CHAPTER 9. LOCAL GOVERNMENT

A. Distribution of Powers

BOOTEN v. PINSON,
77 W. Va. 412, 89 S.E. 985 (1915).

WILLIAMS, JUDGE:

. . . Prior to the 1st day of July, 1915, the city of Williamson was governed by a council consisting of six members, a mayor and a recorder. By an act of the legislature, passed at the regular session thereof in 1915, the charter under which the city was so organized and governed was amended and reenacted so as to provide for government thereof, on and after the 1st day of July, 1915, by five commissioners. The new scheme of government is bi-partisan in character. The terms of the office of the commissioners are two years. Not more than three of them can be members of the same political party; and the governor was authorized to appoint them, for the first term of two years, beginning on the 1st day of July, 1915, and ending on the 30th day of June, 1917. Thereafter the commissioners are to be elected every two years. Respondents in the mandamus proceedings had been elected under the old charter for terms of two years, beginning on the 1st day of May, 1915, and ending on the 30th day of April, 1917; and the new charter provided that those in office at the time of its passage (which was held, in *State ex rel. Peters v. Pinson, Mayor et al.,* 76 W. Va. 572, to mean the time the act took effect) should hold until the 1st day of July, 1915. Under the new act, the governor appointed Booten, Dudgeon, Studebaker, Green and Cooper commissioners and, agreeably to a provision of the act, they elected Booten mayor and Dudgeon city clerk. Pinson, mayor, and Hall, recorder, denying the constitutionality of the act, legislating them out of office, and under which the governor had made his appointments, refused, after the 30th day of June, 1915, to vacate the offices held by them and to permit Booten and Dudgeon to take them. Thereupon Booten and Dudgeon instituted their respective proceedings in mandamus for their admission into these two offices, and Pinson brought his suit in equity against Booten and the commissioners to restrain them from interfering with his possession, pending the proceedings in mandamus. Hall took like action against interference with his possession and Nunemaker and his associate councilmen took the same method for maintaining their positions. The circuit court heard all of the proceedings at one time and, being of the opinion that the act under which the commissioners were appointed was valid, awarded the writs of mandamus and dissolved the injunctions, in so far as they related to or affected Booten and Dudgeon, but left them in force as to Studebaker, Green and Cooper, the three commissioners who had taken no steps to obtain possession of the offices to which they had been appointed. Writs of error in the law proceedings and appeals in the chancery causes have brought the judgments and decrees here for reversal.

. . . It is strenuously urged by the learned counsel for plaintiffs in error that the act is in contravention of both the letter and the spirit of our Constitution and is, therefore, void; and many of the provisions of the Constitution are cited, and Sec. 9, Art. X, is particularly relied on, as imposing restrictions upon the legislature respecting its control over municipalities. It is claimed that the legislature exceeded its constitutional powers when it undertook to provide for the appointment of the municipal officers of the city of Williamson, without the consent of its citizens. First, let us inquire if the Constitution does actually contain any express limitations in that respect. Sec. 9, Art. X, the provision on which the greatest reliance is placed, is as follows: "The Legislature may, by law, authorize the corporate authorities of cities, towns and villages, for corporate purposes, to assess and collect taxes; but such taxes shall be uniform, with respect to persons and property within the jurisdiction of the authority imposing the same."

. . . [T]his section does not provide who shall constitute the corporate authorities, nor how they shall be brought into being, whether by appointment or by election. It was intended to confine the right of taxation to the corporate authorities, and to limit their power to levy taxes for corporate

purposes only. It is not a limitation upon the power of the legislature to prescribe the number and official character of the municipal authorities, and the manner in which they shall be chosen. . . .

Municipalities derive all their power as well as their existence from the legislature, and, in the absence of any express constitutional reservations in their favor or express limitations upon the legislative control over them, they can exercise only such powers as are directly conferred by their charters. One of the most essential powers of government is the right to raise revenue; no government could maintain itself without such power. Yet it must be admitted that municipalities have no right to levy taxes, unless the authority to do so is expressly conferred by the legislature, or is necessarily implied from some other power expressly given, which can not be exercised without the right to levy a tax. As, for instance, the power to issue bonds with no express provision as to how they shall be paid. 5 McQuillin, Sec. 2363; 4 Dillon, (5th ed.), Secs. 1377 to 1380. The taxing power belongs alone to sovereignty. No such power inheres in municipal corporations. It is needless to cite authorities to support a principle so universally recognized as this. But, for a fuller discussion of it, see *Passenger Ry. Co.* v. *Pittsburg,* 226 Pa. 419, and *City of Richmond* v. *Daniel,* 55 Va. 385, 14 Gratt. 385.

Municipalities are but political subdivisions of the state, created by the legislature for purposes of governmental convenience, deriving not only some, but all of their powers from the legislature. They are mere creatures of the legislature, exercising certain delegated governmental functions which the legislature may revoke at will. In fact, public policy forbids the irrevocable dedication of governmental powers. The power to create implies the power to destroy. Furthermore, the legislature may incorporate a city of more than two thousand inhabitants even against the will of the inhabitants. Consent or acceptance is not required as formerly, when charters were granted by the crown. It may also, without the consent of a city, change its form of government, determine the number and character of its officers, and define their powers and duties. It may even prescribe the mode of procedure to be observed in passing its ordinances. *City of Moundsville* v. *Yost,* 75 W. Va. 224, 83 S.E. 910. It may prescribe a different qualification for municipal officers than is required of state officers. *State* v. *McAllister,* 38 W. Va. 485, 18 S.E. 770; *Kahle* v. *Peters,* 64 W. Va. 400, 62 S.E. 691; and *McMillin* v. *Neely,* 66 W. Va. 496, 66 S.E. 635. In the absence of any express constitutional restriction, it may also prescribe the qualification of municipal electors. 2 McQuillin, Sec. 413; 1 Dillon, Secs. 59 and 371; 15 Cyc. 296; *State ex rel. [Lamar]* v. *Dillon,* 32 Fla. 545, 14 So. 383; *Wheeler* v. *Brady,* 15 Kan. 26; *State* v. *Peacock,* 15 Neb. 442, 19 N.W. 685; *Belles* v. *Burr,* 76 Mich. 1; *Mayor, etc.* v. *Shattuck,* 19 Colo. 104, 34 P. 947; and *Plummer* v. *Yost,* 144 Ill. 68, 33 N.E. 191. "The right to vote is not an inherent or absolute right generally reserved in bills of rights, but its possession is dependent upon constitutional or statutory grant. Subject to the limitations contained in the Federal Constitution such right is under the control of the sovereign power of the State, and where the Constitution has conferred the right and prescribed the qualifications of electors, the Legislature can not change or add to them in any way; but where the Constitution does not confer the right to vote or prescribe the qualifications of voters, it is competent for the Legislature, as the representative of the law-making power of the State, to do so." *State ex rel. [Lamar v. Dillon, supra*.

In his opinion, in *Burch* v. *Hardwicke,* 71 Va. 24, 30 Gratt. 24, Judge Staples says: "They (municipalities) are instrumentalities of the government acting under delegated powers, subject to the control of the legislature, except so far as may be otherwise expressly provided by the constitution." Note the word "expressly".

In *Hornbrook* v. *Town of Elm Grove,* 40 W. Va., at page 549, Judge BRANNON, in the opinion, quotes with approval from the opinion of Justice Field in *Meriwether* v. *Garrett,* 102 U.S. 472, 26 L. Ed. 197, the following: "Municipal corporations are mere instrumentalities of the state for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies, and repeated by text writers. There is no contract between the state and the public that the charter of a city shall not be at all times subject to legislative control."

In view of these vast powers which, it must be admitted, the legislature may exercise in the control over municipalities, unless expressly restrained by the Constitution, how can it be logically said that municipalities have inherent rights? Can it be possible for inherent rights to exist, which may not be enjoyed except at the will of some authority other than those who claim the rights? The rights contended for can not be enjoyed in any manner without the legislative will. To say that municipalities have inherent political rights, and at the same time admit that all their powers are delegated by the legislature, is a contradiction in terms. The principle contended for seems to be both illogical and paradoxical.

We look to the Constitution to ascertain what restraints, if any, the people have placed upon the legislature, not to determine what powers they have conferred, for, under our republican form of government, the legislature possesses the sole power to make laws, and it is, necessarily, invested with all the sovereign power of the people, within its sphere. Nothing that is a proper subject of legislation is withheld by implication.

