CHAPTER 8. THE JUDICIAL BRANCH

[Parts A and B are extracted from portions of ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 239-45 (2nd ed., Oxford University Press, 2016).]

A. Introduction

Read Article VIII, § 1.

Article VIII establishes and defines the judicial branch of the State's government. The Article has had four major editions. Each has commissioned a Supreme Court of Appeals as the court of last resort and a system of circuit courts to function as the trial courts of general jurisdiction, although the number of justices on the high court and the number of circuits have both increased since the original constitution. The principal changes in Article VIII, however, have related to the inferior courts of limited jurisdiction and to the administration of the judicial system.

The 1863 Constitution, which relied on the township system of local government, provided that each township should elect a justice (or two) to handle small civil claims and criminal misdemeanors. The 1872 Convention, however, scrapped the township system and reverted to Virginia's reliance on county courts, which Article VIII accorded legislative, executive, and judicial powers. The latter were quite extensive, including even concurrent jurisdiction with the circuit courts (and to some extent with the Supreme Court) over significant legal actions. Article VIII then authorized justices of the peace to handle small claims and other less substantial matters. This system of overlapping jurisdictions and conflicting authority lasted only until 1879, when the first Judicial Amendment took away most of the county courts' judicial functions and left the justice of the peace system intact. With only minor changes, Article VIII remained in its 1879 version until 1974, when the Judicial Reorganization Amendment was passed and the present Article VIII was enacted. Under that Amendment, county courts became county commissions and the sections governing them were moved to Article IX (§§ 9-11). Justices of the peace were replaced by magistrates elected county-wide. (See Article VIII, §§ 10 and 15). Among other changes, the Amendment greatly improved the administration of courts in the State by establishing a unitary court system under the aegis of the Supreme Court of Appeals. An amendment in 2000 added the Family Courts to the judicial system.

Accordingly, Section 1 now vests the State's judicial power in the Supreme, circuit, family, and magistrate courts. It also allows the Legislature to establish intermediate appellate courts (i.e., between the circuit and Supreme courts) – a power that has thus far gone unused.

B. The Supreme Court

Read Article VIII, §§ 2-4, 8.

Section 2 of Article VIII sets up the Supreme Court of Appeals and its basic operating procedure. A 1903 amendment to the first paragraph raised the number of justices from four to five, while a quorum on the Court remained at three justices.

The second paragraph retained the provision that Supreme Court justices are to be selected by popular election, as has been the case throughout the State's history. The 1974 Amendment added that the Legislature may provide that their election be on a nonpartisan basis, an invitation that was declined for years but finally accepted in 2015 legislation. The paragraph also continued to set the justices' terms of office at twelve years, which provides for some measure of judicial independence from political pressures. By virtue of § 1's antecedents, the justices serve staggered terms.

Section 2's third paragraph requires the justices to create rules for the selection of a chief justice and for his or her replacement during a period of disability. Presently, the justices rotate the chief

justiceship among the five justices.

The concluding paragraph authorizes the chief justice to appoint a judge from a circuit court or from an intermediate court (if one is created) to serve in place of a justice who is temporarily unable to serve.

Article VIII, § 3 establishes the jurisdictional and administrative powers of the Supreme Court of Appeals. The jurisdictional grants largely follow the provisions in earlier editions of Article VIII, but the specific allocations of authority regarding the operation and management of the judicial system were new and important additions made by the 1974 Amendment.

The first two paragraphs set forth the Court's subject matter jurisdiction. The original jurisdiction conferred in the first paragraph permits the Court to hear any of the enumerated cases from the beginning, without any prior judicial determination. The specified proceedings--"habeas corpus, mandamus, prohibition and certiorari"--are the extraordinary writs derived from the common law. Habeas corpus is an action that seeks release from an allegedly unlawful detention; mandamus is available to order a public official to perform a nondiscretionary duty; prohibition lies to stop an inferior court from proceeding in a case in which it lacks jurisdiction or is otherwise abusing its power; and certiorari provides a mechanism for reviewing judicial and quasi-judicial decisions. The Supreme Court shares concurrent power with the circuit courts to entertain petitions for the extraordinary writs. Article III, § 6. The writs have been extremely important in West Virginia practice and history.

The enumeration of the Court's appellate jurisdiction in the second paragraph allows an appeal from virtually every civil judgment that would be rendered by a circuit court. The jurisdictional amount ($300) is so low as to apply to most any case worth litigating through a circuit court judgment, let alone appealing, although § 3 does authorize the Legislature to set a higher amount. (It hasn't. See W.Va. Code 51-1-3 for the statutory provisions relating to Supreme Court jurisdiction.) Moreover, the other, additional civil cases that can be appealed, regardless of the amount in controversy, result in an expansive appellate jurisdiction. Those cases include actions involving matters in equity (i.e., those in which the plaintiff sought injunctive or other relief that historically had been the province of the courts of equity), concerning title to land, seeking an extraordinary writ, and raising issues of personal freedom or the constitutionality of a law. The latter provision establishes that the Court has the authority to review the constitutionality of a legislative or executive action and declare it void. This power of "judicial review" has been a subject of some academic debate at the federal level but has been expressly granted in each of the original and amended versions of the State's judicial articles.

The Supreme Court's jurisdiction in criminal appeals attaches to any appeal from a circuit court conviction for a felony or misdemeanor. With the exception for proceedings involving public revenue, the right to appeal in criminal cases rests solely with the defendant, since only "convictions" can be appealed. State v. Bailey (1970); see also Article III, § 5 (Double Jeopardy Clause). In all probability, the exception allowing government appeals in public revenue cases violates the Double Jeopardy Clause of the Sixth Amendment to the United States Constitution. Finally, § 3 authorizes the Legislature to further expand the Court's jurisdiction in either civil or criminal cases.

The third and fourth paragraphs, added by the Judicial Reorganization Amendment of 1974, establish the unitary judicial system in West Virginia. They are considered in the two cases (Quelch and Louk) immediately following this commentary.

Section 4 of Article VIII directs the minimum procedures for the Supreme Court's handling of appeals. The section combines Article VIII, §§ 4-6 of the 1872 Constitution and its 1879 Amendment. The 1863 Constitution had no analogue to § 4's first two paragraphs, but did include a provision in Article VI, § 9 similar to § 4's third paragraph. The original, however, did not impose the syllabus points requirement.

The writs of error, supersedeas, and appeal were the common law methods for obtaining review

of lower court decisions. Section 4's first paragraph provides that litigants seeking such review must petition the Court and describe the error allegedly committed by the lower court. Under long standing past practices, a party appealing to the Supreme Court filed a petition for appeal identifying the perceived errors in the lower tribunal's decision and explaining why the Court should hear the appeal. After time for a response, the Court denied the petition without further proceedings, granted the petition and set a schedule for full briefing and oral argument, or entered some other appropriate order. Under recent amendments to the Rules of Appellate Procedure, the process is somewhat different. See W. Va. Rules of Appellate Procedure, Rules 5-22. Now, the appealing party must file a notice of appeal and then subsequently perfect the appeal by filing its brief and designated portions of the record from the circuit court or agency. The opposing party or parties respond, and there is an opportunity for a reply brief. The Court then decides (1) to affirm or reverse without oral argument and issues a memorandum decision explaining its reasoning and why a full opinion by the Court is not needed; or (2) sets the case for oral argument, which can be an abbreviated or full argument. Following argument, the Court can either issue a memorandum decision summarily deciding the case, a full opinion, or some appropriate order. The Court's criteria for hearing full argument and issuing an opinion of the Court include error in the lower tribunal decision, the importance of the case, the novelty of the issues presented, the presence of any constitutional issues, and the existence of conflicting decisions in the circuit courts. Those criteria implement § 4's directive that the Court grant appeals only after it has examined the record and "is satisfied that there probably is error in the record, or that it presents a point proper for the consideration of the court."

The second paragraph establishes that no decision shall be a binding precedent on other cases unless the decision commands a majority of the justices. The third paragraph imposes certain responsibilities on the Court when deciding cases. It is required to consider and decide all points "fairly arising upon the record" [though not necessarily every point created by ingenuity of counsel, Lubeck Meat Packing, Inc. v. Motorists Mutual Ins. Co. (1988)], to state its reasons in writing, and to prepare a syllabus that summarizes the Court's holdings.

STATE ex rel. QUELCH v. DAUGHERTY,
172 W. Va. 422, 306 S.E.2d 233 (1983).

HARSHBARGER, Justice.

Petitioners are four law students in good standing at West Virginia University School of Law. They have invoked our original jurisdiction to mandamus the Board of Law Examiners to admit them to practice law without taking the Bar examination. In 1981 our state legislature amended W. Va. Code, 30-2-1, to require all West Virginia University law school graduates after July 1, 1983, to take the examination. Until that time, West Virginia University Law School graduates had been "privileged", not required to successfully complete the examination in order to qualify for admission to practice. The Board of Law Examiners has taken no position on this writ.

The diploma privilege is found in both former Code, 30-2-1, and Rule 1.020 of the Code of Rules for Admission to the Practice of Law[.] . . . [Section 30-2-1 has been amended to limit the diploma privilege to College of Law graduates whose graduation date preceded July 1, 1983.]

Petitioners contend that the legislature does not have authority to regulate admission to practice. That power is ours alone, certainly since the 1974 Judicial Reorganization Amendment to our State Constitution, W. Va. Const. art. VIII, §§ 1 and 3.

We need not again trace the historical development of judicial control over the practice of law. See Lane v. W. Va. State Board of Law Examiners, 170 W.Va. 583, 295 S.E.2d 670 (1982); State ex rel. Askin v. Dostert, 170 W.Va. 562, 295 S.E.2d 271 (1982); Carey v. Dostert, W. Va. 294 S.E.2d 137 (1982); State ex rel. Frieson v. Isner, W.Va., 285 S.E.2d 641 (1981); W. Va. State Bar v. Earley, 144 W.Va. 504, 109 S.E.2d 420 (1959). We summarized its evolution in State ex rel.

Askin v. Dostert, supra 295 S.E.2d, at 275:

> It was decided at an early point in West Virginia jurisprudence that the Legislature possessed the authority to govern the admission and practice of attorneys in West Virginia courts, but that the judiciary retained its common law supervisory powers "to exclude or admit, on application for admission, or to dismiss, after admission, for misconduct or unfitness of character . . . ." Ex parte Hunter, 2 W.Va. 122, 182 (1867). However, as a result of legislative and constitutional modifications, the dichotomy of authority to regulate the practice of law, once shared by the legislative and judicial departments, has not survived in West Virginia. Today, the exclusive authority to define, regulate and control the practice of law in West Virginia is vested in the Supreme Court of Appeals. State ex rel. Frieson v. Isner, 168 W.Va. 758, 285 S.E.2d 641 (1981). In Carey v. Dostert, . . ., we wrote:
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> The power to supervise, regulate and control the practice of law includes the power to admit and disbar attorneys. . . .

Any legislatively-enacted provision regarding bar admissions that conflicts with or is repugnant to a Supreme Court rule must fall. Lane v. W. Va. State Board of Law Examiners, supra 295 S.E.2d, at 673; State ex rel. Frieson v. Isner, supra; State ex rel. Thorn v. Luff, 154 W.Va. 350, 175 S.E.2d 472 (1970). The Judicial Branch may honor legislative enactments in aid of judicial power, but is clearly not bound to do so. State ex rel. Frieson v. Isner, supra 285 S.E.2d, at 654. ... Some jurisdictions permit the legislature, in exercise of its police powers, to enact reasonable regulations for admission to the Bar. . . . Legislative enactments which are not compatible with those prescribed by the judiciary or with its goals are unconstitutional violations of the separation of powers.

The case reporters are replete with examples of state supreme Courts invalidating legislation that encroaches upon their constitutionally granted powers. . . . The Kentucky Supreme Court recognized that any power that had resided in the legislature regarding bar admissions was superseded by Kentucky's 1975 Judicial Amendment:

> There can be no doubt that this constitutional amendment completely removed the subject from any legislative authority and rendered obsolete and ineffective the statutes pertaining to it. Strangely, nevertheless, at its 1976 regular session the General Assembly reenacted provisions authorizing the Supreme Court to appoint a board of bar examiners and to organize and govern the bar, and again requiring that admission fees be remitted to the state treasury. . . . These statutory provisions are void because they purport to erect powers and limitations that no longer fall within the legislative province. Ex parte Auditor of Public Accounts, Ky., 609 S.W.2d 682, 684 (1980).

There is no doubt that amended W. Va. Code, 30-2-1 is repugnant to and conflicts with our Rule 1.020. The former removed the diploma privilege that the latter grants. W. Va. Code, 30-2-1, as amended, is an unconstitutional usurpation of this Court's exclusive authority to regulate admission to the practice of law in this State. Petitioners and other West Virginia University Law School graduates shall be admitted to practice law without taking the Bar examination if they have met the other qualifications of Rule 1.020. . . .

NEELY, Justice, concurring.

I concur in the result in this case but for slightly different reasons than those stated by the majority. The 1981 amendment to W. Va. Code, 30-2-1 [1972] did not have the effect of requiring a bar examination of graduates of West Virginia University's College of Law. The amendment merely eliminated the time-honored, statutory diploma privilege that was enacted by the Legislature when it was thought that the Legislature could control certain aspects of the practice of law.

I do not agree with the majority that all aspects of the practice of law in West Virginia are within the exclusive control of the Supreme Court of Appeals. In this regard I fail to find the recent cases of this Court particularly persuasive. . . . In my opinion, a legislative act requiring a bar examination

would be within the prerogative of the Legislature under W. Va. Const., art. VIII, §§ 1 and 3. However, the effect of the 1981 legislative amendment to Code, 30-2-1 [1972] that is now in question was not to require a bar examination of graduates of the West Virginia University College of Law, but rather to eliminate the legislatively mandated diploma privilege.

Our Rule 1.020 allows graduates of the College of Law to be admitted to practice without examination. Since the Legislature has not attempted to invalidate our Rule 1.020, I see no reason that Rule 1.020 should not remain in force and effect. Had the Legislature intended to require a bar examination they would have said so. In fact, the Legislature merely placed this question within the Court's discretion.

I despise bureaucratic requirements that demand that people perform vain acts. In a state like West Virginia where we have a competent law school specializing in West Virginia law, a bar examination becomes nothing but a nuisance. Consequently, I am pleased to leave the diploma privilege in place, but I believe that it is within the legislative prerogative to require by a specific statute that all candidates for admission to the bar take a bar examination.

Finally, my understanding of this matter is instructed by two great principles: First, one should always attempt to avoid the inveterate human compulsion to make the other man's life miserable for no ostensible reason; and second, if it ain't broke, don't fix it.

MILLER, Justice, dissenting.

It seems to me that the majority in its eagerness to demonstrate that this Court has the inherent power to regulate the practice of law has ignored the familiar postulate that a legislative act relating to the practice of law is not necessarily invalid. We recognized this principle in one of our earliest cases relating to the qualifications for the practice of law:

> "But notwithstanding the jurisdiction of the courts over the subject it has been generally conceded that the legislature may in the exercise of its police power, prescribe reasonable rules and regulations for admissions to the bar, which will be followed by the courts. But the legislature may not impose unreasonable rules or deprive the courts of their inherent power to prescribe other rules and conditions of admission to practice." In re Application for License to Practice Law, 67 W. Va. 213, 218, 67 S.E. 597, 599 (1910).

Other states have followed this principle. The primary test used is whether the statute is compatible with the judiciary's goal in regard to the practice of law. One of the best expressions of this rule is found in Sadler v. Oregon State Bar, 275 Or. 279, 286, 550 P.2d 1218, 1222, 83 A.L.R.3d 762, 768 (1976):

> "'The power to admit the applicants to practice law is judicial and not legislative, and is, of course, vested in the courts only. Originally the courts alone determined the qualifications of candidates for admission, but to avoid friction between the departments of government, the courts of this and other states have generously acquiesced in all reasonable provisions relating to qualifications enacted by the legislatures.'" . . .
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> [Sadler] concluded that the overlap of the judicial and legislative powers arises from the legislature's police power to protect the public welfare by promoting the efficient and impartial administration of justice. . . .

Paradoxically, the majority does not mention, although the petitioners candidly admit, that the diploma privilege for graduates of the West Virginia University Law School was first initiated by the Legislature. 1897 W. Va. Acts 50. See In re Application for License to Practice Law, supra. It appears that this Court had no express rule relating to the diploma privilege until 1973. When we did adopt a rule it followed the statute and extended the diploma privilege to graduates of the West Virginia University Law School. Thus, for a period of eighty years, this Court was content to follow a legislative enactment relating to the admission to the practice of law. It is only when the Legislature took steps to withdraw the diploma privilege in 1981, which it had initially created, that

this Court roused from its long slumber and declared there had been a violation of the separation of powers doctrine. One might understand this sudden awakening on the part of the majority, if they had given some reasons why the diploma privilege serves to promote the practice of law.

Only one other state, Wisconsin, currently has the diploma privilege. . . . With the increasing development of federal regulatory laws, uniform acts, and federal constitutional decisions which have an impact on all states, it is sheer myopia to suggest that there is some substantial body of West Virginia law that is different from the general law. Surely, it is not for the uniqueness of our law that we retain the privilege. Furthermore, the perpetuation of the diploma privilege carries with it some long term adverse consequences as several states refuse attorney admission or reciprocity unless the original admission has been by way of a bar examination. . . .

The Montana Supreme Court considered the question of retaining the diploma privilege in In the Matter of Proposed Amendments Concerning the Bar Examination and Admission to the Practice of Law, 187 Mont. 159, 609 P.2d 263 (Mont. 1980), and decided against its retention after a thorough analysis of the issue. I consider many of its observations extremely pertinent:

> First: "There is no substantial or acceptable argument for retention of the diploma privilege. Its primary purpose has long ceased to exist--i.e. incentive to attract students to a small law school as it struggles to gain recognition in the legal community." . . .
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> Second: "There is, in fact, a double standard created by the diploma privilege and the Bar examination [for non-state law school graduates] as it relates to admission to the Bar." . . .
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> Third: "The fact that the law student knows he must face the Bar examination after graduation and before admission to practice is a healthy, educational stimulant . . . . It is also a stimulant to the law school faculty to maintain high standards of legal education because the faculty knows that their students will be examined by state authorities." . . .
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> Fourth: "The Bar examination serves an additional function in that [it] has one essential difference from the law school examination -- it is a comprehensive examination covering the entire field of several years of law study." . . .
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> Fifth: "The American Bar Association has taken a positive, clear and very hard stand against the diploma privilege in connection with the standards of legal education." . . .
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> Finally, and perhaps the most telling point is that by maintaining the diploma privilege: "We have effectively turned over the selection of who becomes a member of the . . . . Bar to . . . . [the faculty of the] School of Law. This is contrary to all present practice and has no recognizable redeeming value." . . .
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> For the foregoing reasons, I respectfully dissent.

LOUK v. CORMIER,
218 W. Va. 81, 622 S.E.2d 788 (2005).

Davis, Justice.

Rita Mae Louk, appellant/plaintiff below (hereinafter referred to as "Ms. Louk"), appeals from an order of the Circuit Court of Randolph County denying her motion for a new trial. A jury returned a non-unanimous verdict against Ms. Louk in her medical malpractice action against Dr. Serge Cormier[.] Here, Ms. Louk contends that the circuit court erred by ruling that the non-unanimous verdict provision of W. Va. Code § 55-7B-6d (2001) (Supp. 2004) was constitutional. . . .

I.
FACTUAL AND PROCEDURAL HISTORY

The sparse record in this case indicates that on June 13, 2000, Dr. Cormier performed a hysterectomy and salpingo-oophorectomy on Ms. Louk. The surgery occurred at Davis Memorial Hospital. Several days after Ms. Louk was released from the hospital, she became gravely ill.

Consequently, on June 22, 2000, Ms. Louk returned to the hospital complaining of a fever, abdominal stress, constipation, bloating and a tender abdomen. On the day that Ms. Louk returned to the hospital, exploratory surgery was performed. The exploratory surgery revealed that Ms. Louk had suffered a perforation of her cecum.

On May 20, 2002, Ms. Louk filed a medical malpractice action against Dr. Cormier. The central allegation in the complaint was that Dr. Cormier perforated Ms. Louk's cecum when he performed the hysterectomy and salpingo-oophorectomy. Dr. Cormier defended the action on a theory that the cecum spontaneously ruptured.

The case proceeded to trial on December 2, 2003, before a twelve person jury. After both parties presented their case-in-chief, the trial court gave its jury charge. Among the instructions given was an instruction that informed the jury that it was not necessary to reach a unanimous verdict. The jury returned a verdict in which ten jurors found in favor of Dr. Cormier. Two jurors found in favor of Ms. Louk.

Thereafter, Ms. Louk filed a post-trial motion seeking a new trial arguing that the non-unanimous verdict instruction authorized by W. Va. Code § 55-7B-6d was unconstitutional. [The circuit court denied the motion.] . . .

III.
DISCUSSION

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B. Separation of Powers Clause and the Rule-Making Clause

Ms. Louk contends that enactment of the non-unanimous verdict provision of W. Va. Code § 55-7B-6d violates the Separation of Powers Clause contained in Article V, § 1 of the West Virginia Constitution because the Rule-Making Clause of Article VIII, § 3 grants this Court the authority to promulgate rules concerning non-unanimous jury verdicts. . . .

The Rule-Making Clause of Article VIII, § 3 provides, in relevant part, that the Supreme "Court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process practice and procedure, which shall have the force and effect of law." W. Va. Const. art. VIII, § 3. *See also* Syl. pt. 1, *Bennett v. Warner*, 179 W. Va. 742, 372 S.E.2d 920 (1988) ("Under article eight, section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law."). As a result of the authority granted to this Court by the Rule-Making Clause, "'a statute governing procedural matters in [civil or] criminal cases which conflicts with a rule promulgated by the Supreme Court would be a legislative invasion of the court's rule-making powers.'" *State v. Arbaugh*, 215 W. Va. 132, 138, 595 S.E.2d 289, 295 (2004) (Davis, J., dissenting)[.] *See also* Syl. pt. 5, *State v. Wallace*, 205 W. Va. 155, 517 S.E.2d 20 (1999) ("The West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction; any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect."); Syl. pt. 7, *in part, State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994) ("The West Virginia Rules of Evidence remain the paramount authority in determining the admissibility of evidence in circuit courts."). A review of some of the prior decisions of this Court indicate that we have historically invalidated statutes that conflicted with rules promulgated by this Court.

The case of *Laxton v. National Grange Mutual Insurance Company*, 150 W. Va. 598, 148 S.E.2d 725 (1966), *overruled on other grounds by Smith v. Municipal Mut. Ins. Co.*, 169 W. Va. 296, 289 S.E.2d 669 (1982), is one of the earliest decisions to address the issue of a statute that was in conflict with a rule promulgated by this Court. In *Laxton,* the plaintiff's automobile was damaged in a wreck. The plaintiff filed an action against his insurer to recover the cost to repair the vehicle. The insurer defended the action on the theory that the policy had been cancelled before the wreck occurred. The jury returned a verdict in favor of the plaintiff. The insurer appealed, and the plaintiff filed a cross-

assignment of error. The relevant issue in the case involved the plaintiff's cross-assignment of error.

On appeal, the plaintiff argued that the insurer had waived its defense of alleged cancellation by failing to plead the defense in conformity with W. Va. Code § 56-4-21. That statute required that, in any action on an insurance policy, certain defenses must be asserted affirmatively by a statement in writing and under oath. The Court in *Laxton* acknowledged that prior to the adoption of the West Virginia Rules of Civil Procedure, the requirements of W. Va. Code § 56-4-21 had been mandatory. However, the opinion went on to invalidate the statute as a result of the Rules of Civil Procedure:

> We believe that the procedural provisions of this statute have been superseded by the West Virginia Rules of Civil Procedure which became effective July 1, 1960. The . . . cases cited in behalf of the plaintiff were decided before that date. R.C.P. 1 is, in part, as follows: "These rules govern the procedure in all trial courts of record in all actions, suits, or other judicial proceedings of a civil nature whether cognizable as cases at law or in equity. . . ." R.C.P. 8 (c)) deals with affirmative defenses, but does not provide that such defenses must be raised by a pleading under oath. R.C.P. 11 provides, that except where otherwise provided by the Rules, pleadings need not be verified or accompanied by affidavit. The Rules embrace actions such as that involved in this case. The answer to the complaint affirmatively pleaded the alleged cancellation. The answer was not required by the Rules to be under oath. The cross-assignment of error, therefore, is not well taken.

Laxton, 150 W. Va. at 601, 148 S.E.2d at 727.

The leading case addressing the issue of a legislative statute that conflicted with a rule promulgated by this Court is *Mayhorn v. Logan Medical Foundation*, 193 W. Va. 42, 454 S.E.2d 87 (1994). *Mayhorn* was a medical malpractice action against an emergency room physician and hospital. During the trial, the circuit court granted the defendants' motion for a directed verdict asserting that the plaintiff's expert relied on a fact not in evidence when rendering his opinion. The plaintiff filed an appeal. The defendants filed a cross-assignment of error. The relevant issue in the case involved the defendants' cross-assignment of error.

