessee counties have a

87. *See supra* notes 14–16 and accompanying text; *see, e.g.*, Marwin v. Bd. of Auditorium Comm'rs, 168 N.W. 17, 18 (Minn. 1918) (finding unconstitutional a Minnesota law that purported to apply to all cities with populations over 50,000—but in reality could only ever have applied to Minneapolis).

88. *See* Elijah Swiney, *John Forrest Dillon Goes to School: Dillon's Rule in Tennessee Ten Years After* Southern Constructors, 79 TENN. L. REV. 103, 118–19 (2011) ("Concern about the General Assembly's abuse of that power, in fact, seems to have played at least some role in precipitating the 1953 Constitutional Convention that radically overhauled the constitutional underpinnings of local government within the state.").

89. *Id.*

90. *See Burson*, 816 S.W.2d at 729–30 (quoting Bozeman v. Barker, 571 S.W.2d 279, 282 (Tenn. 1978); Coffee Cnty. Bd. of Educ. v. City of Tullahoma, 574 S.W.3d 832, 842 n.18 (Tenn. 2019).

91. H.B. 1176, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023).

metropolitan form of government, two of them are exempted both by their small size and by the salient fact that they lack an airport.[92]

Metro is currently seeking an injunction against the law, arguing a constitutional violation of the Home Rule Amendment and the equal protection clause.[93] If it should reach the Supreme Court, the court may still hold the law constitutional under the Home Rule Amendment, following the novel reasoning of *Metropolitan Government of Nashville and Davidson County v. Tennessee Department of Education* that the law *applies* to the airport authority but merely *affects* Metro.[94]

Nor has the General Assembly confined this legislative technique to airport authorities. In the same 2023 session, the General Assembly passed local laws built on similar population brackets to cut in half the number of members of the Nashville Metro Council[95] and dissolve civilian law enforcement review boards in Memphis and Nashville.[96] A clear gap has formed in the protections of the Home Rule Amendment.

Therefore, these legislative scenarios may be those in which the equal protection amendment will be most needed. Because the equal protection clause demands a "reasonable basis" for the General Assembly to amend a general law to target one county's governmental

92. *See Understanding County Government in Tennessee*, TENN. CNTY. COMM'RS ASS'N, https://tncounties.org/TCCA/Resources/Understanding_County_Government_In_Tennessee/TCCA/Resources/Understanding_County_Government_In_TN.aspx?hkey=458c2d6c-e747-4a60-b683-bd7bae0fcec7 (last visited Nov. 6, 2023) ("Davidson County . . . is the second largest county in the state by population, while Trousdale County and Moore County were ranked 85th and 93rd in population respectively according to the 2020 census.").

93. *Case Description of* Metro Gov't of Nashville & Davidson Cnty. v. Bill Lee et al., TENN. CTS., https://www.tncourts.gov/special-cases/metro-govt-nashville-davidson-cnty-v-bill-lee-et-al (last visited Nov. 6, 2023).

94. *See* 645 S.W.3d 141, 151–53 (Tenn. 2022).

95. Melissa Brown & Cassandra Stephenson, *Gov. Lee Signs Bill to Slash Nashville Council in Half*, TENNESSEAN (Mar. 9, 2023, 9:38 AM), https://www.tennessean.com/story/news/politics/2023/03/09/tennessee-general-assembly-passes-bill-to-slash-nashville-council/69986567007.

96. Craig Shoup & Kirsten Fiscus, *Gov. Bill Lee Signs Bill Eliminating Community Oversight Boards*, TENNESSEAN (May 18, 2023, 6:08 AM), https://www.tennessean.com/story/news/local/2023/05/18/police-oversight-board-banned-with-new-tn-law-nashville-knoxville-memphis/70152166007.

capacity,[97] the General Assembly would have the burden to show, for example, that Metro and Shelby County, whether in their aeronautical affairs or police oversight, are "confronted with problems and circumstances unique to [those] count[ies]."[98] This at least is a question of fact that resists a quick dismissal by the court.

In the wake of the Supreme Court's finding in *Metropolitan Government of Nashville and Davidson County* that the Home Rule Amendment was not implicated when the ESA's burden on the budgets of Metro and Shelby County merely *affected* them without *applying* to them,[99] Tennessee municipalities would be justified in worrying that the Home Rule Amendment will offer little protection going forward. Now when the legislature targets a law at a narrow class of counties, that law may be deemed a general law needing no referendum in the affected counties.[100] This new precedent has weakened Tennesseans' interest in "local control of local affairs"[101]—the very thing the Home Rule Amendment sought to defend. The equal protection clause may yet fill the gap left by a weakened Home Rule Amendment. If the Supreme Court will look again to the long history of the equal protection clause, equal protection may prove to be Tennessee counties' last constitutional line of defense.

97. Town of McMinnville v. Curtis, 192 S.W.2d 998, 1000 (Tenn. 1946).

98. Jones v. Haynes, 424 S.W.2d 197, 199 (Tenn. 1968).

99. *Metro. Gov't of Nashville*, 645 S.W.3d at 151–53.

100. *See* Adam Friedman, *Republican Lawmakers Pass Six Bills Targeting Nashville During the 2023 Legislative Session*, TENN. LOOKOUT (Apr. 25, 2023), https://tennesseelookout.com/2023/04/25/republican-lawmakers-pass-six-bills-targeting-nashville-during-the-2023-legislative-session ("A similar legal argument could be made when challenging the other bills, but the Tennessee Supreme Court established some exceptions to the home rule when it allowed a 2019 school voucher plan targeting Nashville and Memphis.").

101. *Metro. Gov't of Nashville*, 645 S.W.3d at 150 (citing Town of Black Brook v. State, 362 N.E.2d 579, 581 (N.Y. 1977)).