Counsel cite Sec. 4, Art. IV; Sec. 39, Art. VI; and Secs. 6, 7, 8 and 9, Art. X, of the Constitution, as recognizing the right of local self-government. We have already considered Sec. 9, Art. X, which we think is the only one among those cited that can have any possible bearing on the question. A mere perusal of the others will show they are not in point. We find in the Constitution no express provision restricting the legislative power to regulate and control municipal governments in cities containing a population of more than two thousand, and the only manner in which its power over smaller towns is qualified is, that it can not incorporate such towns or amend their charters, except by general laws. But it is insisted that, even though the Constitution contains no express inhibition upon the legislative power over municipalities, the right of local self-government must be inferred; that such right is inherent in the people of every community; that when our forefathers came to this country they brought this principle with them; that forms of local self-government existed before written constitutions; and that, in the adoption of state constitutions, it was never intended by the people that they were surrendering to the legislature the right of local self-government. A few of the states have held such principle to exist, notably Michigan, Indiana and Kentucky. One of the leading cases, so holding, is *People* v. *Hurlbut,* 24 Mich. 44, decided in 1871. In that case all of the judges filed opinions. It was a *quo warranto* proceeding to test the right of certain persons to hold office as water and sewer commissioners for the city of Detroit, which they were holding by virtue of an act of the legislature, passed in 1871, creating said board of commissioners, and appointing the members thereof to office, to hold for terms of two, four, six and eight years, respectively. The constitutionality of the act was assailed on two grounds, (1) that by the constitution of the state the right of appointment to local office was given to the executive department, and not to the legislature, and (2) that the appointment contravened the right of local self-government. The extreme views there expressed by Judge Cooley, respecting the so-called right of local self-government, were not necessary to a decision of the case, and are clearly against the great weight of American authorities. To what extent that distinguished jurist may have been influenced by the express provisions of his own state constitution, it is hard to determine from reading his opinion; but that he was in fact influenced to some extent thereby, is shown by the following quotation from page 109 of the report. He says: "But I think that, so far as is important to a decision of the case before us, there is an express recognition of the right of local authority by the constitution. That instrument provides (Art. XV, Sec. 14) that 'judicial officers of cities and villages shall be elected; and all other officers shall be elected or appointed, at such time and in such manner as the legislature may direct.' It is conceded that all elections must, under this section, be by the electors of the municipality. But it is to be observed that there is no express declaration to that effect to be found in the constitution; and it may well be asked what there is to localize the elections any more than the appointments. The answer must be, that in examining the whole instrument a general intent is found pervading it, which clearly indicates that these elections are to be by the local voters, and not by the legislature, or by the people of a larger territory than that immediately concerned. I think also that when the constitution is examined in the light of previous and contemporaneous history, the like general intent requires, in language equally clear and imperative, that the choice of the other corporate officers, shall be made

in some form, either directly or indirectly, by the corporators themselves."

The supreme court of Indiana, in *State ex rel. Jameson* v. *Denny, mayor,* 118 Ind. 382, asserted the same doctrine, and quoted with approval from the opinion of Judge Cooley. But the dissenting opinion, filed in that case by Justice Mitchell, we think, expresses the correct principle. At page 411, he says: "The Constitution has erected no standard by which to determine what constitutes local self-government, or what are natural and inherent rights, as those terms relate to municipal government. These are questions of political, and, therefore, of exclusively legislative concern, with which other departments can not interfere without invading the legislative domain."

As likewise sustaining the doctrine of local self-government, see *City of Lexington* v. *Thompson,* 113 Ky. 540, 68 S.W. 477. But these cases, as well as a few others that may be found, are unquestionably against the great weight of judicial decision in this country, and are unsound in principle. Judge Dillon, a distinguished judge, as well as teacher and writer of law, and of whose great work on municipal corporations it was said by the American Bar Association, in a resolution, passed at its annual meeting in 1909, accepting the author's dedication of his fifth edition, "His great work on municipal corporations will live after many of the municipal corporations themselves shall have perished," says, Vol. 1, Sec. 98: "It must now be conceded that the great weight of authority denies *in toto* the existence, in the absence of special constitutional provisions, of any inherent right of local self-government which is beyond legislative control."

In discussing the powers of the legislature, in that most excellent work of his, Constitutional Limitations, page 126, (6th ed.) Judge Cooley himself declares the true principle. He there lays down the following, as one of the fundamental rules by which to measure the extent of legislative authority in the state: "In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is intrusted with the general authority to make laws at discretion."

Nothing, that is a proper subject for legislation, can properly be said to have been reserved to the people by implication. The Constitution passed all sovereign power not expressly retained or guaranteed by the constitution of the United States. . . .

The privilege of electing their municipal officers is withheld from the citizens of Williamson for a limited time only. Relators are appointed to hold for a period of two years, and until the first election, provided for by the act, takes place. Their appointment may, therefore, well be regarded as provisional. Having made the appointments, the governor's power to make further appointments is exhausted. No purpose is shown by the act to further withhold from the people of the city the privileges usually granted to the citizens of municipalities. Hence, even though we were of the opinion that the legislature could not withhold from the citizens the privilege of electing their officers, indefinitely, still it would be our duty to uphold the act, and the governor's appointments made thereunder, as being provisional. In this view we are supported by the opinion of Judge Cooley, in *People* v. *Hurlbut, supra,* who held that the act, in that case, did not unduly take from the people the right of local self-government, which he asserted as an inherent right in the people of Detroit.

Our conclusion leads to an affirmance of the judgments and decrees appealed from, and it will be so ordered.

Affirmed.

POFFENBARGER, JUDGE, dissenting:

My dissent in these cases is founded upon the rules universally observed in the solution of constitutional questions other than the one now under consideration, but recklessly cast aside and ignored, I think, in every case in which the constitutional guaranty, to municipal corporations, of the

right of self-government, respecting matters primarily or peculiarly local, has been denied. Much of the argument relied upon for justification of the holding merely combats propositions not set up in support of the claim of the guaranty nor at all necessary to maintenance thereof. . . .

The conclusion adopted by the court leaves the legislature wholly unrestrained. It may turn over to appointees of the Governor every municipal corporation in the state, if it sees fit to do so, and such appointees need not be residents of the corporations they are to govern. Citizens of Huntington may be made rulers of Charleston and citizens of Charleston rulers of Huntington. The government of all the cities may be entrusted to citizens of the rural sections. None of these things are likely to happen, of course, but a construction making them possible is violative of the rules of interpretation. An absurd or ridiculous possibility of result always condemns the construction. "But, as in the case of statutes, this rule, (that plain provisions must be allowed full effect, without regard to consequences), extends only so far as the language of a constitutional provision is plain and unambiguous, ** * and where, understood in that sense, it raises no conflict with other provisions in the same instrument, and gives occasion to no absurd effect. An intention to produce such results cannot, of course, be imputed to the framers of a constitution, or to the people adopting it, any more than to the Legislature in passing a statute. And hence, to avoid them, aids in the construction of constitutional provisions are recognized as permissible, analogous to those allowed in the construction of statutes." . . .

Can anything be more obvious, as a matter of reason, than that the people would have provided safe-guards against such results as are here suggested as being possible, if they had realized that, in adopting the constitution, they were clothing the legislature with power to take away from the people of the cities, towns and villages, the right of self-government they then held? The omission thereof proves lack of intent to give such power. Of course, this invokes the force of implication, but it is utterly impossible to interpret the constitution without resort to implications. What prevents the legislature from providing appointed commissioners to govern the counties and districts? Words of express prohibition thereof cannot be found in the constitution. It comes only from implication. Almost all of the restraints upon legislative power are implied, just as almost all the power it has rests upon implication. Of course some implications are stronger than others, but that does not affect the principle. To uphold a particular view in a particular line of policy the courts which deny right of corporate local self-government are forced wholly to disregard the principle, in one aspect, and to stand upon it, in another. Such construction cannot be sound.

The legislature is entitled to the benefit of all doubts as to the extent of its authority, but whether there is a doubt, in a given instance, depends upon the result of the application of the settled rules of interpretation, in the quest for the meaning of the constitution. A doubt arising from failure to apply the rules is legally no doubt at all, and does not bring the court within the protection of the doubt rule. Observance of the rules, upon this inquiry, leads to an absolute certainty of lack of the power the legislature has assumed. . . .