In the defendants' cross-assignment of error, they alleged that the plaintiff's expert should not have been allowed to testify because he did not qualify as an expert under W. Va. Code § 55-7B-7 (1986) (Repl. Vol. 2000). This statute provided, in relevant part, that "expert testimony may only be admitted in evidence if the foundation, therefor, is first laid establishing that: . . . (e) *such expert is engaged or qualified in the same or substantially similar medical field as the defendant health care provider.*"[10] W. Va. Code § 55-7B-7 (emphasis added). The plaintiff argued that the statute was invalid because it was in conflict with Rule 702 of the West Virginia Rules of Evidence. Rule 702 imposed the following requirements for a person to qualify as an expert:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, *a witness qualified as an expert by knowledge, skill, experience, training, or education* may testify thereto in the form of an opinion or otherwise.

(Emphasis added).

The opinion in *Mayhorn* acknowledged that the Court had previously examined the validity of W. Va. Code § 55-7B-7 in *Gilman v. Choi*, 185 W. Va. 177, 406 S.E.2d 200 (1990). However, the issue in *Gilman* had been whether or not the Legislature could enact a statute which addressed the competency of an expert. *Gilman* found that the Legislature could craft competency requirements for experts because Rule 601 of the West Virginia Rules of Evidence specifically stated that "every person is competent to be a witness *except as otherwise provided for by statute* or these rules." (Emphasis added). In dicta, *Gilman* suggested that Rule 601 could be used by the Legislature to

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[10]The statute was amended in 2003, and the italicized language was removed. *See* W. Va. Code § 55-7B-7 (2003) (Supp. 2004).

impose qualifications on experts. The *Mayhorn* opinion rejected *Gilman's* broad application of Rule 601 as follows:

> There is a difference between the competency of a witness, which is governed by W. Va. R. Evid. 601, and the qualifications of an expert, which is governed by W. Va. R. Evid. 702. Furthermore, W. Va. R. Evid. 601 should not be used to allow the legislature to outline when an expert is qualified. Instead, the applicable provision is W. Va. R. Evid. 702. . . .
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> W. Va. R. Evid. 702 does not provide that the legislature may outline when a witness should be found to be qualified as an expert. This Court has complete authority to determine an expert's qualifications pursuant to its constitutional rule-making authority. . . .
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> Accordingly, we hold that Rule 702 of the West Virginia Rules of Evidence is the paramount authority for determining whether or not an expert is qualified to give an opinion. Therefore, to the extent that *Gilman v. Choi*, 185 W. Va. 177, 406 S.E.2d 200 (1990) indicates that the legislature may by statute determine when an expert is qualified to state an opinion, it is overruled.

[*Mayhorn*.] *See also West Virginia Div. of Highways v. Butler*, 205 W. Va. 146, 516 S.E.2d 769 (1999) (holding that the requirement of W. Va. Code § 37-14-3(a) that an expert real estate appraiser had to be licensed and, certified was invalid and that Rule 702 controlled the qualifications of such an expert); *Teter v. Old Colony Co.*, 190 W. Va. 711, 441 S.E.2d 728 (1994) (same).

Recently, in *Games-Neely ex rel. West Virginia State Police v. Real Property*, 211 W. Va. 236, 565 S.E.2d 358 (2002), we were again asked to determine the validity of a legislative statute that conflicted with a rule of this Court. The decision in *Games-Neely* involved the State's seizure of the home of an elderly woman. The home had been used by others to engage in drug trafficking. The State filed a petition to seize the home under the West Virginia Contraband Forfeiture Act (the "Forfeiture Act"), W. Va. Code §§ 60A-7-701 *et seq* The home owner failed to file an answer within the timeframe set by the Forfeiture Act. Consequently, a default judgment was rendered. The home owner subsequently filed a motion to set aside the default judgment under Rule 60(b) of the West Virginia Rules of Civil Procedure. The trial court denied relief. In the appeal, one of the issues the Court addressed was whether or not a provision in the Forfeiture Act precluded the circuit court from entertaining a Rule 60(b) motion. The provision in question, W. Va. Code § 60A-7-705(d)[,] provided as follows:

> If no answer or claim is filed within thirty days of the date of service of the petition pursuant to subsection (b) of this section, or within thirty days of the first publication pursuant to subsection (b) of this section, the court shall enter an order forfeiting the seized property to the state.

The Court in *Games-Neely* properly concluded that W. Va. Code § 60A-7-705(d) could not prevent a trial court from hearing a Rule 60(b) motion:

> Despite the mandatory language of Section 705(d), the Appellant maintains that the circuit court still has discretion to set aside the default judgment pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure. . . .
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> . . . There is no question that rules promulgated under authority of the state constitution . . . prevail whenever there is a conflict, real or perceived, between such rules and legislative provisions involving court procedures. . . .
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> . . . .
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> Upon consideration of these established principles concerning conflicts between judicially-enacted rules of procedure and legislative acts that contain procedural directives, we conclude that Rule 60(b) has the force and effect of law; applies to forfeiture proceedings under the Forfeiture Act; and supersedes West Virginia Code § 60A-7-705(d) to the extent that Section 705(d) can be read to deprive a circuit court of its grant of discretion to review a default judgment order. Accordingly, we hold that a circuit court has discretion under Rule 60(b) of the

> West Virginia Rules of Civil Procedure to set aside a judgment by default entered pursuant to West Virginia Code § 60A-7-705(d) of the Forfeiture Act for failure to file an answer or claim within thirty days of the date of service of a petition of forfeiture or within thirty days [sic] its first publication.

[*Games-Neely*.]

The decisions in *Laxton, Mayhorn* and *Games-Neely* are illustrative of this Court's longstanding position that "the legislative branch of government cannot abridge the rule-making power of this Court." *In re Mann*, 151 W. Va. 644, 651, 154 S.E.2d 860, 864 (1967), *overruled on other grounds by Committee on Legal Ethics of West Virginia State Bar v. Boettner*, 183 W. Va. 136, 394 S.E.2d 735 (1990). *See also* Syl. pt. 2, *Williams v. Cummings*, 191 W. Va. 370, 445 S.E.2d 757 (1994) ("West Virginia Code § 56-1-1(a)(7) provides that venue may be obtained in an adjoining county 'if a judge of a circuit be interested in a case which, but for such interest, would be proper for the jurisdiction of his court. . . .' This statute refers to a situation under which a judge might be disqualified, and therefore it is in conflict with and superseded by Trial Court Rule XVII, which addresses the disqualification and temporary assignment of judges."); *State v. Davis*, 178 W. Va. 87, 90, 357 S.E.2d 769, 772 (1987) (holding that W. Va. R. Crim. P. 7(c)(1) supersedes the provisions of W. Va. Code § 62-9-1 (1931) to the extent that the statute requires the indorsement of the grand jury foreman and attestation of the prosecutor on the reverse side of the indictment), *overruled on other grounds by State ex rel. R.L. v. Bedell*, 192 W. Va. 435, 452 S.E.2d 893 (1994); *Hechler v. Casey*, 175 W. Va. 434, 449 n.14, 333 S.E.2d 799, 815 n.14 (1985) ("W. Va. Code, 53-1-8 [1933], applicable to both mandamus and prohibition proceedings, authorizes an award of either of these types of writs with or without costs as the court or judge may determine. W. Va .R. App. P. 23(b), however, . . . precludes an award of costs to the State in this Court. This Court's procedural rule, to the extent it conflicts with the procedural statute, supersedes the statute."); Syl., *State ex rel. Quelch v. Daugherty*, 172 W. Va. 422, 306 S.E.2d 233 (1983) ("The constitutional separation of powers, W. Va. Const. art. V, § 1, prohibits the legislature from regulating admission to practice and discipline of lawyers in contravention of rules of this Court."); Syl. pt. 2, *Stern Bros., Inc. v. McClure*, 160 W. Va. 567, 236 S.E.2d 222 (1977) ("The administrative rule promulgated by the Supreme Court of Appeals of West Virginia, setting out a procedure for the temporary assignment of a circuit judge in the event of a disqualification of a particular circuit judge, operates to supersede the existing statutory provisions found in W. Va. Code, 51-2-9 and -10 and W. Va. Code, 56-9-2, insofar as such provisions relate to the selection of special judges and to the assignment of a case to another circuit judge when a particular circuit judge is disqualified."); *Montgomery v. Montgomery*, 147 W. Va. 449, 128 S.E.2d 480 (1962) (holding that the bills of exception requirement for an appeal under W. Va. Code § 56-6-35 was abolished by Rule 80).

C. Conflict between W. Va. Code § 55-7B-6d and *W. Va. R. Civ. P. Rule 48*

Ms. Louk next contends that the non-unanimous verdict provision contained in W. Va. Code § 55-7B-6d is a procedural rule that is in conflict with Rule 48 of the West Virginia Rules of Civil Procedure, and is therefore invalid.[13]

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[13]It has been pointed out that "'in order to ascertain whether there is an infringement on this Court's rulemaking authority, we must first determine whether the statute is substantive or procedural. If we find that the statute is "substantive and that it operates in an area of legitimate legislative concern," then we are precluded from finding it unconstitutional.'" *State v. Arbaugh*, 215 W. Va. 132, 138, 595 S.E.2d 289, 295 (2004) (Davis, J., dissenting) (quoting *Caple v. Tuttle's Design-Build, Inc*., 753 So. 2d 49, 53 (Fla. 2000)). Furthermore, it has been recognized that

> substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.

Arbaugh, 215 W. Va. at 139, 595 S.E.2d at 296 (Davis, J., dissenting) (quoting *State v. Templeton*, 148 Wn. 2d 193, 213, 59 P.3d 632, 642 (2002)). In the instant case, we have no difficulty in finding the provisions of W. Va. Code § 55-

We begin our analysis by pointing out that in 2001 the Legislature amended the ["MPLA"] by adding W. Va. Code § 55-7B-6d. . . . This Court is quite sensitive to the need for reform in medical malpractice litigation. Furthermore, we wholeheartedly applaud the efforts of the Legislature in attempting to find a balance between the rights of injured persons and the desire to maintain a stable health care system in our State. However, "it is the constitutional obligation of the judiciary to protect its own proper constitutional authority by upholding the independence of the judiciary." Syl. pt. 4, *State ex rel. Lambert v. Stephens*, 200 W. Va. 802, 490 S.E.2d 891 (1997). "The efficient administration of the judicial system is essential to our duty to implement justice in West Virginia; and, therefore, we must be wary of any legislation that undercuts the power of the judiciary to meet its constitutional obligations." *State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 25, 454 S.E.2d 65, 70 (1994). "The role of this Court is vital to the preservation of the constitutional separation of powers of government where that separation, delicate under normal conditions, is jeopardized by the usurpatory actions of the executive or legislative branches of government." *State ex rel. Steele v. Kopp*, 172 W. Va. 329, 337, 305 S.E.2d 285, 293 (1983). Without question, "this Court has settled on a policy of strong adherence to the several constitutional provisions relating to the separation of powers, as conferred on the three departments of the State government, and particularly as to the jurisdiction of courts, and the powers they may assume or decline to exercise." *Sims v. Fisher*, 125 W. Va. 512, 524, 25 S.E.2d 216, 222 (1943). Therefore, it is our constitutional duty to make certain that W. Va. Code § 55-7B-6d has been enacted in a manner that does not encroach upon the constitutional powers of this Court. *See* Syl. pt. 3, *State ex rel. Weirton Med. Ctr. v. Mazzone*, 214 W. Va. 146, 587 S.E.2d 122 (2002) ("The provisions of the Medical Professional Liability Act, W. Va. Code §§ 55-7B-1 to -11 (1986), govern actions falling within its parameters, subject to this Court's power to promulgate rules for all cases and proceedings, including rules of practice and procedure, pursuant to Article VIII, Section 3 of the West Virginia Constitution.").

The relevant language in W. Va. Code § 55-7B-6d states that, in medical malpractice litigation,

> The judge shall instruct the jury that they should endeavor to reach a unanimous verdict but, if they cannot reach a unanimous verdict, they may return a majority verdict of nine of the twelve members of the jury. The judge *shall* accept and record any verdict reached by nine members of the jury. The verdict shall bear the signatures of all jurors who have concurred in the verdict. The verdict shall be announced in open court, either by the jury foreperson or by any of the jurors concurring in the verdict. After a verdict has been returned and before the jury has been discharged, the jury shall be polled at the request of any party or upon the court's own motion. The poll shall be conducted by the clerk of the court asking each juror individually whether the verdict announced is such juror's verdict. If, upon the poll, a majority of nine members of the jury has not concurred in the verdict, the jury may be directed to retire for further deliberations or the jury may be discharged.

(Emphasis added).[15] W. Va. Code § 55-7B-6d clearly states that trial courts shall instruct juries that

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7B-6d are procedural in nature and, therefore, fall within our sphere of authority pursuant to the Rule-Making Clause. Finally, we also note that,

> if a statute purports to regulate a matter that is within the exclusive control of the judiciary under a specific grant of constitutional authority, then it makes no difference whether the right created by the statute is characterized as substantive or procedural. In neither case could the statute prevail over conflicting provisions of a court rule implementing the constitutional authority in question.

Crow v. State, 866 So. 2d 1257, 1260 (Fla. Dist. App. Ct. 2004).

[15] The foregoing quotation is incomplete only in that it omits the introductory sentence of W. Va. Code § 55-7B-6d. That introductory sentence states: "Notwithstanding any other provision of this code, the jury in any trial of an action for medical professional liability shall consist of twelve members." This provision of the statute is addressed in Part "D" of this opinion.

they may return a non-unanimous verdict. The use of the word "shall" by the statute means that trial courts have no discretion in the matter. In fact, they must give a non-unanimous verdict instruction to the jury. *See State v. Allen*, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999) ("Generally, 'shall' commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary.")[.] Ms. Louk contends that the mandatory non-unanimous verdict instruction in W. Va. Code § 55-7B-6d is in conflict with Rule 48. We agree.

Pursuant to the Rule-Making Clause of our constitution, this Court has addressed the issue of a non-unanimous jury verdict in Rule 48. Rule 48 clearly states that "the parties may stipulate . . . that a verdict . . . of a stated majority of the jurors shall be taken as the verdict . . . of the jury." There is simply no ambiguity in Rule 48. Rule 48 provides only one method by which a jury may return a non-unanimous verdict, *i.e.,* through a stipulation by the parties. . . . The non-unanimous verdict provision in W. Va. Code § 55-7B-6d has stripped litigants of a right granted to them by this Court under our constitutional authority. The Legislature cannot remove that which was not in its power to give. This Court has made clear that "the legislative, executive, and judicial powers . . . are each in its own sphere of duty, independent of and exclusive of the other; so that, whenever a subject is committed to the discretion of the [judicial], legislative or executive department, the lawful exercise of that discretion cannot be controlled by the [others]." *Danielley v. City of Princeton*, 113 W. Va. 252, 255, 167 S.E. 620, 622 (1933). Promulgation of rules governing litigation in the courts of this State rests exclusively with this Court.

Dr. Cormier contends that W. Va. Code § 55-7B-6d is not in conflict with Rule 48 because the rule does not explicitly require a unanimous verdict. This argument misses the critical point of the analysis. The issue under analysis is not whether Rule 48 implicitly or explicitly requires a unanimous verdict. Our analysis addresses the more narrow issue of whether this Court has, through Rule 48, determined how a non-unanimous verdict may be returned. We have. Rule 48 places the issue of accepting a non-unanimous verdict squarely within the discretion of the parties. In contrast, W. Va. Code § 55-7B-6d squarely imposes a non-discretionary duty upon the trial court to accept a non-unanimous verdict. Consequently, it takes no great intellectual strain to conclude that Rule 48 and W. Va. Code § 55-7B-6d are in conflict. We have previously indicated that a rule promulgated by this Court "has the effect of a statute in matters of procedure and supersedes any procedural statute which conflicts with the rule." *State ex rel. Wilson v. County Court of Barbour County*, 145 W. Va. 435, 442, 114 S.E.2d 904, 909 (1960). In this regard, we have held that "legislative enactments which are not compatible with those prescribed by the judiciary or with its goals are unconstitutional violations of the separation of powers." *State ex rel. Quelch v. Daugherty*, 172 W. Va. 422, 424, 306 S.E.2d 233, 235 (1983).

Accordingly, we hold that the provisions contained in [§ 55-7B-6d] were enacted in violation of the Separation of Powers Clause, Article V, § 1 of the West Virginia Constitution, insofar as the statute addresses procedural litigation matters that are regulated exclusively by this Court pursuant to the Rule-Making Clause, Article VIII, § 3 of the West Virginia Constitution. Consequently, W. Va. Code § 55-7B-6d, in its entirety, is unconstitutional and unenforceable.

D. The MPLA's Severability Statute

Because of an amendment to the MPLA's Severability statute in 2001, our determination that the non-unanimous verdict provision in W. Va. Code § 55-7B-6d is invalid impacts other provisions of the MPLA, as well as another statute. The MPLA's Severability statute, W. Va. Code § 55-7B-11[,] reads as follows:

> (a) If any provision of this article as enacted during the first extraordinary session of the Legislature, 1986, in House Bill 149, or as enacted during the regular session of the Legislature, 1986, in Senate Bill 714, or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this article, and to this end, the provisions of this article are declared to be severable.
>
> *(b) If any provision of the amendments to section five of this article, any provision of new*

section six-d of this article or any provision of the amendments to section eleven, article six, chapter fifty-six of this code as provided in House Bill 601, enacted during the sixth extraordinary session of the Legislature, two thousand one, is held invalid, or the application thereof to any person is held invalid, then, notwithstanding any other provision of law, every other provision of said House Bill 601 shall be deemed invalid and of no further force and effect.

(c) If any provision of the amendments to sections six or ten of this article or any provision of new sections six-a, six-b or six-c of this article as provided in House Bill 601, enacted during the sixth extraordinary session of the Legislature, two thousand one, is held invalid, such invalidity shall not affect other provisions or applications of this article, and to this end, such provisions are deemed severable.

(Emphasis added).

A fair reading of the Severability statute indicates that it is a hybrid, *i.e.,* it contains both *severability* provisions and a *non-severability* provision. It is the non-severability provision, W. Va. Code § 55-7B-11(b), that is relevant to our decision in this case. Under the non-severability provision, the Legislature has determined that, if this Court invalidates a provision to the 2001 amendments to W. Va. Code § 55-7B-5, W. Va. Code § 56-6-11, or the newly created W. Va. Code § 55-7B-6d, then all of said provisions are invalid. In other words, the non-severability provision has presumptively invalidated the remaining twelve juror provision in W. Va. Code § 55-7B-6d, and the 2001 amendments to W. Va. Code § 55-7B-5 and W. Va. Code § 56-6-11, as a result of our determination that the non-unanimous verdict provision in W. Va. Code § 55-7B-6d is unconstitutional. The issue of the deference to be accorded a non-severability provision appears to be one of first impression for this Court. . . .

A few courts [have] commented on the degree of deference to be accorded to non-severability provisions. These courts have held that "a non-severability clause cannot ultimately bind a court, it establishes [only] a presumption of non-severability." *Biszko v. RIHT Fin. Corp*., 758 F.2d 769, 773 (1st Cir. 1985). That is, "despite the unambiguous command of . . . [non]severability clauses, . . . they create only a rebuttable presumption that guides – but does, not control – a reviewing court's severability determination." . . .

We have discerned from courts and commentators that statutory construction principles that apply to "severability" provisions are equally applicable to "non-severability" provisions. . . . Consequently, we now hold that a non-severability provision contained in a legislative enactment is construed as merely a presumption that the Legislature intended the entire enactment to be invalid if one of the statutes in the legislation is found unconstitutional. When a non-severability provision is appended to a legislative enactment and this Court invalidates a statute contained in the enactment, we will apply severability principles of statutory construction to determine whether the non-severability provision will be given full force and effect.

1. Severability principles of statutory construction. Under this Court's severability principles of statutory construction we do not defer, as a matter of course, to severability provisions contained in statutes. Instead, we engage in an independent analysis to "determine legislative intent and the effect of the severability section of the statute." *In re Dostert*, 174 W.Va. 258, 272, 324 S.E.2d 402, 416 (1984), *overruled on other grounds byHarshbarger v. Gainer*, 184 W.Va. 656, 403 S.E.2d 399 (1991). *See also State ex rel. Trent v. Sims*, 138 W.Va. 244, 77 S.E.2d 122 (1953) (invalidating entire statute even though the statute contained a severability provision); *Lingamfelter v. Brown*, 132 W.Va. 566, 52 S.E.2d 687 (1949) (same); *Hodges v. Public Serv. Comm'n*, 110 W. Va. 649, 159 S.E. 834 (1931) (same). The reason for this procedure is that a severability provision "provides a rule of construction which may aid in determining legislative intent, 'but it is an aid merely; not an inexorable command.'" . . .

This Court has adopted the following statutory construction principle that is applied in determining the issue of severability:

> A statute may contain constitutional and unconstitutional provisions which may be perfectly distinct and separable so that some may stand and the others will fall; and if, when the unconstitutional portion of the statute is rejected, the remaining portion reflects the legislative will, is complete in itself, is capable of being executed independently of the rejected portion, and in all other respects is valid, such remaining portion will be upheld and sustained.

Syl. pt. 6, *State v. Heston*, 137 W. Va. 375, 71 S.E.2d 481 (1952). . . .

2. The twelve juror provision of W. Va. Code § 55-7B-6d. The remaining provision in W. Va. Code § 55-7B-6d directs that "the jury in any trial of an action for medical professional liability shall consist of twelve members." As will be shown, this provision is invalid because it is in conflict with a specific rule promulgated by this Court and because it is not severable from the unconstitutional non-unanimous jury verdict provision.

The issue of the number of jurors in a civil action is addressed in Rule 47(b) of the West Virginia Rules of Civil Procedure. Rule 47(b) states, in relevant part, that "unless the court directs that a jury shall consist of a greater number, a jury shall consist of six persons." Under W. Va. Code § 55-7B-6d, it is mandatory that a trial court seat twelve jurors in a medical malpractice action. However, under Rule 47(b), a jury is limited to six members unless, in the exercise of the trial court's discretion, a greater number is imposed.[22] Clearly, the twelve juror requirement of W. Va. Code § 55-7B-6d is in conflict with Rule 47(b) and is therefore unconstitutional and invalid for that reason alone.

Additionally, the twelve juror requirement is dependent upon and intertwined with the unconstitutional non-unanimous jury verdict provision of W. Va. Code § 55-7B-6d. In order for the non-unanimous jury verdict provision to take effect, twelve jurors must be chosen so that a minimum of nine jurors may render a verdict. Consequently, the twelve juror provision is invalid because it is not severable from the unconstitutional non-unanimous jury verdict provision of W. Va. Code § 55-7B-6d.

3. Six Member Jury Exemption in Amendment to W. Va. Code § 56-6-11. The 2001 amendment to W. Va. Code § 56-6-11 added subsection (c), which provides:

> The provisions of this section providing for a six member jury trial do not apply to any proceeding had pursuant to article seven-b, chapter fifty-five of this code, the provisions of which apply to all cases involving a medical professional liability action.

Clearly, W. Va. Code § 56-6-11(c)'s exemption of a six person jury in medical malpractice cases is dependent upon the twelve person provision in W. Va. Code § 55-7B-6d, which we have invalidated. Consequently, we find the 2001 amendment to W. Va. Code § 56-6-11(c) is inseverable from W. Va. Code § 55-7B-6d and is therefore invalid. . . .

IV.

CONCLUSION

. . . [We] reverse the order denying a new trial and remand this case for a new trial consistent with this opinion.

Reversed and Remanded.

[A concurring opinion by Justice Albright and a dissenting opinion by Justice Maynard are omitted.]

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[22]One exception exists. Pursuant to Rule 71A, of the West Virginia Rules of Civil Procedure, twelve jurors are required in eminent domain proceedings. It has been noted that "Rule 71A articulates the constitutional right to a jury of twelve persons in an eminent domain proceeding." Cleckley, Davis, & Palmer, *Litigation Handbook §* 71A(b), at 1055. *See also* W. Va. Const. art. III, § 9 (requiring 12 jurors in eminent domain proceedings).

Benjamin, Justice, concurring, in part, and dissenting, in part.

. . . We must focus our review upon whether portions of the MPLA, purporting to govern a sub-category of civil liability cases, are consistent with our Constitution, or, if not, whether they must yield to our Constitution's delegation of such authority to the Judiciary *(i.e.,* this Court's rules governing the practice and procedure applicable to civil liability cases brought in the courts of this State). While the Legislature may have chosen to enact certain statutory provisions applicable only to medical professional liability actions in an attempt to stabilize the availability of health care services in this State, the Legislature may not in so doing appropriate for itself the constitutional authority to supercede or nullify this Court's constitutionally empowered procedural rules or to deny long-standing rights reserved to the people.