NOTES

1. According to Professor Willard Lorensen,

   The reference in *Booten v. Pinson* to Judge Cooley's opinion in *People ex rel. LeRoy v. Hurlbut* points to the original statement of the concept of a judicially recognized concept of an inherent right of local self-government. Though the idea has natural appeal (there were cities before there were states, and the Declaration of Independence decries distant government) the doctrine gained very little following. The year following the *Booten* case, a classic academic argument sounded the death knell. *See* McBain*, The Doctrine of an Inherent Right of Local Self-government*, 16 COLUM. L. REV.190, 299 (1916). McBain was convinced from his research that the drafters of the state constitutions that emerged following the revolutionary war and those that followed intended to give plenary power to state legislative bodies. To find implied limitations upon that power not expressly grounded in the state constitutions themselves, he concluded, was unwarranted. That view is now accepted as dogma.

Willard D. Lorensen, *Rethinking the West Virginia Municipal Code of 1969*, 97 W. VA. L. REV. 653 (1995).

2. In *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), the United States Supreme Court considered a federal constitutional challenge to a statute that authorized the consolidation of the cities of Pittsburgh and Allegheny if a majority of the combined vote of the two cities approved the merger. Allegheny residents objected to the statute because it was much smaller than Pittsburgh and much more financially sound. They contended that the State, by not requiring separate majorities deprived them of (among other things) their due process rights. In rejecting the claim, the Court set forth "the following principles," which have remained the controlling law on the federal constitutional implications concerning the relationship between a State and its local governments:

> Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.

B. County Officers

[Part B and Sections 1 and 2 of Part C are extracted from portions of ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 266-68 and 278 (2nd ed., Oxford University Press, 2016).]

Read Article IX, §§ 1-6, 12.

Article IX, §§ 1 and 2 list elective offices within county government. They include a surveyor of lands, prosecuting attorney, sheriff, and assessor, and they serve four year terms. In addition, §§ 10 and 11 provide for the election of three commissioners to serve six year terms on the county units' general governing body, the county commission. (County commissions are dealt with in Section C, below.) Section 12 creates the office of county clerk and sets the clerk's term of office at six years. In addition, Article IV, § 8 authorizes the Legislature to establish nonconstitutional public offices, including positions at the county level.

The § 1 offices are largely self-explanatory. The surveyor of lands performs official surveying functions for the county and is not, today at least, an important local official. The prosecuting attorney serves as the county's criminal prosecutor and, as such, exercises discretion in the selecting

cases for presentation to either a grand jury or a petit jury and in deciding what charges to pursue. That discretion is checked, somewhat, in three ways. First, the State Supreme Court has construed the state statute setting forth the prosecutor's duties, W. Va. Code 7-4-1, as requiring the prosecuting attorney to institute proceedings against persons when there is probable cause to believe they violated some penal law. *State ex rel. Ginsbert v. Naum* (1984); *State ex rel. Hamstead v. Dostert* (1984). Second, any citizen, upon application to the circuit judge, has the right under Article III, § 17 to present a complaint to a grand jury. *State ex rel. Miller v. Smith* (1981). Third, once an indictment has been handed down, or a criminal prosecution otherwise initiated, the prosecutor can obtain a dismissal of the case only with the court's approval. *State ex rel. Skinner v. Dostert* (1981). In addition to his prosecutorial functions, the prosecuting attorney may also serve as the county's lawyer and represent the county commission, the county school board, and the various county departments and agencies. W. Va. Code 7-4-1. The latter functions, however, have increasingly been contracted out to private counsel, especially in the larger counties and especially regarding work for boards of education.

The Sheriff serves the county as its chief law enforcement officer in unincorporated areas, as the tax collector and ex officio county treasurer (W. Va. Code 7-5-1), and as the jailer (W. Va. Code 7-8-2). (*See also* the discussion of § 3, below.) The development of the Regional Jail Authority has significantly limited sheriffs' duties as jailors, as county jails now house prisoners only for short term purposes.

The assessor's primary function, of course, is to assess property for taxation. In that duty, the assessor is bound by Article X, § 1, which requires equality and uniformity in all taxation of real and personal property, *State ex rel. Hallanan v. Rocke* (1922), and by acts of the Legislature. *See* W. Va. Code 11-2-1, *et seq*.

Section 2 ("Constables, Coroners, and Overseers of the Poor") sort of adds to the list of county offices. Its provision for election of constables was nullified in 1974 by the Judicial Reorganization Amendment. Under that Amendment, the present Article VIII, § 15 abolished the office of constable. The Legislature has implemented the authorization for appointment of deputy assessors in W. Va. Code 11-2-3. Overseers of the poor have met extinction. During the nineteenth century, and into the twentieth, primary responsibility for providing relief to indigents fell upon local governments, and overseers of the poor administered the various efforts at the county level. In the modern era, however, the state and federal governments have assumed the burden of financing and regulating welfare programs, thus rendering overseers of the poor an unneeded relic.[*] Accordingly, the language in § 2 that the coroner, surveyor of roads, and overseer of the poor "shall be appointed by the county court [now, the county commission]" must be read to mean that when a county does decide to maintain one of those posts, it must do so by appointment from the county commission.

Section 3 establishes the limits on sheriff succession. The current form was implemented by a constitutional amendment, ratified in 1973. The prior version of § 3, which was extracted from Article VII, § 5 of the 1863 Constitution, precluded sheriffs from being elected to two consecutive full terms and also prohibited a deputy to succeed his sheriff and a sheriff to act as a deputy to his successor. The present § 3 is a complete rewrite. It allows a sheriff to succeed himself once, and only once. A sheriff's service during any part of a term counts the same as a full term. Thus, when a sheriff serves during any part of two consecutive terms, he or she is precluded from serving during any part of the immediately following term. *State ex rel. Rushford v. Meador* (1980). Furthermore, the appointment or election of an individual to fill a vacancy in the sheriff's office does not create a new or intervening term. *Id*. (That is, if a sheriff leaves office before the four year term expires, the occupation of the office by successor sheriff does not create an intervening term.) The amended

[*]Recall, however, that the Court in *State ex rel. K.M. v. West Virginia Department of Health and Human Resources*, 213 W.Va. 783, 575 S.E.2d 393 (2002), relied upon the inclusion of overseers of the poor in Article IX to infer a constitutional obligation on state government (which has assumed the role of the overseers) to provide a basic subsistence for the poor.

§ 3 has eliminated all restrictions on deputies succeeding their sheriffs and on sheriffs acting as deputies for their successors.

The State's voters rejected proposed amendments to eliminate § 3's limitation on sheriff succession in 1982, 1994, and 2012.

Section 4 of Article IX authorizes criminal conviction and removal of county officers for their official misconduct and neglect of duty. *See McDonald v. Guthrie*, Chapter 4, above. It therefore gives effect to the broad constitutional principles set forth in Article II, 2 and Article III, § 2 that public officers are servants of the people and at all times answerable and amenable to them. *State ex rel. Preissler v. Dostert* (1979). The grounds for conviction and removal include not only affirmative acts amounting to malfeasance and misfeasance of office, but also neglect of duty.

The section is not, however, self-executing. That is, "there cannot be an indictment based upon the constitutional provision alone. It must be implemented by either legislation or the common law before jeopardy can be incurred." *State v. Wolfe*, 128 W.Va. 414, 418, 36 S.E.2d 849, 851 (1946). The Legislature has met the concerns of § 4 by enacting an array of statutes dealing with official misconduct. Once such a conviction has been obtained, the removal from office is automatic. *State ex rel. Matko v. Ziegler* (1971).

The section applies, in effect, to all county officers. The Judicial Reorganization Amendment, however, has effected some changes. "Presidents of the county courts" would now refer to county commissioners. *See* Article IX, § 9. Because "justices of the peace" were eliminated by the amendment, *see* Art. VIII § 15, inclusion of that term would no longer have any effect.

Section 5 of Article IX authorizes the legislature to commission and require bonds of county officers. It and § 6 are extracted, with changes, from Article VII, section 7 of the 1863 Constitution, and the current sections 5 and 6 can be best understood when read in conjunction with their predecessor.[**] When so read, the reference in the first clause of section 5 to "such of the officers herein mentioned" can be seen to embrace the officers mentioned in Article IX. The remainder of the clause leaves the commissioning of officers to legislative discretion when the constitution does not otherwise require it.