Thus, I concur with the majority's conclusion that the non-unanimous verdict provision of W. Va. Code § 55-7B-6d (2001) is unconstitutional because it violates Article V, Section 1 of the West Virginia Constitution. Article V, Section 1, known as the "Separation of Powers Clause," mandates that the powers of the legislative, executive and judicial branches of government remain separate and distinct. The West Virginia Constitution, likewise, specifies each branch's legitimate powers. Article VIII, Section 3 of the West Virginia Constitution, vests this Court with the exclusive power to enact rules governing "process, practice, and procedure" in the courts of this State.

I agree with the majority that rules governing jury verdicts, such as size and unanimity requirements, are procedural matters over which this Court has sole authority. . . . Rules governing jury size and unanimity are deemed procedural because they do not affect substantive rights. Rather, they determine how substantive rights are to be enforced. So long as this Court has a validly enacted procedural rule governing an issue, the Legislature may not seek to circumvent such a rule under the guise of tort reform or any other perceived immediacy. Rule 48 of the *West Virginia Rules of Civil Procedure* adopted in 1998, three years prior to the enactment W. Va. Code § 55-7B-6d, permits a majority verdict in the very limited circumstances where the *parties stipulate* to a less than unanimous verdict. Thus, adoption of Rule 48 . . . modified the long standing common law unanimous verdict requirement in limited situations. . . .

Likewise, I concur that the twelve person jury requirement contained within W. Va. Code § 55-7B-6d is an unconstitutional violation of the Separation of Powers Clause because it, too, infringes upon this Court's rule making power. As noted above, rules governing the size of a jury are procedural matters governed by this Court's rules. I dissent, however, from the majority's reversal of the trial court's decision herein to empanel a twelve member jury. Rule 47(b) of the *West Virginia Rules of Civil Procedure* vests a trial court with the discretion to direct that a jury consist of more than six jurors. Specifically, Rule 47(b) provides, in pertinent part, "unless the court directs that a jury shall consist of a greater number, a jury shall consist of six persons." The record is clear that the trial court directed that the jury in this matter consist of twelve persons. However, the record before this Court does not indicate *why* the trial court directed that twelve persons be empaneled on the jury. I choose not to speculate that the trial court had an improper reason, *i.e.,* a belief that the unconstitutional provisions contained within W. Va. Code § 55-7B-6d were binding on it, for the court's decision to empanel a twelve person jury. As the record is unclear as to the reason for the decision to empanel twelve persons, Appellant's burden has not been met. I would not reverse this discretionary decision. . . .

I conclude that a legislative body may not, years after it has dissolved and been replaced by a new legislative body, reach out from the grave to invalidate an otherwise valid law of this state in the manner intended by this clause. The insertion of a "poison pill" clause into otherwise valid legislation constitutes a usurpation of this Court's role in determining the validity of lawfully enacted statutes. Our system of governance does not envision legislative "dares" to this Court to not invalidate unconstitutional legislative enactments. A non-severability clause, such as here, improperly seeks to protect an unconstitutional enactment from legitimate scrutiny by the judicial

branch by linking it to viability of valid law (law which has been followed and properly relied upon in this State for years). By such "poison pills", the message to this Court is clear – either we permit unconstitutional legislation to stand, or otherwise valid statutes which have been relied upon and used for years by citizens of West Virginia become collateral damage. The Judiciary must resist such an injection of politics into this Court's decisions. This Court's duty to determine the constitutionality of legislation must not be impeded, constrained, threatened or cajoled. Separation of Powers, a foundation of our constitutional system of governance, proscribes any such legislative posturing which would cause us indirectly to do that which we would not do directly.

The non-severability provision of W. Va. Code § 55-7B-11(b) violates the Separation of Powers Clause of our Constitution. It constitutes an improper attempt by the Legislature to usurp this Court's independent consideration of the constitutionality of individual statutes. Any attempt to improperly influence this Court's duty of constitutional scrutiny by hinging the validity of otherwise constitutional legislation upon the requirement that this Court uphold otherwise unconstitutional legislation is intolerable and, therefore, invalid. The 2001 Legislature cannot now act to repeal otherwise valid legislation in 2005. Should the current Legislature seek to do so, it may.

STATE OF WEST VIRGINIA EX REL. WORKMAN v. CARMICHAEL,
241 W. Va. 105, 819 S.E.2d 251 (2018).

Matish, Acting Chief Justice.

[The framing of this case and other issues relating to Article V and the separation of powers appear in Chapter 5, *supra*.]

B.

An Administrative Rule Promulgated by the Supreme Court Supersede[s] Statutes in Conflict with [It]

The first issue we address is the Petitioner's contention that two of the Articles of Impeachment against her are invalid, because they can only be maintained by violating the constitutional authority of the Supreme Court to promulgate rules that have the force of law and supersede any statute that conflicts with them. The two Articles of Impeachment in question are Article IV[26] and Article VI.[27] Both of those Articles charge the Petitioner with improperly overpaying senior-status judges. The Petitioner argues that the statute relied upon by Article IV and Article VI is in conflict with an administrative order promulgated by the Chief Justice.

We begin by observing that the 1974 Judicial Reorganization Amendment of the Constitution of West Virginia centralized the administration of the state's judicial system and placed the administrative authority of the courts in the hands of this Court. . . . The Amendment rewrote Article VIII, substituting §§ 1 to 15 for former §§ 1 to 30, amended § 13 of Article III, and added §§ 9 to 13 to Article IX. Justice Cleckley made the following observations regarding the changes:

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[26][Article IV stated that Chief Justice Margaret Workman, and Justice Robin Davis signed and approved contracts necessary "to overpay certain Senior Status Judges in violation of the statutory limited maximum salary for such Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges 'shall receive the salaries fixed by law' and the provisions of W.Va. Code § 51-2-13 and W.Va. Code § 51-9-1 0 . . . and in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct."]

[27]Article VI stated that Justice Margaret Workman signed certain Forms WV 48, to retain and compensate certain Senior Status Judges the execution of which forms allowed the Supreme Court of Appeals to overpay those certain Senior Status Judges in violation of the statutorily limited maximum salary for such Judges, which overpayment is a violation of Article VIII, § 7 of the West Virginia Constitution, stating that Judges 'shall receive the salaries fixed by law' and the provisions of W.Va. Code § 51-2-13 and W.Va. Code § 51-9-10 [and] in violation of the provisions of Canon I and Canon II of the West Virginia Code of Judicial Conduct."]

> These changes include the entirety of the Reorganization Amendment and its concept of a unified court system administered by this Court and not the legislature. More specifically, that same amendment altered Section 1 of Article VIII to provide that the judicial power of the State "shall be vested solely " in this Court and its inferior courts. The predecessor provision to Section 1, though similarly worded, did not include the limiting adverb "solely." . . . Under the Amendment, the Judiciary, not the executive branch, is vested with the authority to resolve any substantial, genuine, and irreconcilable administrative conflicts regarding court personnel. The judicial system was revised, among other things, to simplify the administrative process and to complement prior nonconflicting statutory and case law. Clearly, the administrative structure requires that if there is a conflict, we must not only consider the concerns of the parties, but also look at the hierarchy of the court system. The administration of the court is very important to the unobstructed flow of court proceedings and business. Court actions are complicated enough without adding to their complexity a struggle over every administrative decision to be made. The purpose of judicial administrative authority is to enhance and simplify our court system and not to burden it.

State ex rel. Frazier v. Meadows, 193 W. Va. 20, 26-28, 454 S.E.2d 65, 71-73 (1994). Professor Bastress has compared the general authority of the Supreme Court before and after the Reorganization Amendment as follows:

> The third and fourth paragraphs, added by the Judicial Reorganization Amendment of 1974, establish the unitary judicial system in West Virginia. The first of those grants the court the power to promulgate rules of procedure relating to all aspects of judicial proceedings in the state. Although the court had previously asserted that as an inherent power, it also conceded that the legislature retained the ultimate authority. After the 1974 amendment, however, the court has ruled, in justifiable reliance on the language of section 3, that the court's rules supersede any legislation in conflict with a court-promulgated rule.

Bastress, *West Virginia State Constitution*[.] See *Foster v. Sakhai*, 210 W. Va. 716, 724 n.3, 559 S.E.2d 53, 61 n.3 (2001) ("the constitutional power and inherent power of the judiciary prevent another branch of government from usurping the Court's authority.").

One of the most important changes that the Reorganization Amendment made was to provide this Court with the exclusive constitutional authority to promulgate administrative rules for the effective management of the judicial system, that "have the force and effect of statutory law and operate to supersede any law that is in conflict with them." Syl. pt. 1, in part, *Stern Brothers, Inc. v. McClure*, 160 W.Va. 567, 236 S.E.2d 222 (1977). This authority is found in Article VIII, § 3 of the Constitution of West Virginia. We will address the relevant text of both provisions separately.[29]

To begin, we will look at the Rule-Making Clause of Section 3. The relevant text of the Rule-Making Clause of Section 3 provides as follows:

> The court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the state relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law.

Section 3 unquestionably provides this Court with the sole constitutional authority to promulgate rules for the judicial system, and demands that those rules have the force of law. See Syl. pt. 5, *State v. Wallace*, 205 W. Va. 155, 517 S.E.2d 20 (1999)[.] [Additional citations are omitted.]

The responsibility imposed on this Court by Section 3 was articulated in *State ex rel. Bagley v. Blankenship*, 161 W.Va. 630, 246 S.E.2d 99 (1978):

> The Judicial Reorganization Amendment, Article VIII, Section 3, of the Constitution, placed heavy responsibilities on this Court for administration of the state's entire court system. The

[29]The authority of the Court to promulgate rules is also contained in Article VIII, § 8. This provision is discussed in the next section of this opinion.

> mandate of the people, so expressed, commands the members of the Court to be alert to the needs and requirements of the court system throughout the state.

Bagley, 161 W.Va. at 644–45, 246 S.E.2d at 107. "Not only does our Constitution explicitly vest the judiciary with the control over its own administrative business, but it is a fortiori that the judiciary must have such control in order to maintain its independence." Syl. pt. 2, *State ex rel. Lambert v. Stephens*, 200 W.Va. 802, 490 S.E.2d 891 (1997). . . . In carrying out the responsibility imposed by Section 3, this Court has not been hesitant in finding statutes void when they were in conflict with any rule promulgated by this Court. See Syl. pt. 1, *Witten v. Butcher*, 238 W. Va. 323, 794 S.E.2d 587 (2016)[.] [Numerous citations and their holdings are omitted.]

Before we address the issue of overpayment of senior-status judges, we must examine the text of the Senior-Status Clause found in Article VIII, § 8 of the Constitution of West Virginia provides as follows:

> A retired justice or judge may, with his permission and with the approval of the supreme court of appeals, be recalled by the chief justice of the supreme court of appeals for temporary assignment as a justice of the supreme court of appeals, or judge of an intermediate appellate court, a circuit court or a magistrate court. . . .
>
> However, as a result of the Judicial Reorganization Amendment of 1974, the legislature was divested of all administrative powers over state court judges. No provision similar to former art. VIII, § 15 [which conferred those] exists. Instead, this Court was given "general supervisory control over all intermediate appellate courts, circuit courts and magistrate courts," and the Chief Justice, as "administrative head of all the courts," was specifically given the power of temporary assignment of circuit judges.

Crabtree, 180 W. Va. at 427 n.3, 376 S.E.2d at 633 n.3 (internal citations omitted). . .

The decision in *Stern Bros. v. McClure*, 160 W. Va. 567, 236 S.E.2d 222 (1977) addressed the issue of statutes that attempted to control assignments of judges, but were in conflict with an administrative rule of this Court. . . . The opinion reasoned as follows:

> . . . [The Court's] rules have the force and effect of statutory law by virtue of Article VIII, Section 8 of the Judicial Reorganization Amendment.... Prior to the adoption of the Judicial Reorganization Amendment, there may have been some question as to this Court's supervisory powers over lower courts. It is now quite clear under the Judicial Reorganization Amendment that considerable supervisory powers have been conferred upon this Court. ...
>
> Undoubtedly, one of the reasons behind the Judicial Reorganization Amendment was to provide a more simplified system of handling the problem of securing a replacement judge where the original judge is disqualified. . . .
>
> The administrative rule promulgated by this Court now controls the procedure for selection of a temporary judge where a disqualification exists as to a circuit court judge. Under Article VIII, Section 8 of the West Virginia Constitution, it operates to supersede the existing statutory provisions found in W.Va. Code, 51-2-9 and -10, and W.Va. Code, 56-9-2, insofar as they relate to the selection of special judges or the assignment of the case to another circuit judge when a circuit judge is disqualified.

Stern, 160 W. Va. at 572-575, 236 S.E.2d at 225-227.

In the final analysis, the foregoing discussion instructs this Court that statutory laws that are repugnant to the constitutionally promulgated rules of this Court are void. With these legal principles in full view, we turn to the merits of the issue presented.

Two of the Articles of Impeachment brought against the Petitioner, Article IV and Article VI, charge her with overpaying senior-status judges in violation of the maximum payment allowed under W.Va. Code § 51-9-10. The Articles of Impeachment also state that the overpayments violated W.Va. Code § 51-2-13, W.Va. Const. Art. VIII, § 7, an administrative order of the Supreme Court and Canon I and II of the West Virginia Code of Judicial Conduct. The Articles also allege that the overpayments "potentially" violate two criminal statutes: W.Va. Code § 61-3-22 (falsification of

accounts) and W.Va. Code § 61-3-24 (obtaining money by false pretenses).[32] The viability of all of the alleged violations in the two Articles hinge upon whether the Petitioner overpaid senior-status judges. The determination of overpayment is controlled by W.Va. Code § 51-9-10, which limits the payment to senior-status judges. The [text] of W.Va. Code § 51-9-10 provides [that] "*the per diem and retirement compensation of a senior judge shall not exceed the salary of a sitting judge*, and allowances shall also be made for necessary expenses as provided for special judges under articles two and nine of this chapter." (Emphasis added.)

The Petitioner does not dispute that she authorized the payment of senior-status judges, when necessary, in excess of the limitation imposed by the statute. Although the Petitioner has advanced several arguments as to why her conduct was valid, we need only address one of her arguments. That argument centers on an administrative order promulgated by the Chief Justice on May 17, 2017. The order expressly authorized the payment of senior-status judges in excess of the limitation imposed by W.Va. Code § 51-9-10. The order stated that it was being promulgated under the authority of Article III, §§ 3, 8, and 17. The order also stated the reason for the decision to authorize payment in excess of the statutory limitation:

> In the vast majority of instances, the statutory proviso [W.Va. Code § 51-9-10] does not interfere with providing essential services. However, in certain exigent circumstances involving protracted illness, lengthy suspensions due to ethical violations, or other extraordinary circumstances, it is impossible to assure statewide continuity of judicial services without exceeding the payment limitation imposed by the statutory proviso.

. . . West Virginia Code § 51-9-10, in its entirety, is repugnant to Article VIII, § 3 and § 8. The statute seeks to control a function of the judicial system, appointing senior-status judges for temporary service, when Article VIII, § 8 has expressly given that function exclusively to the Supreme Court. Moreover, the statute's limitation on payment to senior-status judges is void and unenforceable, because of the administrative order promulgated on May 17, 2017. See Syl. pt. 4, *State ex rel. Brotherton v. Blankenship*, 157 W.Va. 100, 207 S.E.2d 421 (1973) ("The judiciary department has the inherent power to determine what funds are necessary for its efficient and effective operation."). Finally, as we have long held, "[l]egislative enactments which are not compatible with those prescribed by the judiciary or with its goals are unconstitutional violations of the separation of powers." *State ex rel. Quelch v. Daugherty*, 172 W. Va. 422, 424, 306 S.E.2d 233, 235 (1983). To be clear, and we so hold, West Virginia Code § 51-9-10 (1991) violates the Separation of Powers Clause of Article V, § 1 of the West Virginia Constitution, insofar as that statute seeks to regulate judicial appointment matters that are regulated exclusively by this Court pursuant to Article VIII, § 3 and § 8 of the West Virginia Constitution. Consequently, W.Va. Code § 51-9-10, in its entirety, is unconstitutional and unenforceable.[36]

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[32]We must note that "potentially" violating a criminal statute is not wrogful impeachable conduct. Therefore the language in the Articles of Impeachment that state that W. Va. Code § 61-3-22 and W. Va. Code § 61-3-24 were "potentially" violated are meaningless allegations.

[36]We summarily dispense with the Articles of Impeachment's reference to the Salary Clause of Article VIII, § 7 as a source of legislative authority for regulating payments to senior-status judges. This clause does not provide such authority. The Salary Clause provides as follows:Justices, judges and magistrates shall receive the salaries fixed by law, which shall be paid entirely out of the state treasury, and which may be increased but shall not be diminished during their term of office, and they shall receive expenses as provided by law. The salary of a circuit judge shall also not be diminished during his term of office by virtue of the statutory courts of record of limited jurisdiction of his circuit becoming a part of such circuit as provided in section five of this article.It is clear from the plain text of the Salary Clause that it only applies to salaries of judges "during their term of office." See Syl. pt. 1, *State ex rel. Trent v. Sims*, 138 W.Va. 244, 77 S.E.2d 122 (1953) ("If a constitutional provision is clear in its terms, and the intention of the electorate is clearly embraced in the language of the provision itself, this Court must apply and not interpret the provision."). Senior-status judges are retired judges and do not hold an office. Therefore, the Salary Clause does not provide the Legislature with authority to regulate the per diem payment of senior-status judges.

In light of our holding, the Petitioner did not overpay any senior-status judge as alleged in Article IV and Article VI of the Articles of Impeachment, therefore the Respondents are prohibited from further prosecution of the Petitioner under those Articles.

C.

The Supreme Court has Exclusive Jurisdiction to Determine whether a Judicial Officer's Conduct Violates a Canon of the Code of Judicial Conduct

The Petitioner next contends that Article XIV of the Impeachment Articles is invalid because it is based upon alleged violations of the West Virginia Code of Judicial Conduct, which, she contends, is constitutionally regulated by the Supreme Court.[37] To be blunt, Article XIV is an unwieldy compilation of allegations that culminate with the accusation that the Petitioner's conduct, with respect to the allegations, violated Canon I[38] and Canon II[39] of the Code of Judicial Conduct. We agree with the Petitioner that this Court has exclusive constitutional jurisdiction over conduct alleged to be in violation of the Code of Judicial Conduct.

The controlling constitutional authority is set out under Article VIII, § 8 of the Constitution of West Virginia. We have held that "[p]ursuant to article VIII, section 8 of the West Virginia Constitution, this Court has the inherent and express authority to 'prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof [.]' " Syl. pt. 5, *Committee on Legal Ethics v. Karl*, 192 W.Va. 23, 449 S.E.2d 277 (1994). The relevant text of Section 8 provides as follows:

> Under its inherent rule-making power, which is hereby declared, the supreme court of appeals shall, from time to time, prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof, and the supreme court of appeals is authorized to censure or temporarily suspend any justice, judge or magistrate having the judicial power of the state, including one of its own members, for any violation of any such code of ethics, code of regulations and standards, or to retire any such justice, judge or magistrate who is eligible for retirement under the West Virginia judges' retirement system (or any successor or substituted retirement system for justices, judges and magistrates of this state) and who, because of advancing years and attendant physical or mental incapacity, should not, in the opinion of the supreme court of appeals, continue to serve as a justice, judge or magistrate.
>
> * * *
>
> When rules herein authorized are prescribed, adopted and promulgated, they shall supersede all laws and parts of laws in conflict therewith, and such laws shall be and become of no further force or effect to the extent of such conflict.

This Court's express constitutional authority to adopt rules of judicial conduct and discipline is obvious from the language of Section 8. Pursuant to this express authority, we have adopted the Code of Judicial Conduct and the Rules of Judicial Disciplinary Procedure. Under Rule 4.10 and Rule 4.11 of the Rules of Judicial Disciplinary Procedure, this Court has the exclusive authority to determine whether a justice, judge, or magistrate violated the Code of Judicial Conduct. The record does not disclose that this Court has found that the Petitioner violated Canon I or Canon II, based

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[37]Article XIV stated that the Justices had failed to develop adequate policies to control and account for the use of public funds by the Court.

[38]Canon I states the following:A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

[39]II states the following:A judge shall perform the duties of judicial office impartially, competently, and diligently.

upon the allegations alleged in Article XIV of the Articles of Impeachment. Moreover, even if the record had disclosed that the Petitioner was previously found to have violated the Canons in question, those violations could not have formed the basis of an impeachment charge. This is because of the limitations imposed upon the scope of a Canon violation that is found by this Court. The following is provided in Item 7 of the Scope of the Code of Judicial Conduct:

> The Code is not designed or intended as a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court.

It is quite clear that Item 7 prohibits a Canon violation from being used as the "basis" of a civil or criminal charge and, thus, could not be used as a basis for impeaching the Petitioner.[41] This Court observed in *In re Watkins*, 233 W. Va. 170, 757 S.E.2d 594 (2013):

> Just as the legislative branch has the power to examine the qualifications of its own members and to discipline them, this Court has the implicit power to discipline members of the judicial branch. The Court has this power because it is solely responsible for the protection of the judicial branch, and because the power has not been constitutionally granted to either of the other two branches.

Watkins, 233 W. Va. at 177, 757 S.E.2d at 601.

It is quite evident to this Court that the impeachment proceedings under Article XIV of the Articles of Impeachment requires the Court of Impeachment to make a determination that the Petitioner violated Canon I and Canon II. Such a determination in that forum violates the separation of powers doctrine, because pursuant to Article VIII, § 8 of the Constitution of West Virginia, this Court has the exclusive authority to determine whether the Petitioner violated either of those Canons. In other words, and we so hold, this Court has exclusive authority and jurisdiction under Article VIII, § 8 of the West Virginia Constitution and the rules promulgated thereunder, to sanction a judicial officer for a violation of a Canon of the West Virginia Code of Judicial Conduct. Therefore, the Separation of Powers Clause of Article V, § 1 of the West Virginia Constitution prohibits the Court of Impeachment from prosecuting a judicial officer for an alleged violation of the Code of Judicial Conduct.

The Respondents have argued that "to hold that the Legislature cannot consider the Code of Judicial Conduct in its deliberation of impeachment proceedings against a judicial officer would have the absurd result of prohibiting removal from office for any violations of the Code of Judicial Conduct." This argument misses the point. Unquestionably, the Legislature can consider in its deliberations whether there was evidence showing that this Court found a judicial officer violated a Canon. However, the Canon violation itself cannot be the basis of the impeachment charge—at most it could only act as further evidence for removal based upon other valid charges of wrongful conduct.

In light of our holding, the Court of Impeachment does not have jurisdiction over the alleged violations set out in Article XIV of the Articles of Impeachment, therefore the Respondents are prohibited from further prosecution of the Petitioner under that Article as written.

NOTE

As *Louk* makes clear, the Court has repeatedly emphasized that Article VIII, § 3 confers upon it authority to create rules and regulations for the administration of the courts, their cases, and their business. Thus, in concluding that the Court had the power to hear an interlocutory appeal from a denial of a motion for a preliminary injunction, the Court held that it was not restricted by a statute arguably confining its appellate review to appeals of final judgments. *State ex rel. McGraw v. Telecheck Services*, 212 W.Va. 438, 582 S.E.2d 885 (2003). According to Justice Starcher's opinion for the majority, "the Legislature's power with respect to this Court's jurisdiction is additive, not subtractive or restrictive. 'Appellate jurisdiction' is 'the power of a reviewing court to correct error

in a trial court proceeding.' . . . *West Virginia Constitution* art. [VIII], sec. 3 provides that this Court has 'appellate jurisdiction' over 'civil cases in equity.' This language does not limit this Court's power to review and correct error in cases in equity to 'final judgments.'"

Recall, too, the assertion of Article VIII judicial powers against the legislative impeachment proceedings in *State ex rel. Workman v. Carmichael* at the end of Chapter 4, *supra*.

C. Circuit Courts

Read Article VIII, § 5-6, 9.

INTRODUCTION

[Extracted from ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 246-48 (2nd ed., Oxford University Press, 2016).]

Article VIII, § 5 establishes a system of circuit courts, the state's trial courts of general jurisdiction. The Judicial Amendment of 1974 consolidated sections 10, 11, 13, 14, and 15 of the old Article VIII into § 5, deleted the language in section 13 that had made the original division of the state into circuits, and made a few other changes.

The first paragraph of section 5 provides for the election of circuit judges to eight-year terms and leaves to the legislature the option of making the elections nonpartisan. The legislature exercised that option in 2015, so beginning in 2016 circuit judges will be elected on a nonpartisan basis. The paragraph also converted "each statutory court of record of limited jurisdiction" to a circuit court. The provision eliminated courts the legislature had created in some of the more populous counties to handle especially heavy case loads. The Supreme Court has held that section 5 not only abolished courts of limited jurisdiction, but also divested the legislature of any ability to create new ones. *Starcher v. Crabtree* (1986). Thus, a post-1974 statute that created family law masters to hear and render final judgments in domestic cases violated this section and section 6. Starcher; See Art. VIII, § 16, infra (establishing family courts). Finally, the paragraph requires that circuit judges be residents of their circuits during their entire term of office.