The second clause authorizes the legislature, in its discretion, to require bonds of county officers to secure the state against breaches of the standard set in section 5 "for the faithful discharge of the duties of their respective offices." *See, e.g., State ex rel. Hardesty v. Stalnaker* (1981). The legislature has required bonds of a variety of county officials. W. Va. Code § 6-2-10.

Section 6 directs the legislature to set the salaries and responsibilities for the county offices created by Article IX and also authorizes that body to establish whatever subordinate positions it believes counties could use to accomplish their ends. That grant of power has, for example, supported the legislature's passage of the Civil Service for Deputy Sheriffs Act, W. Va. Code §§ 7-14-1 *et seq. Hall v. Protan* (1974). The Legislature's ability to set the salaries for county officers is limited by Article VI, § 38's prohibition on increasing salaries during a term of office. As noted in the commentary to that section, the Supreme Court of Appeals has permitted midterm raises to account for the imposition of additional duties. *Springer v. Board of Education of Ohio County* (1936).

Section 12 creates the office of county clerk and sets the clerk's term of office at six years. It imposes no successor limitations. The duties and compensation for the office are to be prescribed

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[**] The former Article VII, section 7 provided, in relevant parts:
The Legislature shall, at their first session, by general laws, provide for carrying into effect the foregoing provisions of this article. They shall also provide for commissioning such of the officers therein mentioned as they may deem proper, and may require any class of them to give bond with security for the faithful discharge of the duties of their respective offices, and for accounting for and paying over, as required by law, all money which may come to their hands by virtue thereof. They shall further provide for the compensation of the said officers by fees, or from the county treasury; and for the appointment, when necessary, of deputies and assistants, whose duties and responsibilities shall be prescribed and defined by general laws. . . .

by the legislature. The West Virginia Code, accordingly, includes throughout its chapters a wide range of obligations that the legislature has imposed on county clerks.[***] The principal responsibilities are maintaining all of the records of the county, except those of the courts, and serving as the chief elections officer at the county level.

C. County Commissions

Read Article IX, §§ 9-13.

1. Generally

The Judicial Reorganization Amendment of 1974 redesignated county courts as county commissions and established them as the principal governing body in each county. Thus, all references to county courts in the Constitution, statutes, and other laws of the State shall be read to refer to county commissions. Under § 9, a commission shall have three members. The presence of two members provides a quorum.

2. Term of Office

Section 10 sets the commissioners' term of office at six years and provides a mechanism to ensure that members serve staggered terms. All commissioners are elected by county-wide vote, but are subject to a district residency requirement. In an effort to prevent an undue concentration of power at the county level, § 10 provides that no more than one member of a commission may be elected from any one magisterial district. If, in a given election, there is more than one contested seat on a commission (which can happen when vacancies occur) and two or more of the highest vote-getters are from the same magisterial district, only the candidate with the greatest total shall be declared elected. To fill any other vacancy, the county must install the candidate from a different magisterial district who received the highest number of votes. The magisterial district residency requirement, however, applies only to general elections and not to primary elections. *Fansler v. Rightmire* (1934)(construing the former Art. VIII, § 23). Thus, if two commission seats were to be contested in a general election, and the two highest vote-gatherers during the party's primary were from the same district, § 10 would not require deletion of the candidate with the second highest number of votes from the general election ballot. In the absence of legislation to the contrary, the party would have to run as its candidates for the two available commission seats the two highest vote-getters from the primary, regardless of residence and regardless of the fact that only one of them could win in the general election, thus guaranteeing at least one of the seats for an opposing party. *Id*. On the other hand, § 10 does not preclude the legislature from barring a candidacy for county commission if the candidate resides in a magisterial district that, at the time of the nomination, already has one of its residents sitting on the commission. *State ex rel. Brewer v. Wilson* (1966) (construing the former Art. VIII, § 23).

Emphasizing that § 10 says that no two commissioners "shall be *elected* from the same magisterial district, the Court held in *State ex rel. Burkhart v. Sine*, 200 W.Va. 328, 489 S.E.2d 485 (1997), that "a member of the County Commission is deemed to be elected from the magisterial district in which that person resides on the day that person is elected to serve on the County Commission, that is, the date of the general election." Furthermore, "[t]he elected Commissioner carries the magisterial district from which he or she is elected with him or her throughout the entire six-year term of office." During that time, no other person from that district may be elected to the

[***]See Robert M. Bastress Jr., *Manual of the Duties of the West Virginia County Clerks* (2007).

commission. The Court deemed these applications of § 10 to be necessary to prevent what it called "'suitcase gerrymandering,' where officeholders change residence as part of a scheme designed to deliberately disqualify another candidate."

3. Commission Powers and Limitations

STATE EX REL. COUNTY COURT V. ARTHUR,
150 W.Va. 293, 145 S.E.2d 34 (1965).

CAPLAN, Judge:

In this original proceeding in mandamus the relators, the County Court of Cabell County and Mildred Wheeler, seek a writ to compel the respondent, Keith L. Arthur, Clerk of the County Court of Cabell County, to issue a certain county order authorizing the expenditure of county funds and to affix his signature thereto in his official capacity. The respondent filed an answer to the petition, from which it appears that there is no material dispute in relation to the facts which give rise to this controversy. On September 20, 1965 this Court granted a rule returnable October 19, 1965, on which date the case was submitted for decision.

From the pleadings and exhibits filed in this proceeding it appears that the relator, county court, in accordance with the provisions of Code, 1931, 11-8-10, as amended, formulated and submitted to the state tax commissioner the 1965-1966 Levy Estimate for Cabell County. This document, which is actually the budget upon which the county operates, contains an item in the sum of $3,600.00 which is designated as the annual salary for the county court secretary. The Levy Estimate was approved by the state tax commissioner and that document, together with such approval, is included as an exhibit in this proceeding.

The County Court of Cabell County, at a regular session thereof on August 2, 1965, by a vote of two to one, appointed Mildred Wheeler to the position of secretary and assistant to said court. This is a newly created position, the tenure of which commenced on the day of the appointment and was to continue thereafter at the will and pleasure of the county court. The appointment provided for a monthly salary of $300.00 for this recently created position. Immediately after the appointment the oath of office was administered to Mildred Wheeler and she has since acted in that capacity.

Thereafter, on the same day, August 2, 1965, the respondent by letter advised the county court that he was unable to find any express statutory law or case law authorizing this action by the court. His letter then continued as follows: '* * * I must therefore state that I shall not cause my signature to be affixed on any check or draft which may be issued to pay the salary of the secretary and assistant to the Cabell County Court, until I am assured of the legality of such appointment or ordered to do so by a Court of competent jurisdiction.'

The relators allege that county employees are paid by the issuance of a county order with the facsimile signatures of the president and clerk of the county court and that without such signatures no payment can be made. They further allege that Mildred Wheeler has served in the capacity of secretary and assistant to the county court from August 2, 1965 to August 15, 1965, and that after proper deductions for federal and state income withholding taxes, social security taxes and state retirement pension contribution, she is entitled to a net salary of $116.66 for such period of employment; that all other county employees have been paid for this period; that the county court desires to pay this sum to Mildred Wheeler; and that the county court is prevented from paying such salary because of the conduct of the respondent who has arbitrarily and capriciously refused to cause his facsimile signature to be affixed to a county order. The relators therefore seek a writ to compel the respondent to issue a county order in the sum of $116.66 and to cause his signature to be affixed thereto so as to enable the county to pay relator, Mildred Wheeler, her salary as secretary and

assistant to the county court for the period above designated.

The respondent denies that he arbitrarily and capriciously refused to issue the requested county order, but asserts that he did so honestly and in good faith, believing that there being no statutory authority, express or implied, authorizing such action, his issuance of such county order 'would be illegal, invalid and of no effect, causing the respondent and the sureties on his bond to be liable for any payment thereof.'

The relator county court readily agrees that there is no express statutory authority to make the appointment here in question but asserts that, by reason of its many duties, such appointment may be made under its implied powers.

The sole question in this controversy is whether the County Court of Cabell County has the lawful authority to appoint a secretary and assistant to that body. County courts are created as governmental entities by Article VIII, § 22 of the Constitution of West Virginia. The basic powers thereof are provided for under the provisions of § 24 of said article. In addition to setting out many specific powers, § 24 provides: 'Such courts may exercise such other powers, and perform such other duties, not of a judicial nature, as may be prescribed by law.' It therefore becomes clear that in determining the powers of the county court we must look to the constitution, which created that body, and to the laws which were enacted by the legislature pursuant to the constitutional provisions.

The status of a county court, in relation to its powers, is well expressed in Point 3 of the syllabus in Barbor v. County Court of Mercer County, 85 W.Va. 359, 101 S.E. 721, as follows: 'The county court is a corporation created by statute, and possessed only of such powers as are expressly conferred by the Constitution and Legislature, together with such as are reasonably and necessarily implied in the full and proper exercise of the powers so expressly given. It can do only such things as are authorized by law, and in the mode prescribed.'... As heretofore indicated, the relators readily admit that there is no express statutory authority providing for the appointment made by the county court in this case. It must therefore be determined whether this appointment properly can be made under the implied powers of such court. It is pertinent to point out that a county court's implied powers arise from powers expressly conferred upon it. In other words, as expressed in the Barbor case, it has the powers expressly granted by statute, together with such powers as are reasonably and necessarily implied in the full and proper exercise of the powers expressly given. This means that power by implication must be based upon some express statutory authority. When a statute imposes upon a county court the duty to perform a particular function, it has the power to so act, together with such powers as are reasonably necessary to perform that function. For example, under the provisions of Code, 1931, 7-3-2, as amended, the county court of each county is charged with the duty to provide and maintain, at the county seat, a courthouse. While no statute expressly authorizes the court to purchase mops and brooms, such authority is implied as a necessary and reasonable incident to the proper maintenance of the courthouse.

In addition to the general jurisdiction, power and duties provided in Code, 1931, 7-1-3, the county courts are empowered to perform certain other specified functions. Many of these functions are listed in Code, 1931, 7-1-3a through 3l, as amended. In carrying out those duties a county court, in addition to the expressed powers, has such powers as are reasonably and necessarily implied for the full and proper exercise of the powers expressly given.

It is pertinent to now consider the case of Mohr v. County Court of Cabell County, 145 W.Va. 377, 115 S.E.2d 806, relied upon by the relators, and wherein it was held that the County Court of Cabell County had certain implied powers. Therein the county court had entered into a contract with a private firm of appraisers which was to appraise and revaluate the taxable real estate within the county. Mohr, a taxpayer, sought to enjoin the performance of this contract on the ground that the county court lacked the authority to enter into such a contract. Dissolving the injunction, the Court pointed out that under Code, 1931, 7-1-5, as amended, a duty was imposed upon county courts 'to review and equalize the assessments made by the assessor; to inspect and review the lists of property, both real and personal, made up by the assessor and his deputies for taxable purposes, and

to point out to the assessor any property, real or personal, which the said assessors of their respective counties may have overlooked or omitted to place on said tax lists; * * *.' The Court concluded that the power to hire a firm of appraisers was reasonably and necessarily implied in order to permit the county court to perform the express duties imposed upon it by the above quoted provisions of Code, 1931, 7-1-5, as amended.

An examination of the constitution and statutes fails to reveal any provision from which it reasonably may be implied that a county court has the power to appoint a secretary and assistant. Thus, the instant case is readily distinguishable from the Mohr case. No specific duty is imposed upon the county court which carries with it an inference that the county court is empowered to employ a secretary and assistant.

Provisions for the appointment of deputies, assistants, clerks and stenographers are contained in many sections of Chapter 7 of the Code. Code, 1931, 7-7-6, as amended, provides that a prosecuting attorney, with the assent of the county court, may appoint assistants, stenographers and clerks. Code, 1931, 7-4-3, as amended, provides that the county court, in certain circumstances, may appoint a county attorney. In addition thereto, the county clerks of the various counties are empowered by statute to appoint and employ deputies, assistants and such other employees as may be necessary for the proper function of their offices. Code, 1931, 7-7-7, as amended. Nowhere does it appear that the county court has been given the power to make such appointment as attempted in this case. While under its general powers and duties a county court shall have the superintendence and administration of the internal police and fiscal affairs of its county, such functions are performed through its clerk, also an elected official. Code, 1931, 7-1-3. The secretarial and clerical duties can be and generally are performed by the county clerk and his employees.

In the absence of express authority or a statute from which such authority reasonably can be implied, we are of the opinion, and so hold, that the county court is without power to appoint a secretary and assistant.

It is urged by the relators that the respondent is called upon to perform a purely ministerial act and therefore can not question the propriety of the payment provided for in an order of the county court. This position is without merit. As held in the foregoing portion of this opinion, the county court is without authority to appoint a secretary and assistant. Therefore, any payment made pursuant to such appointment would be illegal. This Court has recently held in State ex rel. Damron v. Ferrell, W.Va., 143 S.E.2d 469, that mandamus will not lie to compel the performance of an illegal or unlawful act. . . .

Furthermore, mandamus will not lie unless the party seeking the writ can show a clear legal right to the relief sought and a corresponding duty on the respondent to perform the act demanded. . . . In the instant case it is well demonstrated that the relators have no clear legal right to the relief sought, nor is there a corresponding duty on the respondent to perform the act demanded.

For the reasons stated herein the writ of mandamus will be refused. . . .

NOTE

[From ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 276-77 (2nd ed., Oxford University Press, 2016).]

The Judicial Reorganization Amendment of 1974 moved the provisions affecting county governance of police and fiscal matters from the Judicial Article (Art. VIII) to Article IX. The enumeration of powers over such matters in the present § 11, however, has remained essentially unchanged through the revisions that began in 1872 and is also substantially similar to those powers conferred on the original board of supervisors in 1863.

There are several points to be made in a general outline of the powers of county commissions. First, the commission is responsible for the custody and maintenance of the county's deeds and other

records that need to be recorded. As stated in § 11, that task is accomplished through the commissions' clerks.

Second, the county commission's powers are strictly confined. "A county commission only has powers expressly conferred by the West Virginia Constitution and our State Legislature, or powers reasonably necessarily implied for exercise of those expressed powers." *Berkeley County Commission v. Shiley*, 170 W. Va. 684, 685, 295 S.E.2d 924, 926 (1982); *State ex rel. County Court v. Arthur*, 150 W.Va. 293, Syl. Pt. 1, 145 S.E.2d 34 (1965). Section 11's specific and repeated qualifications on commissions' powers supports that principle. Those qualifications include the following language: (1) the limitation, "under such regulations as may be prescribed by law," prefacing the grant of power over a county's police and fiscal affairs; (2) the limitations, "[u]ntil otherwise prescribed by law" and "subject to such regulations, by appeal or otherwise, as may be prescribed by law[,]" within the grant of power to judge county election contests; (3) the restriction, "as may be prescribed by law," attached to the commissions' ability to exercise other powers and perform other duties.

Third, unless specifically limited by the Legislature, the commissions have considerable discretion in exercising their powers and fulfilling their responsibilities once a power has been granted. *Meador v. County Court* (1955). That is, commissions can pursue all reasonable means needed to give effect to a legislatively granted power. The Legislature has conferred on county commissions a broad range of powers to implement their constitutional duties to superintend and administer the counties' affairs. The powers are concentrated in West Virginia Code 7-1-3 through [7-1-3tt], but others appear in various provisions scattered throughout the Code.

Fourth, § 11 prescribes no judicial functions for the county commission and explicitly precludes the Legislature from assigning commission duties "of a judicial nature." The county courts under the original 1872 Constitution had substantial judicial responsibilities. An 1880 amendment did away with all of them except those that related to probate and the appointment and oversight of personal representatives, guardians, and the like. Those are not mentioned in the present § 11. Article VIII, § 6, however, provides that after January 1, 1976, the Legislature shall have the power to confer such duties exclusively in the circuit courts or their officers. But until the Legislature so acts, "such matters shall remain in the county commissions or tribunals existing in lieu thereof or the officers of such county commissions or tribunals." As of this writing, the Legislature has not yet acted upon that authorization. Thus, matters of probate and personal representatives continue to be in the domain of county commissions.

GOODEN V. COUNTY COMMISSION OF WEBSTER COUNTY,
171 W.Va. 130, 298 S.E.2d 103 (1982).