The second paragraph empowers the legislature to adjust the number of judges in a circuit (so long as decreases are not implemented during an affected judge's term of office), to rearrange the circuits' configuration, and to change the number of circuits. Any exercise of the latter two powers may be implemented only in the year prior to that in which judges are elected for their full terms in the redefined circuits. Judges who are in office when their circuits are changed in any way shall, if they continue to meet the circuit residency requirement, continue to serve to the end of their term or until resignation or removal.

According to the third paragraph of section 5, each circuit gets at least one judge and as many more as are needed. In keeping with the pyramidal design of the 1974 Judicial Amendment, each circuit with two or more judges selects a chief judge, and that person—or the circuit judge in single-judge circuits—serves as the chief administrator for the circuit and oversees the operations of the court, the circuit clerk's office, and the magistrate courts. See sec. 6, below. By virtue of the fourth paragraph, the supreme court has the duty to allocate responsibilities among the judges in multi-judge circuits, but it is an authority that the court has not exercised, at least in the absence of inter-judge disputes. Rather, the Court has left the allocation of business up to the individual circuits.

The final paragraph requires that circuit court must be held in every county in the state at least three times a year. This provision is of greatest significance for multiple-county circuits and ensures that easy access to court can be had even in those counties that do not have a resident judge. Section 5 assigns to the supreme court the task of setting the times at which each circuit court shall sit. See W. Va. Trial Court Rules. Rules 2.01 to 2.31.

Section 6 establishes the jurisdiction of circuit courts and vests administrative authority in chief circuit judges for multiple-judge circuits and in circuit judges for single-judge circuits. The jurisdictional component of section 6 is substantially similar to Article VIII, section 12 under the original 1872 Constitution and, except for some differences regarding the common law writs, to Article VI, section 6 of the 1863 Constitution.

The first paragraph empowers the circuit courts to issue common law writs to control magistrate courts, much as section 3 does for the supreme court to control inferior tribunals. See the commentary to section 3 for a discussion of those writs. Section 6's second paragraph provides the most critical jurisdictional provisions. The broad jurisdictional powers created by the paragraph give circuit courts the authority to hear as original matters all criminal cases; all civil cases at law (referring to actions derived from, or akin to, common law causes of action) where the amount in controversy is less than $100, exclusive of interest and costs; all cases in equity (referring to suits seeking equitable relief, such as an injunction); and any action based on one of the common law extraordinary writs (mandamus, quo warranto, etc.). The last power is shared concurrently with the supreme court (see Art. VIII, sec. 3). The amount-in-controversy minimum for cases at law may be increased by the legislature. (Section 51-2-2 of the West Virginia Code currently sets the threshold at $2,500.) Cases in equity and proceedings seeking an extraordinary writ are not subject to the amount-in-controversy limitation. Section 6 permits county commissions to continue to hear probate matters, but also authorizes the legislature to assign such cases to the circuit courts. At this time, the legislature has not done so.

Section 6's third paragraph confers appellate jurisdiction on the circuit courts to review magistrate court decisions. The legislature may, however, divest that authority by conferring it exclusively on the supreme court or, if ever created, intermediate appellate court. By virtue of the fourth paragraph, the legislature may expand the circuit courts' powers beyond those specifically provided in this section.

The final two paragraphs set forth the circuit courts' administrative powers. Each circuit, subject to supreme court approval, may promulgate local rules of procedure. The supreme court has, however, promulgated a set of trial court rules that pre-empts most local rules. In addition, and in keeping with the hierarchical scheme of the 1974 Judicial Amendment, the last paragraph makes the circuit judge in single-judge circuits and the chief judge in those with multiple judges the administrative head of all the courts in the circuit. As such, he or she possesses, "except to the extent that the circuit courts are given explicit direction by the Supreme Court of Appeals, the power to control the local affairs of the circuit." *Carter v. Taylor*, 180 W. Va. 570, 572, 378 S.E.2d 291, 293 (1989) (*quoting Rutledge v. Workman*, 175 W. Va. 375, 381, 332 S.E.2d 831, 836 (1985)).

RUTLEDGE v. WORKMAN,
175 W. Va. 375, 332 S.E.2d 831 (1985).

NEELY, Justice.

The issues presented by this case concern the role of the Clerk of the West Virginia Circuit Court, the proper exercise of the Court's jurisdiction and administrative authority, and the inherent dignity of the circuit court itself. The petitioner, Phyllis J. Rutledge, is the Clerk of the Circuit Court of Kanawha County and the respondent, Margaret Workman, is a Judge of that Circuit Court.

This novel prohibition proceeding arose when Judge Margaret Workman entered an order prohibiting the transfer of Ms. DeeAnn Hill, one of Mrs. Rutledge's Deputy Circuit Clerk's, out of Judge Workman's court to other duties. Judge Workman's order was then ratified by an order of the Chief Circuit Judge, A Andrew MacQueen. Although Mrs. Rutledge admits that W. Va. Code [6-3-1(a)(1)] requires Court approval before she may hire personnel initially, she asks us to vindicate her position that she has absolute, complete, and unfettered discretion to fire, assign, and reassign

personnel in the office of the circuit clerk.

. . . From [the record] we glean that the Circuit Court of Kanawha County and the office of its circuit clerk is a daily battleground for sordid, unnecessary, and debilitating political in-fighting. This particularly concerns us because Kanawha County has a population of roughly 231,414 inhabitants, is the seat of State government, is the largest county in the State, and is the residence of most state officials. Accordingly its court is crowded with important government matters[.] . . .

The Governor appointed Judge Margaret Workman to office in November, 1981 and at that time Mrs. Rutledge was already the elected circuit court clerk. During the first months of her tenure, Judge Workman labored without the benefit of a courtroom clerk until March 1982 when Mrs. Rutledge assigned Mrs. Iris Brisendine. Mrs. Brisendine performed capably and to Judge Workman's complete satisfaction. After a year, however, Mrs. Rutledge re-assigned Mrs. Brisendine to the court of Judge Robert K. Smith and assigned Ms. Louise Owenby, who had been Judge Smith's clerk, to Judge Workman. Both Judge Workman and Judge Smith objected in writing to this exchange of clerks, but Mrs. Rutledge ignored their request for cooperation. In her deposition, Mrs. Rutledge acknowledged that Ms. Owenby was "not a good courtroom clerk," but Mrs. Rutledge made no attempt to discharge Ms. Owenby or to re-assign her to other duties. Nonetheless, Judge Workman worked with Ms. Owenby and after awhile found her courtroom work acceptable.

Chief Judge MacQueen testified that he attempted to intercede at the time Mrs. Rutledge transferred Mrs. Brisendine and replaced her with Ms. Owenby, but that Mrs. Rutledge refused to reconsider the matter. Furthermore, according to Judge MacQueen, Mrs. Rutledge's reason for making the transfer was that Ms. Brisendine's loyalties were being transferred to Judge Workman and it was necessary for Mrs. Rutledge to re-establish "who was boss."

In February 1984, Mrs. Rutledge transferred Ms. Owenby from Judge Workman's court and replaced her with Ms. Jacqueline Ray. Judge Workman soon discharged Ms. Ray for rank insubordination and disrespect to the judge in the presence of others. Nevertheless, three days later Mrs. Rutledge re-employed Ms. Ray as a staff assistant without any serious inquiry into the circumstances surrounding Ms. Ray's dismissal by Judge Workman.

After Judge Workman had Ms. Ray removed as an officer of her court, there was a period between February and May 1984, during which Judge Workman was without a regularly assigned courtroom clerk. Because she often was forced to work with more than one clerk during the course of a single judicial day, Judge Workman repeatedly asked Mrs. Rutledge's administrative assistant to assign a deputy clerk to her court on a permanent basis. Finally in May, 1984, Ms. DeeAnn Hill was assigned to Judge Workman.

In November 1984, however, Mrs. Rutledge notified the judges that she would transfer various courtroom clerks, including Ms. Hill. Upon receiving that notice, Judge Workman entered her order prohibiting the transfer of Ms. Hill without the court's approval, and the record clearly shows that from the point of view of proper judicial administration, the order was more than justified. Not only was Judge Workman's efficiency impaired by the assignment of incompetent clerks to her court, and the transfer of competent clerks out of her court, but also on many occasions her court's efficiency was impaired by the absence of any clerks whatsoever.

Other events add credence to Judge Workman's side of the case. Judge MacQueen testified that Mrs. Rutledge transferred Ms. Micky Amick, Judge MacQueens' courtroom clerk, and replaced her with Mr. Joseph Schirrman, Mrs. Rutledge's son-in-law. Judge MacQueen described Ms. Amick as "probably the best clerk I have ever had . . . . because of her proficiency, her willingness to learn, ... and her ability to work together with me, with my secretary, my bailiff, and my court reporter." According to Judge MacQueen, the performance of Mrs. Rutledge's son-in-law has been less than stellar. The record in this case is replete with accusations, counter-accusations, and other billingsgate concerning the relation of personnel decisions in the circuit clerk's office to factional politics in Kanawha County. None of that information, however, is relevant to the disposition of this case. We are asked only to decide today whether the clerk of a circuit court is part of that court and subject

to the direction of the chief circuit judge, or, on the contrary, whether the clerk is an independent, elected official with unbridled discretion over the administration of her office. The respective merits of political positions in a county have no bearing on a principled resolution of that issue. We find that the law on this subject is clear: the circuit clerk, although elected by the voters, is completely subject to the control of the chief circuit judge of the circuit court and failure to follow to the letter and in the utmost good faith the direction of the judge or chief circuit judge is grounds for removal from office. Furthermore, a circuit judge has complete control of the deputy circuit clerk assigned to her court.

I

As this case presents a question of first impression, there is only a small corpus of case law to guide our decision. But this is not to say that we are without instruction. The structure of our judiciary, as prescribed by the Constitution of the State of West Virginia, provides us with both a compass and a command.

The paucity of authority on the subject in this jurisdiction is related to the fact that the problem was unlikely to have arisen before the Judicial Reorganization Amendment of 1974 that rewrote our Constitution's judicial article. Before 1974 there was but one circuit judge in each of West Virginia's fifty-five counties, and that allowed for little confusion about who was in charge of the court system. W. Va. Const. art. VIII, §§ 10-16 (1880, amended 1974). A circuit clerk ignored the directions of the circuit judge at considerable peril. In some counties the legislature had, indeed, created inferior courts such as criminal courts, domestic relations courts, or common pleas courts, but the supreme judicial power within the county was held by one elected circuit court judge who was responsible for initial appellate review of the decisions of all statutory courts and controlled the judges of inferior courts through writs of prohibition and mandamus. W. Va. Const. art. VIII, § 12 (1880, amended 1974). See also State v. Mulane, 128 W.Va. 774, 38 S.E.2d 343 (1946) (circuit courts have exclusive jurisdiction to review judgments of courts of limited jurisdiction).

The ratification of the Judicial Reorganization Amendment in 1974 converted all of the intermediate, statutory courts into circuit courts and thus created today's system where one circuit court bench may have as many as seven judges with equal authority. This situation, in turn, made it necessary to create the position of chief circuit judge in multi-judge counties, and that position is filled by election among the circuit judges or, in the event that there is a tie vote, through designation by the Supreme Court of Appeals.

The 1974 Judicial Reorganization Amendment did more than establish a hierarchy among the circuit judges, however. It centralized the administrative power of the entire judicial system and reposed this power in the hands of the Supreme Court of Appeals. The 1974 Judicial Reorganization Amendment patterned our judicial system after the "unitary" system pioneered by New Jersey. The rulemaking power these plans give to their supreme courts in effect make the Chief Justice the administrative head of all courts. The Supreme Court's exclusive authority over administration, and primary responsibility for establishing rules of practice and procedure, secures businesslike management for the courts and promotes simplified and more economical judicial procedures. Given the similar structure of the West Virginia and New Jersey courts, the New Jersey judicial administration experiences are particularly relevant to the problem at hand.

Both the New Jersey and West Virginia courts have faced the problems of insuring that these new "unitary" court systems are also effective court systems. Nowhere have these problems been more apparent than where the courts have had to exercise their new administrative powers to perform their non-judicial duties such as setting their budget or the appointment, transfer or dismissal of court personnel. In these instances, the courts have routinely vindicated their constitutional mandate to exercise the inherent power to administer the court system. State ex rel. Bagley v. Blankenship, 161 W.Va. 630, 246 S.E.2d 99 (1978); (the judiciary has the inherent power to determine what funds are necessary for its efficient operation). . . . We face a similar problem here. As our first duty is to insure the fair and effective dispensation of justice, we hold that the

circuit judges retain control over their clerks.

The New Jersey courts have decided cases on this subject and their reasoning is persuasive. [According to a New Jersey appellate court]:

> The power of the assignment judge to select and assign as his assistants those who satisfy his needs from the coterie of county employees stems from the inherent power of the courts as implemented by R. 1:33-3(b). And although these assistants may remain county employees for the purpose of payment of their remuneration, they nevertheless serve under the control and direction of the assignment judge in the unclassified category and at his pleasure.

Matter of Court Reorganization Plan; etc., 161 N.J. Super. 483, 391 A.2d 1255, 1260 (App. Div. 1978) aff'd o.b. 78 N.J. 498, 396 A.2d 1144 (1979). And since this power to regulate the conduct of the courts is constitutional, it transcends any legislative directives. [Id.] In the same manner, the West Virginia Constitution mandates that we and the circuit court judges administer the judicial system with dispatch. Although the circuit court clerks are more than our minions, the constitution's mandate for effective justice guides their action as well as ours. They must aid the administration of justice or face censure.

Furthermore, it is beyond doubt that the role and authority of circuit court clerk must be analyzed within the framework of the judicial system. W. Va. Const. art. VIII, § 9 establishes the office of the clerk of circuit court. Unlike all other county officials, the office of circuit clerk is created under W. Va. Const. art. VIII, (the judicial article), and not under W. Va. Const. art. IX that creates elected county officials with executive and legislative duties, including the prosecuting attorney, sheriff, assessor, county commission, and clerk of the county commission.

II

Unfortunately, although our constitutional mandate is clear, neither legislative enactment nor specific constitutional provision explicitly address the issue of: "To what extent is a circuit clerk responsible to the circuit court." The only specific legislation is W. Va. Code 6-3-1(a)(1) [1971] which provides as follows:

> The clerk of the supreme court of appeals, or of any circuit, . . . intermediate or county court, or of any tribunal established by law in lieu thereof, may, with the consent of the court, or such tribunal, duly entered of record, appoint any person or persons his deputy or deputies. ...

Obviously, that statute explicitly contemplates that a judge cannot have incompetent, obstreperous, scandalous, or uncooperative personnel thrust upon her and, by implication, it also means that if deputy circuit clerks do not perform in a satisfactory fashion, the judge may have them discharged. Furthermore, although a circuit clerk has duties that are unrelated to the day-to-day operation of the circuit court Code [6-3-1(a)(1)] requires circuit court approval for the hiring of any personnel who have the statutory powers of deputy clerks.

III

In her deposition Mrs. Rutledge opined as follows: "I don't see the office of circuit clerk as a handmaiden to the court . . . ." Unfortunately for Mrs. Rutledge W. Va. Const. art. VIII § 1 is explicit in its placement of all judicial power in the Supreme Court of Appeals and the circuit courts, which means, in effect, that the circuit clerk is an integral part of the circuit court. Both the wording of W. Va. Const. art. VIII, § 1 and the structure of the entire judicial article (Article VIII) are clear in that they establish a centralized state judiciary. Mrs. Rutledge argues that her position as an independently elected, constitutional officer clothes her with discretion and authority independent of the will and pleasure of the circuit court. We, however, find no conflict between the election process that selects Mrs. Rutledge from among competing candidates for the job of circuit clerk and a requirement that after being so selected she serve within the hierarchy of judicial authority. . . . [W]e hold today that by the inclusion of the office of circuit clerk in our Constitution's judicial article, the framers of that article intended to place the circuit clerk within the administrative hierarchy of the judicial system.

Under W. Va. Const. art. VIII administrative direction of the affairs of all of the circuit courts,

magistrate courts, and such other courts as the legislature may from time-to-time create is placed in the Supreme Court of Appeals. At the county level, except to the extent that the circuit courts are given explicit direction by the Supreme Court of Appeals, the power to control the local affairs of the circuit is placed in the circuit judge or the chief circuit judge. It is entirely contrary to the centralized, hierarchical, and well organized structure of the state judiciary as set forth in W. Va. Const. art. VIII for the circuit clerk to be a loose cannon sliding around on the county's judicial deck.

The clerk of a circuit court of this State is subject to the overall administrative control and direction of the West Virginia Supreme Court of Appeals through the Chief Justice and the Administrative Director of the Supreme Court of Appeals and, thereafter, is subject to the day-to-day supervision of the Chief Circuit Judge of the circuit in which the clerk serves. Furthermore, the circuit clerk has an obligation of the utmost good faith in her dealings with all judges of a circuit court, and any decision to hire, fire, promote, demote, or transfer any and all personnel in the office of the circuit clerk that have any responsibility whatsoever within the judicial system must be made with that obligation firmly in mind. A circuit clerk who fails to live up to this obligation may be removed from office pursuant to W.Va. Code [6-6-7]. When there is conflict among or between judges of a circuit court concerning the proper way for a circuit clerk to dispatch her duties, the judgment and discretion of the chief circuit judge controls.

Therefore, . . . the rule to show cause in prohibition heretofore issued is discharged and the writ of prohibition for which the petitioner prays is denied.

STATE OF WEST VIRGINIA EX REL. LAMBERT v. STEPHENS,
200 W. Va. 802. 490 S.E.2d 891 (1997).

Workman, Chief Justice.

This original habeas corpus proceeding [sought] the immediate custodial release of Gordon Lambert, President of the County Commission of McDowell County, and Donald L. Hicks, Sheriff of McDowell County (hereinafter collectively referred to as Relators). This Court issued a writ of habeas corpus *ad subjiciendum*, commanding William Bowman, Administrator of the McDowell County Jail, to release said Relators pending further order of this Court. We also ordered the Honorable Booker T. Stephens, Chief Judge of the Circuit Court of McDowell County (hereinafter the Respondent Judge), to file a written response[.] . . . Upon review of the facts of this case, we find it unnecessary to issue a writ of habeas corpus as Relators have purged themselves of any contempt.

I. FACTS

The facts which give rise to this proceeding involve a dispute over a parking area, consisting of eight parking spaces, situated behind the magistrate court building in the City of Welch, McDowell County. On December 18, 1996, the Respondent Judge issued a "General Order," designating the parking area solely for magistrate court personnel use. In this order, the Respondent Judge found the parking area was paid for by the McDowell County Commission (hereinafter Commission) out of the magistrate court fund. The Respondent Judge further warned that violators of the order would face contempt proceedings.

On January 2, 1997, the Commission met to discuss the magistrate court parking situation and the Respondent Judge's order. According to the Respondent Judge, who attended this meeting, the commissioners voted unanimously to authorize Sidney Bell, Prosecuting Attorney of McDowell County, to file a petition for a writ of prohibition challenging the parking order. The very next day, however, before a petition could be filed, construction began on a ramp to provide the disabled access to the sheriff's office. The sheriff's office was located in a building next to the magistrate court building, and the ramp was being built adjacent to the magistrate court parking area. The Respondent Judge was notified of the construction and went to the construction site.

Upon arrival, the Respondent Judge was informed by Sheriff Hicks of his plan to build the ramp.

After viewing the proposed design and the location of the ramp, the Respondent Judge apparently concluded that use of one of the parking spaces at issue would render the ramp inaccessible. Consequently, the Respondent Judge told Sheriff Hicks to appear before him at 1:30 p.m. that day. After the Respondent Judge left, Robert Estep, a maintenance worker employed by the Commission, arrived at the site with materials needed to build the ramp. After learning of Mr. Estep's arrival at the site, the Respondent Judge apparently believed that construction of the ramp had not ceased, and, therefore, he expedited a hearing to be held at 11:30 that morning.

Relators, along with Mr. Bell and Mr. Estep, attended the hearing. At the beginning of the hearing the Respondent Judge stated he requested Sheriff Hicks and Mr. Estep to appear before the court and "show cause why they should not be held in violation of . . . [the December 18, 1996] order." Mr. Estep testified that he was instructed by Sheriff Hicks and "B. G. Smith," who was instructed by President Lambert, to build the ramp up to the edge of the parking lot. Mr. Estep further testified that: (1) the ramp would not be built on the parking lot, but he believed access to the ramp would be blocked if an automobile was parked in the space closest to the ramp; (2) he did not know much about the contents of the circuit court's prior order and merely was doing what he was told to do; and (3) the only construction performed thus far was that he knocked down and dug out a cement curb at the edge of the parking lot and he got some materials to build the ramp.

President Lambert testified at the hearing that he authorized the construction of the ramp, but that he was not at the site when the construction began. During his testimony, he repeatedly stated he did not know the ramp would interfere with the magistrate court parking and was unaware his authorization of the ramp would be viewed as contemptuous of the prior order. Sheriff Hicks testified he believed the ramp would be accessible to a wheelchair even if a vehicle was in the parking space in controversy and he did not believe he was in contempt of the prior order.

At the conclusion of the hearing, the Respondent Judge orally pronounced President Lambert and Sheriff Hicks to be in "criminal contempt" and sentenced Relators to thirty days in jail. The Respondent Judge added, however, that Relators could purge themselves of the contempt by restoring the disturbed area. Mr. Bell's objections and exceptions to the Respondent Judge's decision were noted in the record. . . .

At oral argument before this Court, both parties agreed that the area in controversy was restored and, consequently, the contempt charges against Relators were purged. Consequently, we find the parties' arguments with respect to the alleged procedural deficiencies in the manner in which the Respondent Judge handled the contempt action are moot. Nevertheless, there are . . . significant issues capable of recurrence which merit discussion by this Court. These issues center around . . . the scope of a court's authority to require reasonable and necessary resources for the performance of its responsibilities.

II. DISCUSSION

. . .

B. A Court's Inherent Authority to Require Necessary Resources

The larger underlying issue in this case, and the one capable of repetition, centers on the extent of a court's inherent authority to require reasonable and necessary resources for the performance of its responsibilities. In the instant case, this issue focuses on the Respondent Judge's authority to enter the order designating the parking area solely for the use of magistrate court personnel. Relators contend that, pursuant to West Virginia Code § 7-1-3s (1993), the power to control the parking area is vested with the Commission and that the Respondent Judge improperly encroached upon such power when he entered the parking order. In relevant part, West Virginia Code § 7-1-3s authorizes county commissions "to promulgate rules and regulations . . . governing (1) the movement, regulation or control of vehicular or pedestrian traffic on property owned by or leased by such . . . [county commissions], or (2) the regulation or control of vehicular parking on such property." W. Va. Code § 7-1-3s.

In the "General Order," the Respondent Judge recognized the area was rented from the City of

Welch by the Commission. However, he also found the payments were taken from the magistrate court fund and stated he was relying upon the circuit court's inherent authority to issue the parking order "to eliminate any possibility of misunderstanding or confusion" and "to promote and insure the fair, effective, expeditious, efficient, and impartial administration of justice . . . ." Upon review, we find the Respondent Judge had the constitutional authority to require these resources and to issue the order.

1. Specific Constitutional Provisions

In 1974, the citizens of this State ratified the Judicial Reorganization Amendment (Reorganization Amendment), which rewrote the constitutional powers and duties of our judicial branch. See W. Va. Const. art. VIII. The overriding purpose behind the passage of the Reorganization Amendment was to provide a unified court system in West Virginia to facilitate the prompt and efficient administration of justice. State ex rel. Bagley v. Blankenship, 161 W. Va. 630, 634, 246 S.E.2d 99, 102 (1978).[10] To meet this purpose, the Reorganization Amendment centralized administrative authority in this Court. State ex rel. Frazier v. Meadows, 193 W. Va. 20, 25, 454 S.E.2d 65, 70 (1994); Syl. Pt. 1, Carter v. Taylor, 180 W. Va. 570, 378 S.E.2d 291 (1989);[11] Rutledge v. Workman, 175 W. Va. 375, 379, 332 S.E.2d 831, 835 (1985); accord W. Va. Const. art. VIII, § 3.

The drafters of the Reorganization Amendment implicitly recognized, however, that this Court can neither make nor micro-manage every administrative decision that needs to be made at the local level. Thus, Article VIII, Section 6 of the West Virginia Constitution provides that, subject to control by this Court, a circuit court judge, or a chief circuit judge in a multi-judge circuit, is given the power to control local affairs. See [Rutledge]; Syl. Pt. 2, Carter v. Taylor.[13] In addition, this section also gives the circuit court judge, or the chief judge thereof, the "general supervisory control over all magistrate courts . . . ." W. Va. Const. art. VIII, § 6.

In State ex rel. Skinner v. Dostert, 166 W. Va. 743, 278 S.E.2d 624 (1981), we addressed whether the Jefferson County Circuit Court possessed the authority under Article VIII, Section 6 to enter an "administrative order," sua sponte, specifying the procedural steps for dismissing warrants in magistrate court. [Id.][15] We recognized that, pursuant to this section a circuit court can exert its control over a magistrate court in two ways. One way is derived from the circuit court's appellate authority,[16] and the other way originates from the circuit court's general supervisory power. [Id.]