HARSHBARGER, Justice:

This case is properly before the Court upon a certified question from the Circuit Court of Webster County, asking us to decide whether a county commission can be held liable in a tort action for personal injuries caused by negligence of its employees. The circuit court in denying the county commission's motion to dismiss ruled that county commissions no longer have common-law governmental immunity. We affirm that decision.

Rachel Gooden brought this civil action alleging that she sustained personal injuries on March 21, 1980, when she stumbled and fell over a cinderblock negligently placed in a public corridor of the Webster County Courthouse. The operation and maintenance of a county courthouse is a purely governmental function. . . .

In Petros v. Kellas, 146 W.Va. 619, 633, 122 S.E.2d 177, 185 (1961), the Court held that: "There is no statute which subjects such county court [now county commission] to liability for personal injuries caused by its negligence while engaged in the discharge of the duties imposed by Section

2 ...."

County commissions have enjoyed only a limited immunity for many years. Traditionally, they, and boards of education, and municipalities were liable for acts of negligence occurring in performance of proprietary functions. Ward v. County Court, 141 W.Va. 730, 738-39, 93 S.E.2d 44, 48-49 (1956). In addition, county commissions have long been held liable for breach of contract when the contract was within the authority of contracting officers and was otherwise valid under general principles of contract law. . . .

In Boggs v. Board of Education, 161 W.Va. 471, 244 S.E.2d 799 (1978), we held that county commissions are not entitled to the constitutional immunity bestowed by Article 6, Section 35 of the West Virginia Constitution. The first syllabus point states:

> "County commissions (formerly county courts) are not instrumentalities of [the State] such as to bring them within the constitutional immunity from suit of W.Va. Const., art. 6, § 35."

Because county commissions lacked constitutional immunity, the Boggs court upheld the constitutionality of W.Va.Code, 17-10-17 (1969), that permits a county commission to be sued when its failure to keep a road or bridge repaired causes personal injury.

Traditionally, county governments were considered political subdivisions of the state created for public convenience in the administration of state government, while cities were private, municipal corporations created by individuals for private advantage. See, Watkins v. County Court, 30 W.Va. 657, 5 S.E. 654 (1888).

Boggs changed this perspective of county government, and clearly removed the major underpinning for tort immunity for county governments.

The incipient demise of common-law immunity for local governmental units began even before Boggs. Long v. City of Weirton, 158 W.Va. 741, 214 S.E.2d 832 (1975), abolished municipal government immunity from tort liability, and clearly foreshadowed our decision today. The importance of Long is its rationale for abrogating municipal tort immunity. We found that the common-law distinction between governmental and proprietary functions was unworkable and created uncertainty, and observed that the duties and responsibilities of all forms of government have vastly expanded, thereby increasing risks of injury to the general public from negligent actions or omissions of government agents and servants.

Long also relied on cases from numerous jurisdictions abrogating this antiquated doctrine. The continuing viability of tort immunity for county government, however, was not addressed but it was recognized that county government immunity represents "an analogous and similar but different body of law in this jurisdiction." [Id.] Boggs eliminated any meaningful difference between municipal and county government for immunity purposes.

We recently reiterated the reasoning of Long in Ohio Valley Contractors v. Board of Education, 170 W.Va. 240, 293 S.E.2d 437 (1982), and abolished common-law immunity for local school boards. Additionally, we noted that "[t]here is little to recommend governmental immunity" and that "[m]any commentators regard immunity to be responsible for irresponsible sovereigns and contrary to our fundamental American jurisprudential tenet that there should be a right for every wrong." We also wrote that there is support for the proposition that "abolition of governmental immunity may have positive redistributive and allocative effects" and that "costs rising from abolished immunity are modest and that no governments have been ruined by its absence." (Citations omitted.) [Id.]

Most scholars and students of government have urged abolition of local government immunity. In our view the various justifications advanced to support immunity, almost all of them economic, are not sufficient in reason to perpetuate the social injustice of requiring citizens injured by their government to bear costs, which in fairness and justice, should be borne by the responsible governmental entity.

County commissions are now expressly authorized by law to purchase public liability insurance, thus protecting the county and its officers, agents, and employees from financial losses because of

negligent performance of official duties. W.Va.Code, 7-5-19 [1981]. Where liability insurance is present, the reasons for immunity completely disappear. We take the legislature's action in authorizing expenditure of public funds to purchase liability insurance to be a recognition that payment of liability claims is a legitimate part of the cost of performing public functions.

Accordingly, those of our cases that have recognized common-law governmental immunity for county commissions are overruled. A county commission shall be liable, just as a private citizen, to members of the general public, for injuries proximately caused by negligence of its employees performing their duties. . . .

4. Reformation of County Government

Section 13 of Article IX gives effect to one of those fundamental principles of natural law, reflected in § 3 of the State's Bill of Rights, that the people at all times retain the right to alter or reform their government. Its basic substance first appeared in the 1872 Constitution, whose framers were outspoken proponents of the natural law theories handed down from John Locke through George Mason and Thomas Jefferson. The provision appeared as § 34 of Article VIII in the original 1872 Constitution and survived the 1880 amendment as § 29 of the same article. The underlying right to alter or reform the county government has remained unchanged through the three versions, although there has been some modification of the implementing procedures and, of course, a substitution of "county commission" for "county court."

The following case provides the current Supreme Court's application of the section's authorization for counties to create their own form of government and the Legislature's role in accommodating the counties' desires to do so.

THE COMMITTEE TO REFORM HAMPSHIRE COUNTY GOVERNMENT V. THOMPSON, 223 W. Va. 346, 674 S.E.2d 207 (2008).

Benjamin, Justice,

The instant matter requires this Court to determine the scope of the Legislature's constitutional duty to act upon a petition to reform the county government of Hampshire County, West Virginia, which was presented to the Legislature in May 2003, pursuant to the provisions of *Article IX, Section 13, of the Constitution of West Virginia*. In a declaratory judgment action seeking an order directing the West Virginia Legislature to pass legislation enabling an election on a proposed reform of the government of Hampshire County, the Circuit Court of Kanawha County, West Virginia declared in an April 4, 2007, order that: (1) the Legislature has "a constitutional duty to process enabling legislation permitting Hampshire County voters to vote on the proposed reform of the government of Hampshire County;" and (2) that "[t]he proposed reform of the government of Hampshire County, including the creation of a tribunal of members elected from and by each of the County's election districts, would be constitutionally valid if and when it is approved by the voters of Hampshire County." For the reasons set forth herein, we reverse the circuit court's determination.

I.

FACTUAL AND PROCEDURAL HISTORY

In 2003, Appellees, the Committee to Reform Hampshire County Government [and Hampshire County voters] circulated a Petition seeking to reform the form of county government in Hampshire County, West Virginia pursuant to the provisions of *Article IX, Section 13 of the Constitution of West Virginia* (hereinafter "Petition"). The Petition provided, in its entirety:

Petition for a Hampshire County Tribunal

We, the undersigned voters of Hampshire County, West Virginia, petition the West Virginia Legislature to cause to happen the creation of a Tribunal to replace the current Hampshire

County Commission.

Tribunal Membership

The Tribunal shall be made up of one member from each Hampshire County voting district; only the registered voters in their respective district elect their member.

Term of Office

The term of each member shall be for a period of six years. Members' terms shall be staggered. Initially, the members first elected shall be required to draw lots to determine which two members shall serve 2-year terms, which three shall serve 4-year terms, which three shall serve 6-year terms.

Compensation

Each member shall be compensated $ 250.00 per Tribunal meeting attended and be reimbursed for expenses incurred while performing official duties as sanctioned by the Tribunal. No other benefits shall be awarded members.

Effective Date of Authority

The Tribunal, when elected and seated, shall replace the present Hampshire County Commission, whose terms of office shall expire immediately.

County Administrator

Following a national search, a county administrator shall be hired by the Tribunal to carry out the day-to-day business of the county as prescribed by the Tribunal. Said county administrator shall be an employee of and answerable to the Tribunal.