After determining the circuit court did not possess the power to issue the order under its appellate

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[10]*See also* W. Va. Const. art. III, § 17[.]

[11]Syllabus point one states: "General supervisory control over all intermediate appellate, circuit, and magistrate courts resides in the Supreme Court of Appeals. W. Va. Const., art. VIII, § 3." Syl. Pt. 1, Carter v. Taylor.

[13]This syllabus point provides: "Local administrative authority in a multi-judge circuit reposes in the chief judge thereof." Syl. Pt. 2, Carter v. Taylor.

[15]We found magistrate courts are independent, constitutionally created courts, and the power exercised by those courts "is subject only to the constitution and the law." Syl. Pt. 3, Skinner; see W. Va. Const. art. VIII, § 10 (providing, in part, that "the legislature shall establish in each county a magistrate court or courts . . .").

[16]"Circuit courts shall have control of all proceedings before magistrate courts by mandamus, prohibition and certiorari. . . . . Circuit courts shall have appellate jurisdiction in all cases, civil and criminal, where an appeal, writ of error or supersedeas is allowed by law to the judgment or proceedings of any magistrate court . . . ." W. Va. Const. art. VIII, § 6, in part.

authority,[18] we proceeded to discuss the circuit court's general supervisory power. We found the circuit court's general supervisory power is implicitly defined in Article VIII, Section 10 of the West Virginia Constitution. [Id.] This section provides, in part:

> The division of the business of a magistrate court in any county in which there shall be more than one magistrate of such court between the magistrates thereof so as to promote and secure the convenient and expeditious transaction of such business shall be determined in such manner or by such method as shall be prescribed by the judge of the circuit court of such county, or the chief judge thereof, if there be more than one judge of such circuit court.

W. Va. Const. art. VIII, § 10. . . . We interpreted this section, along with the relevant language contained in Article VIII, Section 6, essentially as "'housekeeping' provisions," designed to facilitate the efficiency of the magistrate court system. [In] this light, we concluded the circuit court's order, governing the dismissal of warrants in the magistrate courts, did not fall within the realm of its "housekeeping" authority. Therefore, we awarded a writ of prohibition restraining the implementation of the order. ...

Like Skinner, the order designating the parking area in the present case was issued sua sponte, and it did not grow out of an underlying action. Consequently, it is evident that the order was not issued pursuant to the circuit court's appellate jurisdiction under the first prong of the Skinner analysis. However, unlike the attempt to assert control over the dismissal of warrants as occurred in Skinner, we find the Respondent Judge's order designating the magistrate court parking area did not interfere with the judicial function or with the judicial discretion of the magistrate court in anyway.[19] By its very nature, we conclude the control of the parking area was an administrative function within the second prong of the Skinner analysis. Therefore, the Respondent Judge clearly had the power to issue the order pursuant to the circuit court's general administrative authority contained in Article VIII, Sections 6 and 10.

In the present case, there is the question of whether a circuit court's inherent authority to control resources (including parking) can prevail over specific legislation granting such power to county commissions. See W. Va. Code § 7-1-3s. To answer this question, we must make a more fundamental inquiry about the separation of powers doctrine and the scope of a court's inherent authority to require sufficient resources for it to perform its functions.

2. Separation of Powers

As part of our constitutional democracy on both the national and state level, we ascribe to the principle that there shall be three equal branches of government – legislative, executive, and judicial. Article V, Section 1 of the West Virginia Constitution states, in part: "The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others . . . ." W. Va. Const. art. V, § 1. . . .

On several occasions, this Court has found it necessary to defend the right of the citizens of this State to have a free and independent judiciary.[20] In State ex rel. Steele v. Kopp, 172 W. Va. 329,

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[18]There was no proceeding in mandamus, prohibition, or certiorari brought warranting entry of the order. . . . "As a general rule, any order promulgated sua sponte by a superior court which purports to control the judicial function in proceedings in a lower court is void ab initio." Syl. Pt. 10, Skinner.

[19]Parking space is certainly not a constitutionally guaranteed resource for public officials and their staff. However, when a public entity possesses a resource, such as space for parking, then obviously the judicial branch of government is entitled to its fair share of such resource.

[20]*See* Syl. Pt. 3, Frazier (providing, in part, "the Judiciary, not the executive branch, is vested with the authority to resolve any substantial, genuine, and irreconcilable administrative conflicts regarding court personnel"); Syl. Pt. 3, Rutledge (stating, in part, "[a] circuit judge has complete control of the deputy circuit clerk assigned to her . . ."); Bagley, 161 W. Va. at 658-59, 246 S.E.2d at 114-15 (holding that our constitution prohibits both the legislative and executive branches

305 S.E.2d 285 (1983), we emphasized that "the role of this Court is vital to the preservation of the constitutional separation of powers of government where that separation, delicate under normal conditions, is jeopardized by the usurpatory actions of the executive or legislative branches of government." . . . Not only does our Constitution explicitly vest the judiciary with the control over its own administrative business,[21] but it is a fortiori that the judiciary must have such control in order to maintain its independence.

Other courts which have examined the issue of whether the judiciary may invoke its inherent power to require necessary resources (such as adequate parking, office space, and other facilities) have found that it falls within the administrative functions of the courts. In one case involving a parking dispute, an Ohio court conducted an ex parte hearing and, thereafter, entered an order enjoining the police chief and his officers from parking a patrol wagon in such a way that would interfere with the court's parking area. In re Obstruction of Summit County Driveway by Akron Police Dep't, 108 Ohio App. 338, 340, 161 N.E.2d 452, 454 (1959). . . . In upholding a lower court's inherent authority to order a county commission to provide security to a courthouse, the Supreme Court of Colorado reiterated the basic principle that a court holds those "powers reasonably required to act as an efficient court." Board of County Comm'rs v. Nineteenth Judicial Dist., 895 P.2d 545, 547-48 (Colo. 1995) (internal quotations omitted). The court also quoted one of its prior decisions where it eloquently stated that it is the responsibility and duty of the courts to be completely independent. Such independence

> "is not only axiomatic, it is the genius of our government . . . . It is abhorrent to the principles of our legal system and to our form of government that courts, being a coordinate department of government, should be compelled to depend upon the vagaries of an extrinsic will. . . . [It] would interfere with the operation of the courts, impinge upon their power and thwart the effective administration of justice. These principles, concepts, and doctrines are so thoroughly embedded in our legal system that they have become bone and sinew of our state and national polity."

Id. (quoting Smith v. Miller, 153 Colo. 35, 40-41, 384 P.2d 738, 741 (1963)).

Importantly, however, the Colorado court recognized the inherent power of the judiciary is not unfettered and generally is "limited to matters that are reasonably necessary for [its] . . . proper functioning . . . ." [Id.] The judiciary must be wary not to overstep its boundaries and violate the separation of powers doctrine it is trying to protect by encroaching upon legislative and executive affairs. It is the prudent use of the judiciary's inherent power which will advance "the public interest of a cooperative and harmonious governmental structure." [Id.]; see also Board of Comm'rs v. Riddle, 493 N.E.2d 461, 463 (Ind. 1986) (finding the issue to be resolved is whether the mandate for office space "is reasonably necessary for the operation of the court or court related functions, and if so, whether the mandate adversely affects any governmental interest"); Anderson County Quarterly Court v. Judges, 579 S.W.2d 875, 879 (Tenn. Ct. App. 1978) (holding "however broad and justifiable the use of inherent powers may be, it is not a license for unwarranted flexing of the judicial power. The generally recognized standard for applying the inherent powers doctrine requires its use to be reasonable and necessary."); 21 C.J.S. Courts § 7 at 14 (providing "there is inherent power in the courts to provide facilities, personnel, and resources reasonably necessary for the performance of judicial functions").

It is clearly a widely accepted principle in this country that courts have inherent authority to require resources such as sufficient funds for operating expenses, work space, parking space, supplies, and other material items. In order for a court to invoke use of its inherent power to require

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from altering the judicial branch's budget); State ex rel. Brotherton v. Blankenship, 157 W. Va. 100, 207 S.E.2d 421 (1973) (finding that the judicial branch has inherent power to set its budget).

[21]*See e.g.* W. Va. Const. art. VIII, § § 3, 6, and 10.

resources, the court must demonstrate that such resources are reasonably necessary for the performance of its responsibilities in the administration of justice. Although courts must be cautious not to reach beyond the power of the judicial branch, it is crucial for the judiciary to be able to invoke such power as is reasonably necessary to maintain itself as an independent and equal branch of our government. It is the constitutional obligation of the judiciary to protect its own proper constitutional authority by upholding the independence of the judiciary. Of course, whenever a conflict arises between the judiciary and another branch of government, the best first approach ordinarily would be to reach an amicable resolution of the problem without resorting to court orders or other legal actions. However, a court is not restricted to negotiation if an amicable solution cannot be found. A court may use the legal resources available to it to defend those interests it is constitutionally bound to protect, including, but not limited to, ex parte orders in necessary circumstances in administrative matters within the court's inherent authority.

Having enunciated these broad principles, we turn to the facts at hand. Although . . . it appears that the conflict over the contempt is now moot, Relators do raise in their petition for habeas corpus the substantive issues of the court's authority to enter its "General Order." Thus, in order to resolve this matter, we address it specifically.

In this case, the Respondent Judge found the parking area was being paid for out of the magistrate court fund. The magistrate court fund exists pursuant to West Virginia Code § 50-3-4 (1994) and consists of "all costs collected in magistrate courts in a civil or criminal proceeding . . . ." W. Va. Code § 50-3-4. The statute further provides "[a] county may, in accordance with the supervisory rules of the supreme court of appeals, appropriate and spend from such fund such sums as shall be necessary to defray the expenses of providing services to magistrate courts." [Id.] Under Rule 8(f) of the Administrative Rules for Magistrate Courts, we permit a county to use magistrate court funds to pay for "adequate parking spaces for the public and the staff of the magistrate court" when such parking "for the magistrate court staff and the public is otherwise unavailable . . . ." ...

In their memorandum of law, Relators contend the Commission has not limited, restricted, or prohibited the magistrate court staff's parking in any way. Assuming this statement is true, it appears that there is no actual present conflict between Rule 8 and West Virginia Code § 7-1-3s. Certainly, if the Commission desired to do so, it could promulgate rules and regulations under West Virginia Code § 7-1-3s consistent with this Court's rule regarding the use of magistrate court funds. On the other hand, if a direct conflict would arise, we have said that the administrative rules adopted by this Court pursuant to Article VIII, Section 8 "have the force and effect of statutory law and operate to supersede any law that is in conflict with them." Syl. Pt. 1, Stern Bros., Inc. v. McClure, 160 W. Va. 567, 236 S.E.2d 222 (1977); see also [Frazier] (emphasizing that a statute is "superseded only if there is a direct conflict" with a rule). As the Commission only may use such magistrate court funds "as shall be necessary to defray the expenses of providing services to magistrate courts," W. Va. Code § 50-3-4, we conclude by the Commission's expenditure of the funds that the Respondent Judge committed no error in entering the order designating the parking area. Even more importantly, this dispute seems to fall clearly within that realm of inherent administrative authority which supports a court in requiring necessary resources for the performance of its duties.[28]

III. CONCLUSION

For the foregoing reasons, we find the circuit court did not err in designating the parking space

[28]We caution, however, that today's opinion should not be construed in a manner that would embolden judicial officers to embark on actions beyond the parameters of what is reasonable and necessary. The West Virginia Judicial Branch continues to exercise its independence and autonomy without encroachment at least in part because it has historically been immensely frugal and eminently judicious in its requirements and demands. We also emphasize that it is the spirit of cooperation and mutual respect between our three co-equal branches of government that has allowed our democracy to function as well as it has. To our partners in the Executive and Legislative branches, we must express our respect and appreciation for their role in this cooperative approach.

in the first instance. We also find the contempt charges against Relators were purged by their restoration of the parking area in accord with the circuit court's contempt order. Consequently, Relators' request for habeas corpus relief is moot, and we direct the circuit court, if it has not already done so, to enter an order in the underlying case relieving Relators from the contempt order. . . .

D. Family Courts

Read Article VIII, § 16

[Parts D and E and the Introduction to Part F are extracted from ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 255-50 and 262-63 (2nd ed., Oxford University Press, 2016).]

A 2000 amendment added § 16 to provide a system of family courts to specialize in domestic relations matters and to alleviate the case load demands on the general jurisdiction circuit courts. Family law issues are the most common civil cases and, of course, touch upon matters of great importance to ordinary citizens. A previous legislative attempt to create family law judges with authority to make final decisions had been invalidated as usurping the powers of the circuit courts and as inconsistent with Article VIII, §§ 1, 5, and 6. *Starcher v. Crabtree* (1986). The legislature then went to creating family law masters, who merely made recommendations to the circuit judges. Section 16 now vests the family law judges with the same powers to decide cases within their jurisdiction as the circuit judges had previously exercised.

Section 16 charges the legislature with the responsibility for defining the family courts' jurisdiction, which it has done in West Virginia Code § 51-2A-2. Family courts are courts of limited jurisdiction and require specific statutory authority to hear a case, even if it touches on matters of family relations. *Lindsie D.L. v. Richard W.S.* (2003) (family court lacked jurisdiction to decide sibling visitation case). The family judges are elected by the voters to terms of eight years or less, as determined by the legislature. West Virginia Code § 51-2A-5(b) now sets the term at eight years. The judges are required to have at least five years of West Virginia law practice experience and must live in the circuit they serve. The legislature sets the number of family court judges and arranges their circuits. West Virginia Code § 51-2A-3. The family law circuits do not necessarily coincide with the judicial circuits. *Id*. The legislature has the discretion to stagger the judges' terms.

The final paragraph makes clear that the family courts are part of the hierarchical judicial system established by the 1974 Judicial Reorganization Amendment, subject to Supreme Court supervision, and are governed by the general provisions regulating the judiciary set forth in Article VII, §§ 7 and 8.

E. Magistrate and Municipal Courts

Read Article VIII, § 10-11.

Section 10 establishes a system of magistrate courts, which are courts of limited jurisdiction for hearing small civil claims and misdemeanor criminal cases and for issuing warrants.[1] The section was entirely new with the 1974 amendment. Previously, the judicial article had divided counties into districts of equal population, with each district electing one justice of the peace for each 1,200

[1] *See generally* W. Va. Code §§ 50-1-1 *et seq*.; Robert Batey and Diana L. Fuller, *Streamlining Criminal Procedure in Magistrate Court*, 79 WEST VIRGINIA LAW REVIEW 339 (1977); Note, *Judicial Reform in West Virginia: The Magistrate Court System*," 79 WEST VIRGINIA LAW REVIEW 304 (1977).

people. The justices had county wide jurisdiction and heard roughly the same kinds of cases as magistrates now do. The system had many critics and had long been the target of reform. A 1940 effort[2] to pass a constitutional amendment abolishing the justice of peace system and creating a "summary court" in each county failed, however, to gain majority support among voters.

The first paragraph requires the legislature to establish a magistrate court in each county and to prescribe a right of appeal from its judgments. See W. Va. Code §§ 50-5-12, -13. The legislature has the discretion to designate such courts as courts of record.

In its second paragraph, section 10 further directs the legislature to set the qualifications of magistrates, the number of magistrates per county, the number of officers to serve each magistrate court, the method for selecting those officers, and the procedure for filling any magistrate court vacancies. See W. Va. Code §§ 50-1-1 to -13. The paragraph also gives the legislature the discretion to make the election of magistrates either partisan or nonpartisan. Beginning in 2016, their elections will be on a nonpartisan basis. The first proviso ensured that those justices of the peace who were in office for the year preceding the adoption of the 1974 amendment could never be excluded from eligibility to be a magistrate by legislatively set qualifications. The second proviso is unique; it prohibits the legislature and the court system from requiring that magistrates be lawyers. Finally, the second paragraph sets magisterial terms at four years and requires each magistrate to be a resident of the county in which he or she was elected.

The third and fourth paragraphs address the jurisdiction of magistrate courts. The jurisdiction of each magistrate court extends throughout the entirety of its county. The legislature has the responsibility for regulating the venue of magistrate courts and setting the times and places for them to be in session. The limits of magistrate courts' subject matter jurisdiction appear in the fourth paragraph. Their authority to decide criminal matters shall be set by the legislature, but may not extend to felonies. Section 10 specifically exempts magistrate courts from the requirement in Article III, section 4 that no person may be held to answer for a crime except upon indictment or presentment. Instead, section 10 permits magistrate court criminal actions to be initiated by information (a charge issued by a prosecutor) or an arrest warrant.

The civil jurisdiction of magistrate courts is restricted to cases at law—actions that do not seek any equitable relief—in which the amount in controversy is less than $1,500, but the legislature may make exceptions and may raise the jurisdictional maximum. See W. Va. Code § 50-2-1 (raising the maximum to $5,000 and excluding magistrates from deciding certain claims). In no event, according to section 10, may a magistrate court adjudicate title to land.

The section's three concluding paragraphs offer an important miscellany. In keeping with the general structure for the judicial system established by the 1974 amendment, the fifth paragraph provides for the circuit judge, or the chief judge in multiple-judge circuits, to direct the manner for dividing the work among a county's magistrates. See also Art. VIII, sec. 8. This power, however, extends only to promoting the "convenient and expeditious transaction" of magistrate court business. It contemplates a purely "housekeeping" function and does not "confer upon the circuit court the power to interfere with the judicial function of the magistrate or to control judicial discretion in any particular case before the magistrate." *State ex rel. Skinner v. Dostert* (1981). Circuit court control over the substance of magistrates' decision-making may be exercised only in the traditional case-by-case forums of appeal, certiorari, mandamus, and prohibition. Id.

Magistrate court juries, says the sixth paragraph, shall consist of six persons. This relieves such courts of the requirement in Article III, section 14 that trials of crimes and misdemeanors shall be by a jury of twelve persons.

Finally, the concluding paragraph prohibits magistrates and the officers of their courts from being paid or receiving any payments for their services other than their statutory salaries. The provision

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[2] See Leo Carlin, "The Judiciary Amendment," West Virginia Law Quarterly 45 (1939): 220.

would apply not only to criminal acts like bribery and influence peddling, but also to more subtle practices that had previously existed in which justices of the peace were paid, in part, by the number of cases they decided. That system created a competition among magistrates for litigants and led to less than judicious results. See *State ex rel. Shrewsbury v. Poteet* (1974).

Unlike justices and judges, however, magistrates who are attorneys may practice law, except to the extent prohibited by the legislature. See Art. VIII, sec. 7; W.Va. Code § 50-1-12. Presumably, then, magistrates can pursue other occupations not in conflict with their offices.

Section 11 authorizes the establishment of municipal courts to decide cases based on the law created by city ordinances. The three earlier judicial articles had also empowered the legislature to "establish courts of limited jurisdiction within any incorporated town or city" (1863 Const. Art. VI, sec. 17; 1872 Const. Art. VIII, sec. 22 (1872); 1872 Const. Art. VIII, sec. 19 (1880 Am.)). This section differs from those earlier provisions primarily in the jurisdictional limits it imposes on city courts and its inclusion of the last sentence.

The section leaves the establishment of municipal courts to the discretion of the legislature. That discretion has been exercised, and cities may either use their mayor as a judicial officer, W. Va. Code § 8-10-1, or create and maintain a police or municipal court, with its judges to be selected as provided by the individual cities, W. Va. Code § 8-10-2. According to section 11, the legislature has the authority to direct the method of selection for city judges. The section limits the jurisdiction of such courts, however, to the enforcement of municipal ordinances. The legislature has the responsibility for specifying litigants' appeal rights from the municipal courts.

City court defendants threatened with jail time for violating an ordinance have a right under Article III, section 14 to demand a trial by a jury of twelve persons, regardless of whether they have a right to de novo review and a jury trial in circuit court. *Champ v. McGhee* (1980). In addition, a court may not circumvent a defendant's right to a jury trial by dismissing the charges and directing they be refiled under state law in magistrate court, where Article VIII, section 10 ensures a separate right to jury trial. *Scott v. McGhee* (1984). Although city law enforcement officers can initially choose where to bring charges and may opt for state charges in magistrate court, if they choose to prosecute in city court, its judge may not dismiss the charges and redirect them to magistrate court solely because the defendant exercised his or her right to a jury trial—at least where (as would normally be the case) the state charges carry a potentially longer sentence. *Scott.* In addition, municipal court criminal defendants have a right to be represented by counsel and, if indigent, have a right to counsel appointed by the county's circuit court. *Bullett v. Staggs* (1978); see W. Va. Code § 51-11-5. City court defendants who exercise their right to appeal to circuit court cannot receive a heavier sentence in the higher court than was imposed initially by the city court. *State v. Bonham* (1984). To hold otherwise would penalize the defendant's right to appeal.

The West Virginia Supreme Court of Appeals has upheld against constitutional attack the vesting, authorized by section 8-10-1 of the West Virginia Code, of the municipality's judicial power in a mayor. Separation of powers principles do not apply at the lower levels of government, where some overlapping of officials' functions is needed to avoid imposing costly and unnecessary obligations on local governments. Nor is fairness compromised by such a system if a tiny fraction of municipal revenues is generated by the mayor's court. *Hubby v. Carpenter* (1986).

On the other hand, the court has held that no city official other than the city's judicial officer—that is, its mayor or municipal court judge, whichever is applicable—can issue warrants. Accordingly, the court invalidated a city ordinance that had authorized warrants for all city offenses to be issued by the "municipal judge, mayor, city clerk, municipal court clerk, chief of police, or in the absence of the chief of police, the captains of police and lieutenants of police." Such a system offended the constitutional requirement that warrants be issued only by a neutral and detached officer, and law enforcement officers charged with ferreting out crimes did not qualify. In addition, the court observed that section 11 authorizes the establishment of municipal courts and section 12 empowers the legislature to name the officials who can issue and execute writs, warrants, and

process. Pursuant to those sections, the legislature enacted section 8-10-1, which gave that power to mayors, and section 8-10-2, which accorded municipal court judges, where established, the same judicial powers that a mayor has under section 8-10-1. Thus, only the judicial officers authorized by those two sections can issue warrants. Although the legislature, under section 12, may have the constitutional discretion to extend the power to neutral and detached clerks, it has not done so. State ex rel Hill v. Smith (1983).

The last sentence of section 11 prohibits municipal court judges and officers from being paid or receiving payment for their official work by any means other than their prescribed salary. This is the same restriction as section 10 applies to magistrates and their subordinate officers. It aims to avoid possible conflicts and compromising justice. See *Tumey v. Ohio* (1927); *State ex rel. Shrewsbury v. Poteet* (1974).

F. General Provisions Relating to Judicial Officers

Read Article VIII, § 7 & 8

This section's provisions relate to the qualifications for, compensation of, and limitations on the state's judicial officers. The section's development can be traced through each version of the judicial article (see W. Va. Const. Art. VIII, sec. 16 (1880 Am.); Art. VIII, sec. 17 (1872); Art. VI, secs. 11–12 (1863)). The bar against judges holding other offices also appeared in the Virginia constitutions of 1830 and 1851. The ban on judges practicing law first appeared in the state in the 1872 article. The 1974 Amendment made several changes: It added the requirement that justices and judges be admitted to practice for a minimum number of years, deleted a provision that fixed judges' salaries and assigned that task to the legislature, inserted the prohibition on judges becoming candidates for nonjudicial elective offices, and added the last paragraph, which establishes the method for filling vacancies.

The first paragraph sets the qualifications. All judicial officers must be residents of the state. Justices must have been admitted to practice law for at least ten years prior to their election and circuit judges for five years. According to the supreme court, those requirements refer to admission to the bar in West Virginia for the stated number of years and not to practice in any state. *State ex rel. Haught v. Donnahoe* (1984).

The second paragraph charges the legislature with the responsibility of setting judges' salaries and specifically provides that the salaries may be increased, but not decreased, during judges' terms of office, thus exempting them from Article VI, section 38's bar on in-term increases. The inclusion of this paragraph in the 1974 amendment reflected the realization that neither constitutionally fixing salaries nor locking them in for periods of eight and twelve years makes sense in light of modern economic conditions.

The third paragraph dealt with the 1974 amendment's impact on judges in office at its passage and particularly on judges of the limited jurisdiction courts that the amendment abolished. The paragraph has no remaining significance. For examples of its application, see *State ex rel. Dunbar v. Stone* (1976) and *State ex rel. Casey v. Pauley* (1974).