Upon obtaining signatures from ten percent (10%) of the registered voters in Hampshire County, Appellees presented the Petition to the Hampshire County Commission on March 21, 2003. By letter dated May 20, 2003, the Hampshire County Commission then requested the Legislature, pursuant to *Article IX, Section 13*, to enact enabling legislation permitting the citizens of Hampshire County to vote on the proposal and, if approved by the majority of voters, to implement the change. During the 2004 legislative session, the next regular legislative session after the County Commission's request, the Senate passed an enabling bill, Senate Bill 727, allowing the matters contained in the Petition to be placed before the citizens of Hampshire County for a vote during the 2004 primary election. If approved by the majority of Hampshire County voters during that election, Senate Bill 727 provided that the requested Tribunal set forth in the Petition would replace the Hampshire County Commission on January 1, 2005, as the governing body of Hampshire County, West Virginia. Section 2 of Senate Bill 727 authorized the matters contained in the Petition and provided that, if reformation was approved by the voters during the 2004 primary election, the Tribunal members were to be elected during the 2004 general election. Finally, Senate Bill 727 contained a provision expressing serious reservation regarding the constitutionality of the form of government requested in the Petition, but noting that this Court's decision in *Taylor County Commission v. Spencer, 169 W. Va. 37, 285 S.E.2d 656 (1981)*, precluded the Legislature from modifying the Petition's substance. Accordingly, Senate Bill 727 also contained a provision directing the Attorney General to institute a declaratory judgment action regarding the constitutionality of the Tribunal set forth in the Petition. However, neither Senate Bill 727 nor a similar bill introduced in the House of Delegates, House Bill 4396, passed the House of Delegates during the 2004 Regular Session of the West Virginia Legislature. Subsequent bills to enact the requested enabling legislation likewise failed during the 2005 and 2006 regular legislative sessions.

On August 23, 2005, Appellees filed a complaint for declaratory relief in the Circuit Court of Kanawha County seeking a declaration "that the defendants must process enabling legislation permitting Hampshire County voters to vote on the proposed reform of the government of Hampshire County" and a declaration "that the proposed reform of the government of Hampshire County, including the creation of a tribunal of members elected from and by each of the County's election districts, would be constitutionally valid[.]" The defendants below and Appellants herein [are] the Honorable Richard Thompson, Speaker of the West Virginia House of Delegates, and the

Honorable Earl Ray Tomblin, President of the West Virginia Senate, (hereinafter collectively "Appellants"). By order entered April 4, 2007, the circuit court granted the declarations sought by Appellees. In this order, the circuit court concluded, as a matter of law, that the Legislature had a mandatory duty under *Article IX, Section 13* to enact the enabling legislation requested in the petition and that this duty does not expire with the end of a legislative term. . . .

III.

DISCUSSION

The fundamental question to be resolved herein is what requirements, if any, are imposed upon the Legislature by *Article IX, Section 13 of the Constitution of West Virginia* to act upon a petition to reform a county government. *Article IX, Section 13* provides, in its entirety:

> The Legislature shall, upon the application of any county, reform, alter or modify the county commission established by this article in such county, and in lieu thereof, with the assent of a majority of the voters of such county voting at an election, create another tribunal for the transaction of the business required to be performed by the county commission created by this article. Whenever a county commission shall receive a petition signed by ten percent of the registered voters of such county requesting the reformation, alteration or modification of such county commission, it shall be the mandatory duty of such county commission to request the Legislature, at its next regular session thereafter, to enact an act reforming, altering or modifying such county commission and establishing in lieu thereof another tribunal for the transaction of the business required to be performed by such county commission, such act to take effect upon the assent of the voters of such county, as aforesaid. Whenever any such tribunal is established, all of the provisions of this article in relation to the county commission shall be applicable to the tribunal established in lieu of said commission. When such tribunal has been established, it shall continue to act in lieu of the county commission until otherwise provided by law.

W. Va. Const. art. IX, § 13.

. . . Appellees rely heavily on this Court's opinion in *Taylor County Commission v. Spencer*, 169 W. Va. 37, 285 S.E.2d 656 (1981), in support of their argument that the Legislature had a non-discretionary duty to enact enabling legislation which would submit the Petition's proposed alternative form of government to the voters of Hampshire County unaltered. In response to arguments that a court cannot order the Legislature to enact specific legislation, Appellees maintain that a court may interpret our Constitution to determine a legislative duty without intruding upon legislative prerogative.[2] Appellees respond to the arguments regarding the constitutionality of the proposed reform by arguing that it is their indefeasible right to reform, alter or abolish their government into any democratically elected form. In essence, Appellees argue that to require the

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[2]It is important to note that in the cases Appellees rely upon, this Court discussed the parameters of constitutional provisions but in no instance ordered the Legislature to perform a specific act. *See, e.g., Crain v. Bordenkircher, 180 W. Va. 246, 248, 376 S.E.2d 140, 142 (1988)*, *modified by Crain v. Bordenkircher, 187 W. Va. 596, 420 S.E.2d 732 (1992)*, *modified by Crain v. Bordenkircher, 191 W. Va. 583, 447 S.E.2d 275 (1994)* (per curiam) (ordering that the state penitentiary at Moundsville be closed due to unconstitutional conditions in the hopes that the closure order will "set in motion the procedures that will eliminate the unconstitutional conditions. We can only hope that with the beginning of a new legislative session and the election of a new executive, action will be taken to construct a new facility that will meet constitutional standards."); *West Virginia Education Assoc. v. The Legislature of the State of West Virginia, 179 W. Va. 381, 383, 369 S.E.2d 454, 456 (1988)* ("We do not today order the Governor to do any act. We do not today order the Legislature to do any act. The law presumes the Governor to know his duty when faced with an unconstitutional budget. The law presumes the Legislature to know its duty too.") (footnotes omitted); *Pauley v. Kelly, 162 W. Va. 672, 707, 718-19, 255 S.E.2d 859, 878, 883-4 (1979)* (finding that in light of the constitutional duty to provide a thorough and efficient education, the educational financing system cannot be discriminatory and ordering the addition of legislative leaders as party defendants in the underlying litigation so that the record could be fully developed as to whether the financing system at issue is constitutionally valid). In none of these cases did this Court order the passage of specific legislation.

alternative form of government to comply with constitutional provisions governing county commissions negates their right to alter or reform their government in the manner they see fit. Finally, Appellees argue that the Legislature's duty under *Article IX, Section 13* does not expire at the end of the legislative term because this Court has previously "enforced constitutional duties on the Legislature that have extended past the existence of a single Legislature."[3]

Thus, we must begin with the language of the first two sentences which comprise *Article IX, Section 13*. The first sentence of this constitutional provision states:

> The Legislature *shall, upon the application of any county*, reform, alter or modify the county commission established by this article in such county, and in lieu thereof, *with the assent of a majority of the voters of such county voting at an election*, create another tribunal for the transaction of the business required to be performed by the county commission created by this article.

(Emphasis added). Under the clear and unambiguous language contained in this first sentence, the only mandatory duty imposed on the Legislature by *Article IX, Section 13* is the duty to create another tribunal in lieu of the current county commission *after* a majority of voters in the county have assented to the same – something which has not happened here. A preceding petition for reformation alone does not trigger this directive for legislative action under the plain language of this constitutional provision. Rather, the petition seeking reformation is an initial step in a process which may lead to such an election. The process which may lead to the triggering election is set forth in the second sentence of *Article IX, Section 13*. This second sentence governs the submission of a petition for reformation and action thereon. This sentence provides:

> Whenever a county commission shall receive a petition signed by ten percent of the registered voters of such county requesting the reformation, alteration or modification of such county commission, it shall be the mandatory duty of such county commission *to request the Legislature, at its next regular session thereafter, to enact an act* reforming, altering or modifying such county commission and establishing in lieu thereof another tribunal for the transaction of the business required to be performed by such county commission, *such act to take effect upon the assent of the voters of such county*, as aforesaid.

(Emphasis added). The only mandatory duty clearly imposed by this sentence is imposed upon the county commission, not the Legislature. The county commission is required, upon receipt of a petition from ten percent of the registered voters of the county *to request* the Legislature *at its next regular session* to enact enabling legislation which would take effect upon the assent of the majority of registered voters. Thus, the receipt of the petition by the Legislature is plainly deemed only to be a request to act.