The fourth paragraph imposes certain limitations on judicial officers. First, they may not hold any other public office under any government. Although the West Virginia court has not interpreted this particular restriction, it probably would not preclude judges from serving in positions that did not hold some sovereign power and did not create the potential for conflict and interference with

judicial duties. See *Thomas v. Wysong* (1943); commentary to Art. VII, sec. 4.[3] Thus, serving on some commissions and boards or teaching as an adjunct at a state college would not violate section 7. *Thomas;* 56 Op. atty. gen. 46 (1974). The 1974 amendment added that judges were also to be barred from continuing in office after they become candidates for any nonjudicial public offices. Anyone who violates these provisions of section 7, which are designed to prevent both obstructive conflicts and judicial entanglements with politics, vacates his or her office. The Supreme Court relied on those purposes to conclude that an incumbent justice could not run for another seat on the Court when his own term extended past the election. *State ex rel. Carenbauer v. Hechler* (2000) (immediately below). The goal was to "remove politics and its attendant imbroglios from the judicial process," and allowing justices to run (perhaps even repeatedly) for another seat on the same court to extend their terms was inconsistent with that goal.[4] Allowing that would also defeat the purposes of Article VIII, § 2's provision for the lengthy term of twelve years for justices to enhance their judicial independence and minimize political influences. Section 7's fourth paragraph also prohibits justices and judges from practicing law while in office, although it leaves to the legislature the discretion to decide whether or to what extent magistrates may maintain a law practice. *West Virginia Judicial Inquiry Commn. v. Allamong* (1979); see W. Va. Code § 50-1-12.

Section 7's final paragraph provides the mechanism for filling vacant judgeships. If the vacancy occurs with less than two years (expandable to three years by the legislature) remaining on the judge's term, the governor appoints a successor to complete the unexpired term. If the term remainder is longer than two years (or up to three years, if the legislature so provides), the governor directs that an election be held to elect a person to complete the unexpired term and appoints an individual to serve until a successor is elected and qualified. See W. Va. Code § 3-10-3; *State ex rel. Robb v. Caperton* (1994). This section supersedes the more general provisions for filling vacancies in Article IV, sections 7–8.

Section 8 confers rule-making powers on the West Virginia Supreme Court of Appeals to govern the conduct of judicial officers and sets forth the procedures for disciplining and removing those who violate the conduct codes. Most of the section was new with the 1974 amendment. Each of the prior versions provided only for legislative removal of judges and did not vest any rule-making authority in the supreme court. Under those predecessors, the legislature regulated courts and judges. Transferring that power to the supreme court, however, is fully consistent with the general scheme of the 1974 judicial article, which created a centrally controlled, hierarchical judicial system.

Section 8's first paragraph establishes the supreme court's rule-making authority and directs that it be used to prescribe standards of conduct for justices, judges, and magistrates and penalties for violations of those standards. The paragraph also empowers the court to impose disciplinary measures, including temporary suspensions and multiple sanctions. *In re Toler*, 218 W. Va 653, 625 S.E. 2d 731 (2005). That power may be exercised to suspend judges with or without pay. *In re Grubb* (1992). By virtue of the first paragraph, the court may retire any judge who is eligible for retirement and who is no longer able to fulfill the obligations of the office.

The second paragraph describes the minimum in procedures that must be provided to judicial officers threatened with disciplinary sanctions or involuntary retirement. A judge in such a position has the right to a hearing before the supreme court and to notice of the hearing and the allegations at least twenty days prior to the hearing date. Supreme court justices may not be suspended or retired unless the remaining members of the court unanimously concur in the decision. The final sentence of the second paragraph makes clear that regulations issued by the court pursuant to the authority of this section control over, and render void, all other laws to the extent that they conflict with

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3 Forest Jack Bowman, "A Judicial Dilemma: Real or Imagined," West Virginia Law Review 83 (1980): 29.

4 208 W.Va. 584, 589, 542 S.E.2d 405, 410 (2000).

(1988).

The fourth paragraph provides for temporary assignments of retired justices and judges by the chief justice to serve in any of the state's courts. The last paragraph addresses removal of judicial officers; justices and judges may be permanently removed from office only by impeachment and conviction under Article IV, section 9, but magistrates may be removed in the same manner as is provided for other county officials. See W. Va. Code § 6-6-7.

STATE ex rel. CARENBAUER v. HECHLER,
208 W. Va. 584, 542 S.E.2d 405 (2000).

ACTING CHIEF JUSTICE SCOTT delivered the Opinion of the Court. CHIEF JUSTICE MAYNARD, JUSTICE DAVIS, and JUSTICE McGRAW, deeming themselves disqualified, did not participate in the decision in this case. JUDGE FRANK E. JOLLIFFE, JUDGE FRED L. FOX, II, and JUDGE THOMAS H. KEADLE sitting by temporary assignment. JUSTICE STARCHER dissents and reserves the right to file a dissenting Opinion. JUDGE JOLLIFFE concurs and reserves the right to file a concurring Opinion.

Scott, Justice:

Relator George E. Carenbauer seeks a writ of mandamus to have Respondent, the Honorable Warren R. McGraw, declared ineligible as a candidate for election to a separate twelve-year term on this Court.[2] As grounds for the extraordinary relief sought, Relator asserts that Justice McGraw fails to qualify as an eligible candidate for office due to his status as an incumbent currently fulfilling an unexpired term to which he was elected. Additionally, Relator contends that Justice McGraw's actions first, as the author of a recent opinion declaring Speaker of the House of Delegates Robert S. Kiss ineligible for appointment to this Court under the emoluments clause of this state's constitution, and now, in seeking the position which Speaker Kiss was denied,[4] have both undermined the integrity of this judicial institution and cast upon it a pernicious cloak of aspersion. Following an exhaustive examination of constitutional principles combined with an equally thorough review of judicial decisions concerning the penumbral issues presented by the petition, we conclude that while the constitution does not expressly proscribe an incumbent justice whose term has yet to be fulfilled from seeking election to a separate seat on this Court, the intent underlying the enactment of article VIII of our state constitution, which sets forth the requirements for selection to this Court, as well as the entire structure of the judicial branch of government; the social compact of this state's citizenry as expressed through the adoption of both the Constitution and the Judicial Reorganization Act of 1974; and the state's compelling interest in maintaining the integrity of the judiciary, as well as its equally-compelling interest in securing an independent judiciary removed from the entanglements of politics, all combine to require this Court to conclude that Justice McGraw cannot seek to enhance his term-length through these means. Accordingly, we grant the writ of mandamus as moulded.

I. Factual Background

The precipitating fact that spawned this petition was the filing of a certificate of candidacy by

[2]Justice McGraw is currently serving the remainder of a term on the West Virginia Supreme Court of Appeals to which he was elected as a result of the resignation of Justice Thomas E. McHugh in 1998. The term to which Justice McGraw has been elected ends on December 31, 2004.

[4]While we fully appreciate the gravity of the ethical concerns Relator has raised that arise from Justice McGraw's involvement in the proceedings which resulted in the nullification of Speaker Kiss' appointment to this body, we do not rely on such grounds to resolve this matter.

Justice McGraw via the U.S. Postal system on January 29, 2000. . . . Were it not for the fact that Justice McGraw is currently filling the remainder of an unexpired term, which runs until December 31, 2004, the filing would not have been momentous. Due to the unprecedented nature of this filing, the press immediately began publishing commentary[7] on the issue of whether a supreme court justice could seek election to another term of court while still occupying an unexpired term on that same body. When Justice McGraw permitted the deadline for withdrawing his candidacy to pass, Relator avers that he was prompted to file a request for extraordinary relief by virtue of Justice McGraw's failure to withdraw his name from the list of Democratic candidates seeking election to this Court. This Court granted the rule to show cause for the purpose of determining whether Justice McGraw's candidacy is in violation of the West Virginia Constitution or the general laws of this state....

III. Discussion

As an initial matter, we feel constrained to observe that not once in the 137 years since this state's formation has any individual adopted a course of action such as that pursued here by Justice McGraw. No one has previously attempted to "switch seats" while already occupying a position on this Court, the highest tribunal in this state. The absence of precedent for this audacious conduct is not limited to this state's jurisprudence, but similarly is lacking throughout the other fifty states, save one. Were it not for the thwarted aspirations of one other judge, we would be completely bereft of authority against which to examine Justice McGraw's novel approach to term extension.

We are not unmindful of the fact that a differing viewpoint exists with regard to the authority of this Court to prohibit Justice McGraw from seeking another term on this judicial body based on the fact that our state constitution does not expressly proscribe such a candidacy. In anticipation of such reproach, we respond that this Court is obligated by its role as the arbiter of constitutional issues, as well as its duty to uphold the confidence reposed in the judiciary by this state's citizenry, to resolve the issue of Justice McGraw's candidacy. Concomitant to the sustained confidence of the public in the judiciary is the correlative responsibility that integrity must be the cynosure of all judicial endeavors, both actual and perceived. So crucial is the state's interest in maintaining the integrity of its judicial system that regulations or restrictions which temporally affect an officeholder's access to the ballot have been found to withstand constitutional challenge on this ground alone. Clements v. Fashing, 457 U.S. 957 (1982). This recognized state interest in upholding the integrity of the judicial system, and the inherent and express power of this Court to control the political activities of all judicial officers, thus serve as both the predicate core of our decision and as the authority for the ruling itself.

A. Constitutional and Statutory Provisions

We look first to the governing constitutional language found in article VIII, section seven to determine whether the legislative framers anticipated and addressed the situation with which we are confronted. The only language that addresses the issue of judicial candidacy states as follows:

> No justice, judge or magistrate shall hold any other office, or accept any appointment or public trust, under this or any other government; nor shall he become a candidate for any elective public office or nomination thereto, except a judicial office; and the violation of any of these provisions shall vacate his judicial office.

While some advocates might contend, at first glance, that the constitutional language does in fact authorize the candidacies of incumbent judges, upon scrutiny it becomes clear that this proviso was not adopted with the concerns in mind presented by Justice McGraw's filing. It does not pertain to the question of his right to run for this particular judicial office as a term-enhancement maneuver.

The language of article VIII, section seven, which permits a justice to become a candidate for

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[7]We reference the aspect of press coverage not as support for the decision reached in this case, but as commentary on the state of calumny that has beset this institution since Justice McGraw filed his pre-candidacy statement.

judicial office without vacating his/her judicial seat is aimed at two interrelated concerns: preserving the separation of powers amongst the three branches of government and preventing judicial entanglements with politics. The insertion of this constitutional language through the Judicial Reorganization Amendment of 1974 is directed at "barring [judges] from continuing in office after they become candidates for any nonjudicial public offices." Robert M. Bastress, The West Virginia Constitution at p.213 (1995). These provisions were "designed to prevent both obstructive conflicts and judicial entanglements with politics." Id. The Montana Supreme Court, in discussing the purpose of its constitutional language on this subject, stated: "The constitutional prohibition against judges seeking nonjudicial offices while still holding judicial office is but part of a general constitutional scheme declaring directly or indirectly the rights of office holders in all branches of government to seek other office while still holding office." Committee for an Effective Judiciary v. State, 209 Mont. 105, 679 P.2d 1223, 1228 (Mont. 1984). In upholding the constitutional language that permits a judge not to forfeit office if he/she files for a judicial position, the Montana Supreme Court opined:

> The [Montana constitutional] delegates perceived a public benefit in opening up the judicial election process to judges who desired to move from lower courts to the district court and from district court to the supreme court, or from a justice on the supreme court to a chief justice on the supreme court. . . . To say that a judge forfeits his office if he files for a non-judicial office is but another way of saying that a sitting judge can file for *other* judicial office without forfeiting his office.

679 P.2d at 1228-1229 (emphasis supplied).

Undergirding the constitutional prohibition against seeking nonjudicial elective office is the correlative objective of both removing and insulating judges from the political realm. While the reasons for separating the judiciary from politics are many and varied, there can be no question that the goal of removing politics and its attendant imbroglios from the judicial process is necessary to the proper functioning of our judicial system. See, e.g., Philyaw v. Gatson, 195 W. Va. 474, 478, 466 S.E.2d 133, 137 (1995) (discussing consequences of judge defeated in bid for nonjudicial office returning to bench post-election)[.] . . . It is not surprising then that the Code of Judicial Conduct includes a complementary restriction on "inappropriate political activity" which requires judges to "resign from judicial office upon becoming a candidate for a non-judicial office." W.Va. Code of Judicial Conduct, Canon 5A(2). In discussing the Washington corollary to Canon 5, often referred to as a "resign-to-run" requirement, the Washington Supreme Court stated that this canon "seeks to prevent embroiling the court in political controversy and allowing a judge to trade on the prestige and dignity of the judicial office." In re Disciplinary Proceeding Against Niemi, 117 Wash.2d 817, 820 P.2d 41, 46 (Wash. 1991)[.] . . .

Having thus concluded that the language of article VIII, section seven is directed at forcing judges to vacate their office if they intend to run for nonjudicial office and to similarly uphold the separation of powers by proscribing judicial officers from becoming candidates for either of the two remaining branches of government while still holding office, we next address whether the language at issue authorizes an incumbent justice to seek a separate seat on the court before his term has expired. The answer to this query cannot be reached by simply concluding that, because the office sought by Justice McGraw is a judicial office, he is permitted by the terms of article VIII, section seven to seek judicial office while still holding and fulfilling an unexpired judicial seat. While the dissent employs contorted logic in rewriting the language of article VIII, section seven to state in positive terms that "a sitting justice may 'become a candidate for any elective . . . judicial office,'"[13] such reformulation is shallow and jurisprudentially indefensible. It neither withstands constitutional analysis nor does it answer the query before the Court. The words of Justice Story still ring true:

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[13]This language is included by the dissent in the order issued by this Court on March 23, 2000.

"How easily men satisfy themselves that the Constitution is exactly what they wish it to be." Alpheus T. Mason & Donald G. Stephenson, Jr., American Constitutional Law 38 (10th ed. 1993). If the course of action undertaken by Justice McGraw was not contemplated by either the framers of our state constitution or the drafters of the Judicial Reorganization Act of 1974, and we seriously doubt that it was,[14] then we cannot summarily conclude that such action is sanctioned under this constitutional provision. It is more reasonable to find that this behavior is simply outside the express terms of our social compact. As we recognized in Randolph County Board of Education v. Adams, 196 W. Va. 9, 467 S.E.2d 150 (1995), "when the Constitution is silent on a particular issue, the solution cannot be found in a methodology that requires us to assume or divine the framers' intent on an issue which most likely was never considered." [Id.] . . .

B. Analogous Precedent

Despite multitudinous research efforts, only one factually similar decision was unearthed that involved a judicial officer who sought to enhance his term length while still fulfilling a term to which he had been elected. In Hurowitz v. Board of Elections, 53 N.Y.2d 531, 426 N.E.2d 746, 443 N.Y.S.2d 54 (N.Y. 1981), a sitting civil court judge, who had served less than half of the ten-year term to which he had been elected, filed as a candidate for another ten-year seat on the same judicial body. Like Justice McGraw, Judge Hurowitz asserted his right to seek a separate judicial seat on the same court based on the language of New York's corollary to article VIII, section 7 of our state constitution. Citing the language of article VI, section 20 of the New York Constitution, which provided that "a Judge may not 'be eligible to be a candidate for any public office other than judicial office . . . unless he resigns his judicial office,'" Judge Hurowitz argued that the quoted constitutional language "not only permits members of the judiciary to retain their positions while they pursue vacancies on other courts, but also sanctions sitting Judges whose terms have not yet expired to be candidates for identical positions on the same court." 426 N.E.2d at 747. In rejecting Judge Hurowitz's postulate, the New York court examined the entirety of the language of article VI in which the subject constitutional language was located to determine the underlying general intent of the article.

> "When the whole sixth (or judiciary) article of the Constitution is considered, certain purposes are clearly indicated. It was proposed to provide for the State a general and complete and continuous judicial system, and to create, or recognize and continue, all the judicial officers needed therefor . . . . It was designed that the general and * * * the exclusive mode of filling these offices * * * should be by election by the people, and not by appointment."

426 N.E.2d at 747 (quoting People ex rel. Jackson v. Potter, 47 N.Y. 375, 379-80 (N.Y. Sup. Ct. 1872)). In light of the historical underpinnings of the judiciary article, the court in Hurowitz concluded that

> article VI was designed to assure a structured judiciary elected on a regular basis without fragmentation of terms. To accept this candidate's interpretation of section 20 would defeat the over-all purposes of article VI. Such activities could fragment terms and create interim vacancies on a regular basis, thereby infringing upon the people's right to a "complete and continuous judicial system".

426 N.E.2d at 748 (quoting Potter, 47 N.Y. at 379).

Besides its concerns over fragmentation and the consequent disruption to the judicial process, the court in Hurowitz considered the logical consequences of the judge's candidacy on the selection of judges:

> The nature of the Judge's candidacy could have the effect of aborting the election process. By

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[14]We have found no authority, and similarly been cited to none by the parties hereto, that demonstrates any historical contemplation was given to the issue of whether an incumbent on this Court whose term has not expired could seek election to another seat on this Court.

> seeking another position on the same court where he currently sits, he not only allows himself multiple chances to be re-elected, but also assures that when he is elected to the other position on the same court, a vacancy will occur. Such a vacancy creates an additional occasion for political involvement. Moreover, should this type of conduct become the norm, it would be possible that all positions would be appointive upon the resignations and shiftings of the other Judges; only at the next general election would the people be given a chance to vote, the effect of which may well be to merely approve the appointment. Although we do not find that this is currently the practice, the likelihood of such a result portends abuse of the elective system. Even viewed in its most favorable light, this conduct has the potential for "mischief" which this court cannot condone. . . .

The potential for public backlash to this type of candidacy was fully appreciated by the court in Hurowitz: "Not without significance in this connection is the risk of the appearance of impropriety that may be perceived by the public in a Judge's injection of himself into the political process *for the sole purpose of extending his tenure*." 426 N.E.2d at 748 (emphasis supplied). Such injection into the political process, according to the court in Hurowitz, was contrary to the intent of the constitutional framers to "minimize the involvement of the judiciary in the political process and the possible influences such exposure might bring with it." Id. With this sentiment, we heartily agree.

C. Fundamental Right to Candidacy

Despite the compelling nature of the rationale employed by the Hurowitz court in forcing Judge Hurowitz to withdraw his name from the ballot, we must proceed to examine whether Justice McGraw has a fundamental right to candidacy which prevents this Court from similarly foreclosing his candidacy. Beginning with this Court's decision in State ex rel. Brewer v. Wilson, 151 W. Va. 113, 150 S.E.2d 592 (1966), overruled on other grounds, Marra v. Zink, 163 W. Va. 400, 256 S.E.2d 581 (1979), we have recognized that the "'right to become a candidate for election to public office is a valuable and fundamental right.'" Id. at 121, 150 S.E.2d at 597 (quoting 29 C.J.S. Elections § 130 at 377)[.] . . . In syllabus point two of State ex rel. Billings v. City of Point Pleasant, 194 W. Va. 301, 460 S.E.2d 436 (1995), we held that "the West Virginia Constitution confers a fundamental right to run for public office, which the State cannot restrict unless the restriction is necessary to accomplish a legitimate and compelling governmental interest."

D. Additional Qualification

Before proceeding to analyze whether there is a legitimate and compelling state interest that would justify prohibiting Justice McGraw's candidacy, we must digress to consider Justice McGraw's contention that what Relator seeks is to impose an additional qualification for the office of supreme court justice. The quintessence of Justice McGraw's defense to the relief sought by Relator is that any ruling which prohibits his candidacy amounts to the imposition of a constitutionally-prohibited qualification for this Court. Justice McGraw argues that Relator erroneously seeks to use his incumbency as a justice serving an unexpired term as a roadblock to candidacy.

We do not take issue with Justice McGraw's assertion that this Court cannot impose qualifications for the office of supreme court justice in addition to those enumerated in article VIII, section 7. . . . It is axiomatic that the qualifications necessary to seek office as a supreme court justice are those which are prescribed by the constitution. See W.Va. Const. art. VIII, § 7. While understandable in terms of advocacy, Justice McGraw's attempt to "dress" his incumbency in qualification clothing does not withstand scrutiny. What Relator seeks is not the insertion of an additional qualification for office, but instead a limitation on when a sitting supreme court justice is eligible to seek reelection to this body. Far from being a distinction of semantical significance only, the foundation for imposing a restriction on eligibility for seeking judicial office is well entrenched in this state's jurisprudence.

In State ex rel. Haught v. Donnahoe, 174 W. Va. 27, 321 S.E.2d 677 (1984), this Court was presented with the issue of a judicial candidate's eligibility for circuit court through a petition

seeking a writ of mandamus. At issue was an interpretation of the language of article VIII, section 7, which requires that to be elected to circuit court judge, an individual must "have been admitted to practice law for at least five years prior to his election." W.Va. Const. art. VIII, § 7. The specific issue presented was whether the five-year law practice requirement entailed that such practice had to have been performed within the confines of this state. The judicial candidate whose candidacy was being challenged had practiced law only in the State of California. 174 W. Va. at 29-30, 321 S.E.2d at 679-80. After first determining that an ambiguity was presented by the language at issue, this Court proceeded to analyze the reasons for requiring judicial candidates to have practiced before the respective bar of the state in which they sought office. "Recogniz[ing] that the regulation of the practice of law and the judiciary is traditionally and inherently intraterritorial," we concluded that there were valid reasons for requiring that the constitutionally-imposed period of law practice had to have been performed in this state. 174 W. Va. at 32-34, 321 S.E.2d at 682-84.

After interpreting the law-practice requirement as encompassing a non-existent, but necessary element of in-state practice, the Court proceeded to consider whether its interpretation could withstand equal protection analysis. Recognizing that this court-created restriction upon eligibility could only satisfy the constitutional protections inherent to the fundamental right to become a candidate for public office if it served a compelling state interest, we reasoned:

> As previously noted, similar experi[]ential requirements for judges are common. The purpose for such requirements is unquestionably clear. They are intended to insure not only that judges are competent in the law, but that they are reasonably familiar with the law of the jurisdiction to which they are elected. While it may be axiomatic that judges are elected to interpret and uphold the law, due process demands a high level of jurisdictional competence and integrity in that endeavor. Requirements or restrictions affecting eligibility for judicial office that reasonably strive to meet such valid public purposes do not impose impermissible barriers to such offices. Furthermore, a state's particular interest in maintaining the integrity of its judicial system can support restrictions which could not survive constitutional scrutiny if applied to other types of offices. [Clements v. Fashing.]
>
> Therefore, we hold that the requirement contained in West Virginia Constitution art. VIII, § 7, that candidates for the office of circuit judge must have been admitted to the practice of law in the State for five years prior to their election advances the State's compelling interest in securing and maintaining a judiciary well qualified in the law of the jurisdiction.

174 W. Va. at 34, 321 S.E.2d at 684. . . .

Just as this the Court has the inherent power to regulate the practice of law so too does it have the inherent power to regulate the judiciary. See W.Va. Const. art. VIII, § 8 (setting forth "inherent rule-making power" of supreme court of appeals). In examining whether a judicial employee was subject to the "resign-to-run" requirement of article VIII, section 7 of our state constitution, this Court began its analysis in Philyaw v. Gatson, 195 W. Va. 474, 466 S.E.2d 133 (1995), with an examination of the constitutional framework of article VIII.

> West Virginia Constitution article VIII is devoted entirely to the powers and function of the judicial branch of government. *Since the powers and functions, and indeed the entire structure, of the judicial branch are unique and unlike any other department of government, the rules regulating those powers and functions must, of necessity, be adapted to recognize those differences. The very soul of the judicial branch of government is that on a systemic basis, the judiciary must maintain both actual and perceived impartiality*:
>
> > It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community.... After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach or the suspicion of unfairness.

Gatson, 195 W. Va. at 477, 466 S.E.2d at 136 (emphasis supplied). . . .

As an aid to resolving the issue of whether judicial employees are subject to the constraints of

the "resign-to-run" provision of article VIII, section 7 in Gatson, this Court examined how the duties of judicial employees are necessarily intertwined with the judicial objectives of assuring "independence, impartiality, and public confidence in the court system." [Id.] Discussing the inevitable encroachment on "the integrity of the judicial system" that would result from permitting judicial employees to continue in office while seeking non-judicial office, we identified as "legitimate public objectives": "ensuring the impartiality of court employees, protecting the integrity and appearance of impartiality of court offices, and preserving the division of powers set out in West Virginia Constitution article V, section 1." [Id.]

Continuing with the issue of whether prohibition of an incumbent justice's attempt to seek election mid-term amounts to the imposition of an additional qualification, we find useful the discussion in Gatson concerning whether the "resign-to-run" requirement amounted to an unconstitutional qualification for candidates seeking office. We explained in Gatson why Marra, a decision in which this Court found that a municipal charter provision had wrongly imposed an additional qualification of one year of residency in contravention of the constitutionally-provided qualifications for non-judicial office, was not determinative of the issue before the Court:

> We believe that the circuit court's reliance on Marra is misplaced *since the resign-to-run rule does not impose an additional qualification* on a candidate. The employer did not alter the qualifications necessary to run for office, but rather established requirements for retaining employment. The claimant's employment was conditioned upon a reasonable restriction, which because of the unique nature of the employment would not be imposed on employees in the private sector. This extension of the resign-to-run requirement to judicial employees is designed as a prophylactic measure to protect the entire judicial branch. This rule is a legitimate and independent condition of claimant's continued employment with the Judiciary. We hold the restriction on judicial employees requiring their resignation upon becoming a candidate for a non-judicial office is reasonable.

195 W. Va. at 478-79, 466 S.E.2d at 137-38 (emphasis in original omitted and emphasis supplied).

Like the circuit court in Gatson, Justice McGraw has wrongly relied on Marra as controlling of the outcome of this case. Contrary to the position advanced by Justice McGraw, no additional qualification for office will be imposed by restricting when a sitting supreme court justice, whose term has not expired, may seek a new term on this Court. The fundamental qualifications required to seek a seat on this Court are not affected by prohibiting Justice McGraw from seeking a second seat on this judicial body at this juncture in his currently unfulfilled term. What this Court is being forced to do, solely in response to the unprecedented candidacy undertaken by Justice McGraw, is to impose a restriction which affects eligibility for election to this body, not the qualifications for holding a seat on this tribunal. . . .

Counsel for Justice McGraw suggests repeatedly in his brief that if this Court rules in any fashion which defeats his candidacy, such ruling can be motivated only by political, non-legal bias of the members of this Court. Such assertions, besides being inaccurate, are both insulting and grossly unprofessional.

E. Compelling State Interest

Against both state and federal precedent, we examine whether this state has a compelling interest which permits it to grant the relief requested by Relator based on Justice McGraw's status as a current officeholder of this Court. Both Relator and this Court have identified multiple bases for concluding that the state has a compelling interest in prohibiting an incumbent justice whose term has not expired from seeking election to another term on this body. In addition to maintaining the integrity of the judiciary, the state also has a valid interest in assuring the public an independent and impartial judiciary, minimizing the involvement of the judiciary in the political process, upholding the constitutionally-delegated method of selecting supreme court justices, and ensuring that the judiciary can sustain the critical and unique element of collegiality necessary to the decision-making process of this Court. Collectively, these legitimate state interests combined with the judiciary's

inherent power to regulate itself, compel the conclusion that no person who is serving a term as a justice of the Supreme Court of Appeals of this state shall be eligible to file as a candidate to seek nomination or election to another term on said Court which begins prior to the expiration of the term then being served.

Addressing these legitimate state interests individually, we first consider the primary interest at stake here--upholding the integrity of the judiciary. It is beyond dispute, based on the pronouncements in Clements, that regulations or restrictions affecting candidacy in the form of ballot access can withstand constitutional scrutiny when those ballot limitations are established for the purpose of maintaining the integrity of the judiciary. 457 U.S. at 460. This Court previously adopted the rationale employed in Clements when we interpreted the constitutional requirement concerning the qualifications necessary for eligibility to seek judicial office as a circuit court judge in Donnahoe. See 174 W. Va. at 33-34, 321 S.E.2d at 684. It is equally beyond dispute that the action of Justice McGraw in seeking to "switch seats" mid-term has impugned the character of this judicial body. Similarly above discussion is the importance of preserving the integrity of the judicial system. See W.Va. Code of Judicial Conduct, Canon 1. As one wise jurist has expounded, "The need to preserve judicial integrity is more than just a matter of judges satisfying themselves that the environment in which they work is sufficiently free of interference to enable them to administer the law honorably and efficiently. Litigants and our citizenry in general must also be satisfied." Hobson v. Hansen, 265 F. Supp. 902, 931 (D. D.C. 1967) (Wright, J., dissenting). When an individual seeks so obviously to advance his personal interests through such an unorthodox and previously uncharted method of term-enhancement, it cannot be gainsaid that public sentiment would quickly conclude that this action is not deserving of a justice sitting on this court of last resort.

The state's interests in assuring the independence and impartiality of the judiciary and minimizing the involvement of the judiciary in the political process go hand in hand. It is axiomatic that a judiciary can properly function only when it acts independent of all extraneous influences or interests, whether political or otherwise. Critical to understanding the imperative that the judiciary be separated from politics, other than as may be required for the purpose of elections, is an appreciation of the dangers presented by commingling politics with the judiciary. The Hurowitz court instinctively recognized the inimical effects that unnecessary exposure to the political process would have on the judiciary. See 426 N.E.2d at 748. Judges have to guard against the public perception that involvement in the political process subjects them to the influences of those who help secure their elections. Here, as in other instances of judicial conduct, it is not only the accuracy of an allegation of impropriety that warrants concern, but, significantly, it is even the mere appearance of impropriety that has the capability of signaling disastrous results for the judiciary as an institution. As recognized by the Supreme Court of Washington in Niemi, "public confidence is undermined when the 'citizenry concludes, even erroneously, that cases [are] decided on the basis of favoritism or prejudice rather than according to law and fact.'" 820 P.2d at 44 (quoting J. Shaman et al., Judicial Conduct and Ethics § 10.03 at 275). Consequently, the judicial system must be ever vigilant with regard to the public's perception of the improper infusion of politics within its courts.

Perhaps the most obvious and compelling reason why Justice McGraw's candidacy should not be permitted arises from the effects that a mid-term candidacy has on the court system as a whole. As fully-explored by the New York courts in both Hurowitz and Potter, the electoral method of judge selection is abrogated by requiring, perhaps ad infinitum, that judges be placed on a court via the appointment process when contrived judicial vacancies occur. See [Hurowitz]. The evils that could be attempted through such "forced" judicial vacancies are easily perceived. Notwithstanding the patent circumvention of the electoral process, the disruption to the operations of this Court would be catastrophic were we to permit Justice McGraw, and consequently every present and future sitting justice desirous of following suit, to jump into the election fray, irrespective of when the term

being filled by that individual expires.[26]

Finally, we would be less than forthright if we did not acknowledge the effects this candidacy has had on the ability of this Court to conduct its constitutionally-required duties with the element of collegiality necessary to properly effect judicial decision-making. While the process of judicial decisions implies disagreement, it also implies that the parties to such decisions must approach dispassionately the business of dispute resolution without personal animosity and with a healthy respect for honest differences of opinion. Unfortunately, this candidacy has brought with it an unhealthy pall of partisanship. The author of this opinion has experienced first-hand that the loss of collegiality can only serve to promote disharmony and impede rational discourse.

We do not conclude that Justice McGraw is ineligible to be a candidate based on lack of qualifications. See W.Va. Const. art. VIII, § 7. Instead, his ineligibility arises from the State's compelling and permissible interest in regulating the political activities of its judicial officeholders. . . . Given our explicit and implicit regulatory powers over the judiciary, we are required to resolve this unprecedented, and clearly unanticipated by either the constitutional framers or our legislature, issue of an incumbent justice's authority to seek another seat on the same judicial body while currently serving an unexpired term. Because of the constitutional and statutory void, and because of the pressing need to resolve this issue, this Court was forced to formulate a rule that addresses the propriety of an action which never had been attempted during the history of this state. . . .

We come to the end of this case with a profound respect for our constitutionally-proscribed responsibilities and an equally healthy regard for our historical, institutionally-mandated obligations to protect the structural integrity of this Court and to apply the terms of our constitution in a manner which comports with common sense and which promotes the public weal.

Based on the foregoing, the writ of prohibition is granted as moulded and the Clerk of the Court is hereby directed to issue forthwith the mandate for this case. Writ granted as moulded.

Starcher, J., dissenting:

The majority opinion unconstitutionally steals from the voters of West Virginia the right to decide whether or not they, the voters, would elect a qualified, eligible candidate -- Justice Warren McGraw -- to a 12-year seat on our Supreme Court of Appeals.[1] . . .

II. The Rhetoric of Rudeness

To quote from the majority opinion: "The author of this opinion has experienced first-hand that the loss of collegiality can only serve to promote disharmony and impede rational discourse." . . . Then the majority opinion proceeds to use language conducive to anything but collegial discourse. See, e.g., [supra] that credits the press with "commentary . . . [leading to a] state of calumny that has beset this institution [the West Virginia Supreme Court of Appeals] ..."

"Calumny" is defined in the Oxford English Dictionary as "slander."

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[26]Were this Court to sanction Justice McGraw's candidacy, we would be setting in place a mechanism that would allow judicial seats to be continually up for grabs by those already sitting on this body, whether for the sole purpose of term-enhancement or as a means of defeating the reelection of a particular justice. Whatever the objective, no one can seriously doubt the folly inherent to the establishment of such a "revolving-door" method of justice selection. Where would it end? We fear that the end result would be the utter and complete demise of the public's confidence in its judicial system.

[1]As I file this dissent, there are eerie parallels between the majority's creation of a rule in the instant case that deprives the voters of West Virginia of their right to vote for a candidate -- and the decision by a 5-to-4 majority of the United States Supreme Court to create a rule that prohibits the hand count of machine-rejected ballots in the Florida Presidential election, a procedure that is clearly authorized by state law and is as established and as American as apple pie! In the case of Vice President Gore -- and in the case of Justice McGraw -- judges should not be making up rules that deny citizens their right to vote!

But it is a case of the pot calling the kettle black for the majority opinion to characterize others' language as "slanderous."

For example, the majority opinion describes my dissenting language in this Court's original order by which we agreed to hear the merits of this case as "contorted logic," "shallow," and "jurisprudentially indefensible[.]" And the majority opinion calls Justice McGraw's attorney "insulting and grossly unprofessional[.]" The majority opinion further describes Justice McGraw as "audacious" and "impugning the character" of this Court[.]

I could go on, but these examples suffice. It was a mistake to include such ephemeral, ill-considered gibes in a formal opinion of this Court. Such an unfortunate choice of words certainly does nothing to encourage collegiality on the Court. (Dissents, being more personal than Court opinions, historically have greater latitude, but even in dissents, harsh, ad hominem, language does not age well.)

III. The Majority Opinion is Legally Erroneous

The majority says that it is "imposing a restriction which affects [Justice McGraw's] eligibility for election to this body, not [his] qualifications for holding a seat on this tribunal." . . . In other words, the majority says that imposing a restriction that "affects" certain people -- by saying they are not "eligible" to be elected to a seat on this Court -- is not the same thing as holding that those same people are not "qualified" to hold a seat on this Court.

For any sensible person, this is an utterly non-existent distinction.

After wading through a field of irrelevant cases that are apparently cited and discussed to provide cover for the majority's lack of authority for its holding, the majority opinion ultimately hangs its jurisprudential hat on our recent case of Philyaw v. Gatson, 195 W. Va. 474, 466 S.E.2d 133 (1995). In Philyaw, we upheld a (properly promulgated) Supreme Court rule that said that a magistrate court employee -- not a judicial officer -- had to resign their employment with the court system, if they ran for a non-judicial office. We said that this rule was not an imposition of an additional qualification on a candidate for office, but was a "reasonable requirement[] for retaining employment [in the] . . . judicial branch." We specifically grounded the reasonableness of this regulatory restriction on judicial employees upon the analogous express constitutional provision forbidding judicial officers from running for non-judicial office.

Contrasting Philyaw with the instant case: the majority is not reviewing an employment restriction -- it is creating one, out of whole cloth.

Prior to this case, no West Virginia judicial officer or employee has ever been barred from running for any judicial office -- because, of course, their right to do so is specifically reserved in our Constitution. The majority has by its own acknowledgment created a "restriction" that has no grounding in any written provision of any rule, statute, or constitutional phrase. The restriction that the majority is creating is not -- as it was in Philyaw for the judicial employee -- part of any power that is given to this Court to set the "conditions" for Justice McGraw's "employment" in his current seat on this Court. Justice McGraw's "employment" conditions are entirely set by the Constitution and other applicable express law. Justice McGraw could be removed from office for a breach of those conditions -- not by any vote of the majority of this Court -- but only by impeachment. Philyaw, then, the sole case that the majority uses to support its distinction-without-a-difference reasoning, is totally inapposite to the case of Justice McGraw.

IV. The Majority [Violates
Justice McGraw's and the Voters' Rights]

The West Virginia Constitution, Art. 8, § 7, "General Provisions Relating to Justices, Judges and Magistrates," states in pertinent part, with emphasis added:

> No justice, judge or magistrate shall hold any other office, or accept any appointment or public trust, under this or any other government; nor shall he become a candidate for any elective public office or nomination thereto, except a judicial office; and the violation of any of these provisions shall vacate his judicial office.

This language is easy to understand. It is clear that if Justice McGraw chose to run for Governor, or State Senator, or County Commissioner or for any other non-judicial office, he would have to first resign from the judiciary (or be automatically removed by filing for the office). However, it is equally clear that if Justice McGraw chose to run for Magistrate, Circuit Judge, or a Supreme Court seat -- all "judicial offices" -- he is not required to resign from his currently-held judicial office.

How in the world can anyone say that -- on reading this clear language -- Justice McGraw should believe that he was barred from running for an open seat on this Court, when that open seat is a "judicial office?"

But the majority (in essence) says -- ". . . it just doesn't seem right."

Well, a little over 100 years ago, a great Justice [then a Judge] on this Court warned of the dangers of letting people tamper with the Constitution when they thought something "didn't seem right." Not long after the Constitution of this state was adopted, Justice Brannon warned that permitting additional qualifications for office to be imposed -- by any process other than constitutional amendment -- would make the fundamental right to hold public office "subject to the fluctuation of sentiment, the caprices of constantly changing legislatures, the passions of the hour[.]" . . . State ex rel. Thompson v. McAllister, 38 W. Va. 485, 507-08, 18 S.E. 770, 777-78 (1893) (dissenting opinion of Justice Brannon, adopted by this Court in Marra v. Zink, 163 W. Va. 400, 256 S.E.2d 581 (1979)).

In the case before the Thompson court, an additional qualification for office had been created by at least a colorably legitimate way -- legislative enactment. In Justice McGraw's case, an additional qualification for office has been created by a majority of this Court, which has asserted the right to add a qualification that is found nowhere in our Constitution -- in accordance with the majority's views of public policy.

In both cases, the result is the same: a fundamental constitutional right of West Virginians has been made "indefinite, unsafe, precarious, dependent upon the times and motives and aims dominating them." [Thompson.]

West Virginia law is clear that every citizen has the right to run for public office. That right can be tempered only by explicitly stated requirements:

> The right of a citizen to hold office is the general rule, and ineligibility to hold office is the exception, hence courts will hesitate to take action resulting in deprivation of the privilege to hold office, except under explicit constitutional or statutory requirements.

State ex rel. Thomas v. Wysong, 125 W. Va. 369, 24 S.E.2d 463, 468 (1943) (citation omitted)[.]...

The majority admits that there is no clear or explicit constitutional or statutory prohibition to Justice McGraw's candidacy for election to a 12-year seat. The law mandates that Justice McGraw is presumed to be eligible for office unless the Constitution clearly and explicitly prohibits his candidacy. It is not Justice McGraw's burden to point to some explicit provision allowing him to run for office, because his eligibility is presumed; rather, the law is clear that his right to run can be taken from him only by some clear and explicit constitutional restriction -- not by a judicially-imposed restriction. The Court's ruling in this case thus turns longstanding precedent on its head.

This Court's articulation of a new public policy in this case is extraordinary, especially in light of the obvious fact that the Court's previous holdings -- recognizing that our State Constitution has at its core a fundamental right to run for office -- confirm that the public policy of West Virginia is the fundamental right to run for office itself.

Creating, from whole cloth, a vague new "public policy" that defeats the clear expression of this fundamental constitutional right, is antithetical to all known forms of constitutional interpretation. It is wrong for the Court to search outside the Constitution, to create a new public policy to defeat Justice McGraw's fundamental constitutional right. The heart of constitutional construction is not to search for ways to defeat a fundamental constitutional right, but to ensure that such rights are preserved. . . .

[W]hen the State passes a law that infringes on a fundamental constitutional right, such as the

right to stand for election, such a law only withstands strict constitutional scrutiny if it is narrowly tailored to meet a compelling state interest. Never before has this Court used a "compelling state interest" analysis, not to review, but to create from whole cloth, a constitutional abridgement.

In the instant case, the State has taken no action to deprive anyone of a fundamental constitutional right. To the contrary, Secretary of State Hechler has sought to protect Justice McGraw's fundamental constitutional right to stand for election.

There was an attempt in the House of Delegates this year to legislate the very restriction on Justice McGraw's fundamental constitutional right that was sought by the petitioner in this case. Had that measure been enacted, the question of whether the measure was designed to meet a compelling state interest may have presented itself to this Court, because such a law would have abridged Justice McGraw's clear constitutional right to run for office. But the measure failed.

. . . The Constitution clearly and plainly allows a "justice" to run for "a judicial office." West Virginia Constitution, Art. VIII, § 7. There is no exception to this provision; there is simply nothing that can be interpreted to limit a justice's right to run for "a judicial office." Another term on the Supreme Court of Appeals is, obviously, "a judicial office." Nothing about the relevant portion of Art. VIII, § 7 is unclear, yet the majority has grafted onto it an exception for justices who already are in office. The majority's action in this case is not an "interpretation" of Art. VIII, § 7, but an expansion of it.

The Court could not possibly be interpreting the phrase "a judicial office" because that phrase is clear, and includes the office of Justice of the Supreme Court of Appeals. If it did not, circuit judges like Justice Maynard and myself, who ran for a term on the Supreme Court of Appeals while still sitting as circuit judges, would have been barred from running at that time. Rather than interpreting the provision, the majority is expanding it. Such an expansion is foreign to all precedential rules of constitutional construction.

The Court's decision also completely ignores longstanding precedent from West Virginia and around the nation that requires every reasonable construction in favor of eligibility for office. In State ex rel. Maloney v. McCartney, 159 W. Va. 513, 223 S.E.2d 607 (1976), this Court stated that: "in the event of ambiguity a constitutional amendment will receive every reasonable construction in favor of eligibility for office."

. . . Significantly, the petitioner has never suggested that a construction of Art. VIII, § 7, that allows a sitting justice to run for re-election before the expiration of his present term, is unreasonable. Indeed, considering the fact that the right to run for office is a fundamental constitutional right and the fact that any ambiguity must be construed in favor of eligibility, such a construction is, at the very least, a reasonable one. It would be a departure from reason and logic and require extraordinary contortions of accepted definitions to find otherwise. The law mandates that this Court ask the question: If the provision is ambiguous, is there any reasonable construction that would allow a sitting justice to run for a separate term on the court? The Constitution specifically allows, without exception, a "justice" to run for "a judicial office." Justice McGraw is a "justice," and the two seats open during the 2000 election are both "a judicial office."

VI. [Hurowitz] does not
Provide a Basis for this Court's Decision

The decision of the New York Court of Appeals in Hurowitz v. Board of Elections, 53 N.Y.2d 531, 426 N.E.2d 746, 443 N.Y.S.2d 54, (1981), a 3-page, 4-3 decision, construing the constitution of New York, is the only direct authority cited by this Court for its ruling. However, Hurowitz does not lend any controlling legitimacy for the majority's reading of the West Virginia Constitution.

Most importantly, in New York State, contrary to West Virginia law, the right to hold public office is not considered to be a "fundamental right," and it may be restricted simply upon a showing that the restriction has some "rational basis. "In the Matter of Simon Rosenstock v. Scaringe, 388 N.Y.S.2d 876, 357 N.E.2d 347, 40 N.Y.2d 563 (1976). In West Virginia, by contrast, citizens have a fundamental constitutional right to hold public office, unless some clear and explicit constitutional

provision disqualifies them. E.g., State ex rel. Thomas v. Wysong, 125 W. Va. 369, 24 S.E.2d 463, 468 (1943). Thus, even if the constitutions of the two states were identical -- and they are not -- only West Virginia requires that there be a clear and explicit constitutional provision in order to render a candidate ineligible for the ballot, and the New York case is easily distinguishable on that basis alone.

The New York court did not purport to find that the constitutional clause providing that a judge may not "be eligible to be a candidate for any public office other than judicial office" clearly and explicitly barred sitting judges whose terms have not yet expired from becoming candidates for identical positions on the same court; and under New York law, unlike West Virginia law, no such clear and explicit provision was required to restrict the rights of the petitioner in Hurowitz Indeed, the slim majority in Hurowitz based its ruling upon the entirety of New York's extremely complex constitutional provisions regarding eligibility and terms of judicial offices. . . .

[T]he New York Constitution's eligibility provisions are dissimilar to those of the West Virginia Constitution. Simply stated, because West Virginia law and constitution require application of very different legal standards than New York law, [Hurowitz] does not support this Court's rewriting of the [unambiguous] provision of the West Virginia Constitution, which permits a judge to run for "a judicial office," without any restriction or qualification. . . .

VII. The Business of Judging

It is ironic that the majority panel -- entirely composed of pragmatic politician/judges who have substantial personal experience and understanding of the politics of judging -- have chosen to affix their support to the majority opinion's erroneous rhetoric about courts being "pure" and "above the fray" of the world of politics.

This rhetoric is, of course, poppycock.

As one noted scholar put it:

> Whether judges are mere oracles of fixed and known legal principles is a question which most social scientists thought resolved more than fifty years ago by the realist revolution. The battle need not be fought again here. In the modern view, well established among political scientists, sociologists, and eminent legal thinkers, judges not only make conscious policy choices in the adjudication of cases and in the exercise of the power of judicial review, but also engage in political decision-making as a matter of function. "The judges are [political] actors charged with special responsibilities, and their decisions . . . allocate values in society such as opportunity, liberty, money, protection, or representation in other types of decision-making. Like other political decision-making, this allocation of values is differential; that is, some individuals and groups are favored and others are disadvantaged. These policy outputs are called 'justice.'"
>
> At the appellate court level, judges are likely to confront policy choices directly in the course of developing common law principles and in interpreting state constitutional and statutory provisions. Even in the process of reviewing lower court decisions for procedural irregularities or substantive errors, however, appellate court decisions may serve to favor some kinds of interests while disadvantaging others, demonstrating thereby the political nature of the judicial function.
>
> This view of the judicial process does not posit that judges are merely "politicians in robes" or that judicial policy-making is exactly like that engaged in by legislatures and executives; these over-simplifications do not withstand even casual analysis. Nor does it deny that relatively few cases are explicitly partisan or ideological in nature or that many times judges are called upon to make relatively minor and technical adjustments in long-settled principles of law. But it does emphasize that judicial discretion is extensive and that judges are aware of the options available to them and the differential effects alternative choices will have upon individuals and groups affected by the litigation before them. Finally, of course, this conception of the political nature of judicial decision-making recognizes that judges frequently are able to develop common law, to interpret statutes and administrative regulations, and to adjudicate constitutional disputes--all

opportunities which allow judges explicitly to make, veto, legitimize, or reinforce public policies. Phillip L. DuBois, From Ballot to Bench, pp. 23-24, University of Texas 1978.

Or as journalist Tom Miller more vernacularly opined in the April 3, 2000 edition of The Charleston Gazette:

> There was some talk -- but not much -- instigated by the governor during the 2000 legislative session about the possibility of electing our Supreme Court justices in a nonpartisan election. Events in recent days prove how transparent that unlikely change would be.
>
> Just as there is nothing more partisan than the nonpartisan county board of education in the state's 55 counties, there would be nothing more partisan in state government than a nonpartisan Supreme Court.
>
> These five people get to make the final decisions on the tough political issues that the two other branches of government can often duck. Next on the table is the constitutional correctness of the $ 4 billion pension fund bond issue. Maybe the governor and Legislature should ask these folks to solve the Public Employees Insurance Agency funding problem.
>
> Last week, the court decided that gubernatorial candidate Denise Giardina can't have her cake and eat it too. By a 3-2 vote, the court refused to review a lower court ruling that as a member of an independent party, she can't get people who are registered with one of the two major political parties to sign her nominating petitions unless she warns them that this will prohibit them from voting in their own party's primary election in May.
>
> The week before, the court told one of its own, Justice Warren McGraw, he can't run for a 12-year term on the court while he's serving a shorter term. And before that it was the controversial rejection of Gov. Cecil Underwood's appointment of House Speaker Bob Kiss, D-Raleigh, to fill a seat on the court.
>
> These are partisan, political hot potatoes that demand partisan, political decisions. Probably no one among us can agree completely with all three rulings, but who can complain that they dodged the question?
>
> What did the Legislature do about third-party candidates? Last year lawmakers did remove the penalty for signing one of these nominating petitions and then voting in the Democratic or republican primary, but didn't change the section that says it still prohibits this double dipping by voters. Lawmakers also doubled the number of signatures required for third-party nominations for good measure.
>
> And why did a Republican governor appoint a Democrat to the court? For the likely reason that he wanted to curry favor with Democratic voters he needs so desperately in November to win another term, with the hope that it would be rejected so he could then name a Republican to appease his own grumbling GOP ranks.
>
> The partisan labels in the Supreme Court right now may more correctly be business and labor than Democrat and Republican, but partisanship is alive and flourishing. And changing the election labels won't alter those dynamics.

Both academics and journalists agree that a necessary part of the business of judging is deciding difficult political issues. The art of good judging, as I see it (and I think most honest judges would agree), is doing so in a way that properly respects the structure of our democratic, constitutional system.

It is utterly absurd to suggest that judges just "apply the law," and do not make decisions that are influenced by their philosophies -- or their "prejudices" -- the unfortunate term that the majority chooses to use.

For example, my former colleague, Justice Margaret Workman, is (and was while she sat on this Court) strongly "prejudiced" toward helpless children. And whenever she could, she made judicial choices that favored those children. Some people thought that Justice Workman sometimes "stretched the law" to favor children -- and they were probably right. But she never, in my opinion, stretched it beyond the permissible bounds imposed by our constitutional, democratic system.

The majority in this case, I suggest, are certainly bringing their "prejudices," or philosophies, to the issues before them. There is nothing wrong with that.

But they are also improperly "stretching the law" well beyond the limits of our Constitution.

VIII. A Final Note

In conclusion, let me step back for a moment from the specific legal reasons why the majority opinion is wrong.

I personally understand why many people would oppose allowing a sitting justice – any sitting justice – to run for a full term before his unexpired term is finished. If the Legislature prohibited such conduct, I might even vote as a judge to uphold such a law. And if I were writing our Constitution, I might support inserting such a clause.

But our Legislature, the elected representatives of our people, declined the opportunity to enact such a law – just this year! And I am not writing a new Constitution, but applying the one we have.

Under our Constitution, there is only one group of people who have the legal power to say -- if they want to – that what Justice McGraw intended to do was a bad idea. That group is not the ad hoc group of judges in the majority, who have conjured up a phantom restriction out of their own feelings about what seems "right" to them. Let me reiterate: The only group of people who have the legal right to say that what Justice McGraw sought to do would be a bad idea are the voters of West Virginia.

The majority opinion unconstitutionally steals the right to choose from the voters of this State. . . . I therefore dissent.

CAREY V. DOSTERT,
185 W.Va. 247, 406 S.E.2d 678 (1991).

O'HANLON, Acting Justice[1]:

This matter is before the Court to answer the certified questions posed by the Circuit Court of Morgan County. . . .

On or about December 1, 1981, the petitioner, Judge Pierre Dostert, then Judge of the Twenty-third Judicial Circuit, received a written communication from Syvilla Hovermale, a client of respondent, William B. Carey, a licensed practicing attorney in Morgan County, complaining about the proposed settlement of a wrongful death case prosecuted by the respondent on behalf of Mrs. Hovermale.

Mrs. Hovermale set forth the nature of her contingency contract with Carey and charged that he had refused to consummate the settlement. On December 7, 1981, petitioner issued an order to show cause against the respondent directing him to appear before the court. The petitioner's order referred to his concern with the respondent's fifty percent contingency fee contract with Mrs. Hovermale. On December 9, 1981, Frank Brill, a newspaper reporter, was visiting the office of Judge Dostert and was supplied with a copy of the order by either the petitioner, his secretary, or his clerk. An article written solely from the contents of the order to show cause was published December 10, 1981, in The Evening Journal, a newspaper of general circulation published in Martinsburg. The order to show cause was filed with the clerk of the court on December 10, 1981. On the same date, the petitioner issued a second order in which he recused himself from hearing the matter.

The respondent obtained a writ of prohibition against the petitioner in this Court, wherein we held that W.Va.Code § 30-2-7 (1931), the statute under which the judge had acted, had been

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[1]With four of the Justices having deemed themselves disqualified, Acting Chief Justice Margaret L. Workman designated Circuit Judges Robert Burnside, Thomas Keadle, Daniel P. O'Hanlon and Booker Stephens as Acting Justices.

superseded by W.Va.Code § 51-1-4a, the Bylaws of the West Virginia State Bar, and the Judicial Reorganization Amendment to the West Virginia Constitution, Article VIII, and was consequently invalid. Syl. Pt. 2, Carey v. Dostert, 170 W.Va. 334, 294 S.E.2d 137 (1982) (hereinafter referred to as Carey I).

On December 1, 1982, the respondent filed a civil action against the petitioner in the Circuit Court of Morgan County, seeking damages for libel, slander, malicious prosecution, abuse of process, negligence, intentional infliction of emotional distress, and violation of civil rights under 42 U.S.C.A. § 1983 (West 1981). The essence of the respondent's action was that his professional reputation had been damaged as a result of the petitioner's order to show cause and the resulting news article.

. . . The first three certified questions call upon us to determine whether the petitioner enjoyed judicial immunity if he 1) knew, 2) should have known, or 3) subsequently learned that the statute was obsolete. The petitioner argues that immunity exists and is applicable in all these situations, since all acts taken by the petitioner were judicial acts made within his actual or apparent jurisdiction. The respondent, however, argues that the petitioner judge was not performing a judicial act to which immunity would attach.

It is critical to the independence of the judiciary that judicial officers be free to exercise their authority without fear of personal liability for their actions. Historically, courts have recognized this as the doctrine of judicial immunity, and it is "as old as the law" as recognized by the United States Supreme Court in Randall v. Brigham, 74 U.S. (7 Wall.) 523, 536, 19 L.Ed. 285 (1868). Because it is a judge's duty to decide all cases within his jurisdiction, and because his decisions may arouse intense feelings, particularly in hotly-contested cases, fearless and independent judicial decision-making should not be intimidated by potential litigation from dissatisfied litigants. See Pierson v. Ray, 386 U.S. 547, 554 (1967).

The doctrine of judicial immunity as enunciated by the United States Supreme Court is sweeping in its scope. In Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1871) the United States Supreme Court recognized that judicial immunity applied to preclude liability however erroneous or injurious the judge's action may have been, or indeed whatever the judge's motive in taking such action may have been, so long as it was a judicial act. Id. at 347. Moreover, this Court in Pritchard v. Crouser, 175 W.Va. 310, 332 S.E.2d 611 (1985) concurred with the three major policy grounds identified by the United States Supreme Court for shielding judges from liability, which included: "(1) the preservation of judicial independence; (2) the need for finality in lawsuits; and, (3) the existence of another remedy against judicial excess in the form of appellate review." 175 W.Va. at 314, 332 S.E.2d at 615.

In Stump v. Sparkman, 435 U.S. 349 (1978), the United States Supreme Court reiterated this doctrine despite circumstances indicating a rather aggravated lack of due process. In that case, the circuit judge approved a petition filed by the mother of a " 'somewhat retarded' " girl to have the girl sterilized. . . . The approval of the petition came the same day it was filed after an ex parte proceeding without a hearing and without notice to either the girl or her guardian ad litem. . . . The Court in Stump went so far as to hold that a judge would not be deprived of immunity even if the action were malicious or beyond his authority. . . . The Court made it clear that the judge would only be subjected to liability "when he has acted in the 'clear absence of all jurisdiction.'"

. . . Courts have reasoned that it is necessary to imbue the doctrine of judicial immunity with such broad scope in order to preserve the integrity of the judicial system. As the Court stated in Stump, disagreement with the action taken by the judge does not justify a deprivation of immunity. . . . Even if this doctrine may in some circumstances create unfairness to litigants, it is necessary in order to ensure that judges render decisions without fear of personal consequences. . . .

This Court has also recognized broad judicial immunity against civil liability. See Crouser, 175 W.Va. at 310, 332 S.E.2d 611. In Crouser, this Court . . . stated "[a] judge without immunity is a judge without power." . . . We also emphasized that immunity is required to prevent the chilling

effect that even the threat of litigation would have on judges in the performance of their duties. . . . Finally, this Court in Crouser refused to grant attorney's fees against a judge although the United States Supreme Court had allowed similar fees in Pulliam v. Allen, 466 U.S. 522 (1984). . . . Consequently, this Court's finding in Crouser that "[j]udicial immunity in West Virginia is absolute" indicates that we have given a broader interpretation to judicial immunity then found in many other jurisdictions. . . .

In short, judges are absolutely immune from civil liability for damages for actions taken in the exercise of their judicial duties. Furthermore, a judge may act within his jurisdiction even when he acts outside his authority. [Crouser.] "[T]he factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." [Stump.]

In this case, the Hovermale complaint was directed to Judge Dostert in his judicial capacity. The issuance of the show cause order in connection therewith clearly was also done in the judge's judicial capacity. The fact that respondent thereafter sought and was granted a writ of prohibition against the judge further substantiates that the issuance of the show cause order was judicial in nature, since only judicial acts can be prohibited by a writ of prohibition. See Carey, 170 W.Va. 334, 294 S.E.2d 137; see also State ex rel. Collier v. County Court of Mingo County, 97 W.Va. 615, 618, 125 S.E. 576, 577 (1924); 15 Michie's Jurisprudence, Prohibition, s 2 (1979 & Supp.1990). Therefore, in this case, there is no question that all the acts taken were judicial in nature.

Furthermore, the scope of a circuit judge's jurisdiction is broad-based. In West Virginia, a circuit court is one of general jurisdiction. W.Va. Const. art. VIII, s 6; W.Va.Code s 51-2-2 (1978). In addition, the petitioner's December 7, 1981, order was premised upon statutory authority. Although this Court held in Carey I that it had the inherent power to regulate licenses to practice law, there had been no clear ruling at the time of the defendant's show cause order that W.Va.Code § 30-2-7 was not a viable and enforceable statute. See Syl. Pt. 1, 170 W.Va. 334, 294 S.E.2d 137. Furthermore, the statute itself can be distinguished from the common law power of courts of general jurisdiction to disbar errant attorneys. State v. Shumate, 48 W.Va. 359, 361, 37 S.E. 618 (1900). Although the conflict between that statute and Article VIII of the West Virginia Constitution, W.Va.Code § 51-1-4a, and the Bylaws of the West Virginia State Bar was resolved by this Court in Carey I, the fact that W.Va.Code § 30-2-7 was subsequently found to be obsolete in no way indicates that the defendant acted in a "clear absence of jurisdiction."

The fact that a judge acts upon a void or invalid law does not deprive him of immunity if he otherwise has jurisdiction. ...

Finally, the respondent makes much of the fact that Judge Dostert is covered by a general policy of insurance purchased by the State of West Virginia to cover all its employees, contending that the existence of such coverage along with the language of the policy constitutes a waiver of the right to assert judicial immunity as a defense in this action.

While we do not reach the issue of the effect of this type of policy on the general doctrine of sovereign immunity, we do here specifically hold that it has no effect whatsoever on the doctrine of judicial immunity in this jurisdiction. It would not be consonant with a doctrine which is meant to foster judicial independence to allow judges to be sued, but merely spared from any personal liability above the limits of an insurance policy.

Therefore, we hold that judges in this jurisdiction are absolutely immune from suit for the results of any judicial act performed by them while acting in their official capacity.[11]

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[11]While this grant of judicial immunity is both absolute and broad, the avenues provided by the Code of Judicial Ethics and, indeed, the electoral process remain for dealing with judicial misconduct in office. It is clear, therefore, that while a judge cannot be held civilly liable in this jurisdiction for

[The fourth] certified question presents the issue of whether a judge who provides a copy of a court order to a newspaper reporter prior to the filing of such court order with the clerk of the court waives the protection of judicial immunity. The petitioner submits that the publication or dissemination of a court order does not abrogate judicial immunity since the execution of a court order constituted a judicial act with immunity attaching to any matters connected with the contents of the order. Any subsequent publication of the order, petitioner argues, is privileged and falls within the confines of judicial immunity. The respondent, on the other hand, argues that the petitioner's publication of the order was an administrative, rather than judicial act, and deprived him of an initial period of confidentiality during which a totally unmeritorious ethical accusation could be investigated and dismissed. Thus, respondent asserts the petitioner disseminated privileged material in a nonprivileged manner, thereby losing any judicial immunity defense.

Since the signing of the show cause order was a judicial act, causing judicial immunity to attach to the contents of the order, the subsequent publication of the order was privileged and an absolute defense to a libel or defamation charge. The United States Supreme Court in Forrester v. White, 484 U.S. 219 (1988), examined this issue in a different context and enunciated a functional approach to the analysis of when immunity of judicial officials must be utilized. . . .

In Forrester, the issue was whether a state court judge was entitled to absolute immunity from suit for damages brought pursuant to 42 U.S.C. § 1983. . . . The case was brought by a probation officer who claimed she had been demoted and ultimately dismissed by the judge on the basis of sex discrimination. . . .

The Court questioned whether the actions performed by the judge were in fact judicial acts which would have entitled him to absolute immunity. . . . Particularly the Forrester Court reflected that

> [d]ifficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges. Here, as in other contexts, immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches.

[The] Supreme Court expanded further on the application of this functional approach to the immunity issue by stating that

> [u]nder th[is] approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. Officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy, and the Court has recognized a category of 'qualified' immunity that avoids unnecessarily extending the scope of the traditional concept of absolute immunity.

[Based] upon the application of this functional approach, the Forrester court concluded that the judge was not entitled to absolute immunity for his decision to demote and discharge the probation officer because the function performed by the judge was clearly administrative rather than judicial in nature. . . .

We agree that such a functional approach is useful in determining whether a particular act is judicial in nature. . . . [T]he defendant's show cause order, even though not yet filed with the clerk of the court at the time a copy was obtained by the newspaper reporter, still was the manifestation of a judicial act. . . . Since issuance of a show cause order is a judicial act, the petitioner cannot be sued for libel or defamation because of the publication of the contents of the order. . . . Finally, the fact that the alleged defamatory statements were made outside of a courtroom is in no way dispositive in determining whether or not they are cloaked with immunity. . . .

Thus this Court holds that a judge acting in his judicial capacity who provides the public with

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judicial acts done in his official capacity, other remedies exist.

information contained in the public record, whether through the press or otherwise, or distributes copies of pleadings or other official court documents which are a part of the public record does not thereby give up the protection of judicial immunity. In short, there is no cause of action against a judge for the publication of an order that is part of a public record and is the manifestation of a judicial act. We therefore answer this question in the negative. . . .

G. Continuation of the Common Law

Read Article VIII, § 13.

MORNINGSTAR v. THE BLACK AND DECKER MANUFACTURING COMPANY, 162 W. Va. 857, 253 S.E.2d 666 (1979).

MILLER, Justice.

This case presents the question of the extent to which a manufacturer of a defective product is liable in tort in this State to a person injured by such product.

The question comes to us from the United States District Court for the Southern District of West Virginia under the Uniform Certification of Questions of Law Act. The plaintiffs, the Morningstars, filed a personal injury action in the District court based on diversity of citizenship against the defendant, Black and Decker Manufacturing Company. The basis for their action is the allegation that Black and Decker manufactured an "8-Inch Builders Sawcat" and Mr. Morningstar was injured when the saw's safety guard failed to close. Mrs. Morningstar sued for loss of consortium.

The Morningstars' complaint set out multiple theories for the defendant's liability, all based on tort concepts. . . .

Black and Decker initially raises [a procedural issue that] we must dispose before addressing the substantive law. It contends that[,] . . . as a result of W.Va. Code, 2-1-1, and the provision found in Article VIII, Section 13 of the West Virginia Constitution, we are not empowered to alter the common law as it existed in 1863. . . .

II

THE EFFECT OF ARTICLE VIII, SECTION 13, AND CODE 2-1-1 ON THIS COURT'S ABILITY TO MODIFY THE COMMON LAW

Black and Decker urges that Article VIII, Section 13 of our Constitution and W.Va. Code, 2-1-1,[5] operate as a bar to this Court's ability to change the common law. These two provisions have led to some confusion in the opinions of this Court and have brought into existence two conflicting responses.

The first is a line of cases which suggest that this Court cannot alter the common law and that such alterations must come from the Legislature. See, e.g., Seagraves v. Legg, 147 W. Va. 331, 127 S.E.2d 605 (1962) (absence of wife's right to sue for loss of consortium resulting from personal injury to husband); Walker v. Robertson, 141 W. Va. 563, 91 S.E.2d 468 (1956) (bar to women serving on petit jury); State v. Arbogast, 133 W. Va. 672, 57 S.E.2d 715 (1950) (rule that dogs cannot be subject of larceny); Shifflette v. Lilly, 130 W. Va. 297, 43 S.E.2d 289 (1947) (strict liability of innkeeper to guest for personal injury or property damage); Poling v. Poling, 116 W. Va.

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[5]. . . W. Va. Code, 2-1-1, states:

"The common law of England, so far as it is not repugnant to the principles of the Constitution of this State, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundered and sixty-three, or has been, or shall be, altered by the legislature of this State."

187, 179 S.E. 604 (1935) (interspousal tort immunity), overruled, Coffindaffer v. Coffindaffer, W. Va. , 244 S.E.2d 338 (1978); Cunningham v. Dorsey, 3 W. Va. 293 (1869) (applying English common law rule that easement of "ancient lights" can arise only by adverse enjoyment from time immemorial).

A subcategory within this category consists of those cases where the Court has acknowledged that it is required to apply the common law as it existed in 1863, but has been able to find a common law precedent that enables the Court to follow more modern common law principles. See, e.g., Long v. City of Weirton, W. Va. , 214 S.E.2d 832 (1975) (abolishing doctrine of municipal tort immunity).

A second and rather divergent approach has been taken in cases where the Court has said a common law rule may be overruled or modified where the old rule does not meet existing conditions. In many of these cases the Court mentions neither the statutory nor the constitutional provision. See, e.g., Currence v. Ralphsnyder, 108 W. Va. 194, 151 S.E. 700 (1929) (restricting doctrine of champerty); Powell v. Sims, 5 W.Va. 1, 13 Am. Rep. 629 (1871) (disapproving doctrine of ancient lights); see also Board of Education v. W. Harley Miller, Inc., W. Va. , 221 S.E.2d 882, 888 (1975) (Neely, J., concurring) (disapproving doctrine that arbitration agreement is no bar to suit on underlying contract); State ex. rel. Worley v. Lavender, 147 W. Va. 803, 131 S.E.2d 752, 761 (1963) (Calhoun, J., dissenting) (disapproving rule that husband and wife may not testify to "nonaccess" in bastardy proceeding).

Included within this category are cases in which the Court has adopted new common law principles without ever discussing whether those princples arose out of pre-1863 common law. See, e.g., Teller v. McCoy, W. Va. , 253 S.E.2d 114 (1978) (affording residential tenant implied warranty of habitability); Harless v. First National Bank, W. Va. , 246 S.E.2d 270 (1978) (limiting private employer's right to discharge an at-will employee); Lee v. Comer, W. Va. , 224 S.E.2d 721 (1976) (establishing right of unemancipated minor to maintain action against parents for personal injuries received in automobile accident); State v. Grimm, 156 W. Va. 615, 195 S.E.2d 637 (1973) (abolishing the M'Naghten common law rule on insanity and adopting a rule similar to the Model Penal Code); Adkins v. St. Francis Hospital, 149 W. Va. 705, 143 S.E.2d 154 (1965) (abolishing doctrine of charitable immunity in tort cases against hospitals); Weaver Mercantile Co. v. Thurmond, 68 W. Va. 530, 70 S.E. 126, 33 L.R.A. (N.S.) 1061 (1911) (adopting Rylands v. Fletcher Doctrine, which did not come into the English common law until 1868); Snyder v. Wheeling Electrical Co., 43 W.Va. 661, 28 S.E. 733, 64 Am. St. Rep. 922, 39 L.R.A. 499 (1897) (adopting Res Ipsa Loquitur Doctrine, which Byrne v. Boadle, 2 H. & C. 722, 159 Eng. Rep. 299 (1863), created on [Nov. 25, 1863], some five months after our Constitution was adopted on June 20, 1863).

While there has been a lack of consistency on the part of this Court in its treatment of [§ 2-1-1 and Art. VIII, § 13], there apparently has been no attempt made to determine the origin of and the historical reasons for these two provisions. In fact, in Seagraves v. Legg, 147 W. Va. 331, 336, 127 S.E.2d 605, 607 (1962), we find this statement in reference to these two provisions: "Apparently [other] states do not have the same constitutional and statutory provisions as West Virginia. . . ."

Our constitutional and statutory provisions are not unique, but are similar to many state constitutional provisions statutes and early colonial and territorial charters. It can be shown from the decisions of other courts that these provisions were designed to establish the initial body of law on which the particular state would operate, and were not viewed as provisions designed to limit the courts in their historic role of developing the common law.

At an early date in Baring v. Reeder, 11 Va. (1 Hen. & M.) 154, 161-63 (1806), the Supreme Court of Virginia met this issue under a 1776 ordinance which provided that the common law of England and acts of Parliament prior to the fourth year of King James the First "shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony." The court stated the effect of this ordinance on the common law as interpreted

by the Virginia courts:

> "I would receive them [modern English decisions] merely as affording evidence of the opinions of eminent Judges as to the doctrines in question, who have at least as great opportunities to form correct opinions as we have, and are influenced by no motives but such as are common to ourselves: and with respect to ancient decisions in England, what Judge would wish to go further? Who will contend that they are binding authorities upon us, in all cases whatsoever? Shall we not have the privilege every day exercised in England, of detecting the errors of former times?" ...

In Trustees, etc., of Town of Brookhaven v. Smith, 188 N.Y. 74, 77-80, 80 N.E. 665, 666-67 (1907), the court had before it a constitutional provision referring to the common law of 1777 -- the year in which New York adopted its first constitution. It declined to treat this provision as preventing the judicial alteration of the common law:

> "The adoption by the people of this state of such parts of the common law, as were in force on the 20th day of April, 1777, does not compel us to incorporate into our system of jurisprudence principles, which are inapplicable to our circumstances and which are inconsistent with our notions of what a just consideration of those circumstances demands." . . .

[Justice Miller discussed and quoted with approval appellate decisions from Nebraska, Colorado, Ohio, Pennsylvania, Maryland, Kentucky, and Wisconsin construing provisions similar to § 13 and reaching results similar to those of Virginia and New York.]

Justice Schaefer of the Illinois Supreme Court dispatched this same issue in Amann v. Faidy, 415 Ill, 422, 114 N.E.2d 412 (1953). There, an Illinois statute had set the common law as of the fourth year of James I, and stated that it "shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority":

> "What the statute adopted was not just those precedents which happened to have already been announced by English courts at the close of the sixteenth century, but rather a system of law whose outstanding characteristic is its adaptability and capacity for growth. The common law which the statute adopted 'is a system of elementary rules and of general judicial declarations of principles, which are continually expanding with the progress of society, adapting themselves to the gradual changes of trade, commerce, arts, inventions and the exigencies and usages of the country.'. . ."[10] . . .

Perhaps there is no more eloquent and forceful expression of this principle than that found in Ketelsen v. Stilz, 184 Ind. 702, 111 N.E. 423, L.R.A. 1918D, 303 (1916), which construed an Indiana statute that adopted the common law made "prior to the reign of James the first. . . ." After a lengthy discussion of common law jurisprudence as a system of judge-made law, the court concluded:

> "We can not believe, then, that our legislature intended to petrify the rules of the common law as declared by judicial decisions at any one time or period, and to set them up in such unflexible form as to make them absolute rules of decision throughout all time. . . . Under the section of the

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[10]Justice Schaefer also observed that if the statute had forged the common law for the Illinois court as of 1607, then many fields of the law would never have been developed:

"The complaint in this case would certainly fail to state a cause of action because negligence did not emerge as a separate basis of tort liability until two hundred years after 1607. . . . The development of the law of contracts would lie before us, for Slade's case . . . was not decided until 1602. The law of quasi-contracts began with Moses v. Macferlan, 97 Eng. Repr. 676, decided in 1760. The validity of a future interest in real property was first made to depend upon the period within which it would vest in the Duke of Norfolk's case, . . . decided in 1682, and the present period of the rule against perpetuities became settled in Codell v. Palmer, . . . decided in 1833. We would have no law of agency, for it, too, developed after 1607. . . . The list could be expanded." . . .

> statute relied on where there are no governing enactments of the legislature, the courts of this State are in all matters coming before them, to endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law, and they are not to accept blindly the decisions of the English courts of any particular time or period without inquiring as to the reasons upon which they rest. To do so would be to adopt a practice which would be in direct violation of the theory of that common law which the statute prescribes we are to follow. . . ." . . .

The obvious thread running through all of these cases is that the term "common law" encompasses two components: first, a body or collection of case precedents extending from the present time back into the ancient courts of England; second, and of more importance, a system of reasoning from case to case precedent that permits the common law to grow with and adapt to changing conditions of society. . . .

In this statement from The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897), Justice Holmes, in his characteristically pragmatic fashion, summarized the reason why the English common law cannot be rigidly imposed as binding precedent:

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

From the foregoing discussion, it can be seen that the provisions of our Constitution, Article VIII, Section 13, and of our statute, W.Va. Code, 2-1-1, are not unique to this State, but exist in similar form in many other states. The historical purpose of such provisions was to declare what sources would initially constitute the organic law which would govern the body politic. We do not find any jurisdiction which adheres to the view that such provisions were adopted to freeze common law for the courts as of the date the particular provision was enacted.

Certainly, many of these provisions provide, as do ours, that the legislature may alter or amend the common law, but this has never caused the courts in other jurisdictions to conclude that the silence about the courts' right to change the common law must mean that courts could not alter it.

Such a construction appears to have been considered by this Court only in some of its cases. This construction does violence to the very nature of the common law, which, as we have seen, has been judicially evolved from prior precedents and modified as necessary to meet society's changing needs. It would have been a mere redundancy to require the constitutional and statutory provisions to read "until altered or repealed by the legislature or the courts," since the courts always had the historic power to evolve and alter the common law which they created.

Based on the foregoing law, we hold that Article VIII, Section 13 of the West Virginia Constitution and W.Va. Code, 2-1-1, were not intended to operate as a bar to this Court's evolution of common law principles, including its historic power to alter or amend the common law. . . .