The term "request" is defined, when used as a verb as "to ask or beg (someone) to do something" and "the act of asking for something to be given or done, esp. as a favor or courtesy; solicitation or petition" when used as a noun. 1636 *Random House Webster's Unabridged Dictionary* (2d. Ed. 1998). Thus, it follows that the person or entity being requested to do something must have the discretion as to whether or not to act. *Article IX, Section 13*'s use of the term "request" demonstrates in a plain and simple manner that the Legislature retains its discretion to act or not to act upon the request being made and that the submission alone of a petition for reformation does not compel a ministerial act on the part of the Legislature. Further, even if such request would impose a duty on the Legislature to do something, that duty is limited to commencing the legislative process with respect to the matters set forth within a petition for reformation. Accordingly, when the Legislature

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[3]. . . Thus, we are squarely presented with the question of the duties imposed upon the Legislature by *Article IX, Section 13*. It is axiomatic that "in every case involving the application or interpretation of a constitutional provision, analysis must begin with the language of the constitutional provision itself." *State ex rel. Mountaineer Park, Inc. v. Polan*, 190 W. Va. 276, 283, 438 S.E.2d 308, 315 (1993). . . .

receives *a request* to act upon a Petition to reform a county government, only the legislative deliberative process is triggered. If this second sentence was intended to mean that the Legislature has a non-discretionary duty to enact legislation in accordance with the terms of the Petition, different language would have been used. For example, the second sentence could have stated that upon receipt of petition for reformation of county government, the Legislature shall enact enabling legislation in accordance with the terms set forth in the petition with such legislation to become effective upon the assent of the majority of registered voters of the county. However, it does not. Likewise, if *Article IX, Section 13* imposed a purely ministerial duty upon the Legislature to enact legislation authorizing the matters set forth in a petition for reformation, it would also have imposed a like duty on the Governor to sign any such bill passed by the Legislature into law. It does not.

Pursuant to the second sentence of *Article IX, Section 13*, a request to act upon a petition for reformation of county government triggers the legislative process. This deliberative process necessarily includes an examination of the proposal to verify compliance with constitutional provisions in light of the third sentence of *Article IX, Section 13* which provides, "[w]henever any such tribunal is established, all of the provisions of this article in relation to the county commission shall be applicable to the tribunal established in lieu of said commission." To find that the Legislature has no discretion in deliberating whether to enact enabling legislation to authorize the reform of county government upon receipt of a petition, including whether the matters set forth in the petition would be constitutional, would lead to bizarre and unacceptable results. For example, suppose the requisite ten percent of voters of Hampshire County approved a petition to reform their county commission to be comprised solely of white males owning no less than 100 acres of property within the county. Under *Article IX, Section 13*, the county commission must then request the Legislature to enact appropriate enabling legislation. Should the Legislature be required to enact legislation enabling such blatantly unconstitutional reformation? We think not and cannot find *Article IX, Section 13* was ever intended to create such an absurd result.

In the instant matter, the Hampshire County Commission complied with the provisions of *Article IX, Section 13* by presenting the Petition to the Legislature and requesting legislative action, thereby triggering the legislative process. Incumbent in the legislative process was the examination of the proposal to determine whether it may have had constitutional deficiencies. The Legislature did so. Indeed, the third sentence of *Article IX, Section 13* recognizes that the constitutional provisions applicable to county commissions shall also apply to any tribunal created thereunder.

Nor do we find that our decision in *Spencer* compels the Legislature to pass legislation enabling a reformation when presented with a petition for reformation of county government. In *Spencer*, we stated that *Article IX, Section 13*:

> contemplates the reorganization of the county government upon petition by, and with the approval of, the voters of a county. *The legislative process is set in motion upon the filing of a proper petition*, signed by ten percent of the voters of the county, with the county commission requesting the reformation of that body. The county commission is required by the constitution to submit the reformation petition to the Legislature and *request the enactment of enabling legislation which will permit the voters of the county to cast their ballots either for or against the proposal*.
>
> * * *
>
> When requested by the voters of the county, the Legislature may depart from the constitutional model for county government in a limited fashion so as to give a degree of flexibility to the county structure and to allow the citizens of the county to exercise a measure of local control over their government.
>
> * * *
>
> *Article 9, section 13 clearly anticipates that when the Legislature responds by the enactment process* to a communication from a county commission that ten percent of the voters of the county have requested by petition an alternative form of county government, it has an obligation

> to see that the act upon which the people of the county will vote embodies the substance, spirit and intent of the petition. The use of the word "shall" connotes a mandatory duty on the part of the Legislature. *Its role in the reformation process is to expedite, within constitutional parameters, the will of the citizens of the county by producing enabling legislation* which reflects the stated preference of the petitioning voters and provides the other voters of the county an opportunity to approve or to reject that alternative to the existing form of government. In effect, the Legislature is obliged by the constitution to vindicate the desires and designs of the voters of the county. This it is constitutionally required to do and beyond this it cannot act.

Spencer, 169 W. Va. at 43-5, 285 S.E.2d at 660-1. *Spencer* makes clear that the receipt of a request for reformation triggers the legislative process. *Id. at 43-4, 285 S.E.2d at 660-1*. The legislative process necessarily includes submission of a bill, deliberation in committee, a vote on the bill by both houses of the Legislature and, if the bill obtains the approval of the majority of members of both houses of the Legislature, submission of the bill to the governor for his approval or veto. It is only after a bill has passed both houses and been endorsed by the governor that it becomes law. A bill may fail at any point in the legislative process.

The circuit court apparently found, as noted by Appellants and argued by Appellees, that the language from *Spencer* cited above imposes a mandatory duty upon the Legislature to enact legislation authorizing the reformation set forth in the petition as presented effective upon the assent of the majority of voters of Hampshire County. However, our holding in *Spencer* was not so broad. It is well settled in this state that the holdings of this Court are set forth in the syllabus of our opinions. Syl. pt. 13, *State ex rel. Medical Assurance v. Recht, 213 W. Va. 457, 583 S.E.2d 80 (2003)*; Syl. pt. 2, *Walker v. Doe, 210 W. Va. 490, 558 S.E.2d 290 (2001)*. The sole *syllabus point of Spencer* states:

> *Article 9, section 13* of the state constitution, providing for the reformation, alteration or modification of the county commission, clearly anticipates that *when* the Legislature responds by the enactment process to a communication of a county commission to the effect that ten percent of the voters of the county have requested by petition an alternative form of county government, it has an obligation to see that the act upon which the people of the county will vote embodies the substance, spirit and intent of the petition.

Syl., *Spencer, 169 W. Va. 37, 285 S.E.2d 656* (emphasis added). This holding does not state that the Legislature is required to respond with a specific legislative result. To the contrary, it states that "when the Legislature responds by the enactment process" to a request for reformation that the enactment upon which the particular county's voters will ultimately vote must embody "the substance, spirit and intent of the petition" initially presented to the Legislature. Our holding in *Spencer* confirms that the Legislature retains its discretion to refuse to enact enabling legislation, but finds that when the Legislature does enact enabling legislation, such legislation must conform to the petition initially presented. To the extent the *dicta* contained in *Spencer* may be read to impose a mandatory duty upon the Legislature to enact legislation upon the mere presentation of a petition for reformation, it is hereby clarified. *Spencer* does not require that the Legislature enact enabling legislation, only that if the Legislature chooses to enact enabling legislation, the enabling legislation must conform to the substance, spirit and intent of the petition for reformation initially presented. To read *Article IX, Section 13* as imposing a mandatory duty upon the Legislature to enact whatever is presented to it in a petition to reform county government thwarts the legislative process and the fundamentals of our system of government.

When read together, the first and second sentences of *Article IX, Section 13* evidence a clear intention that the Legislature's mandatory duty to create a tribunal *in lieu of* the constitutionally established county commission is triggered *after* legislation enabling a county election on the proposed reformation has passed, the election takes place *and* a majority of the county's voters agree to the proposed reformation. Until all three steps of this process are complete, no mandatory, non-discretionary duty can exist. The necessity of the prior assent of a majority of the county's voters is

emphasized by the repetition in both sentences that the creation of a tribunal *in lieu of* the constitutionally created county commission does not take effect until such vote has occurred. The language of the first and second sentences of this constitutional provision provides that once the Legislature responds by enacting legislation authorizing a county's citizens to vote on a petition for reformation, it must authorize the changes proposed in the petition for reformation upon the assent of the majority of the county's voters.

Accordingly, we now hold that *Article IX, Section 13 of the Constitution of West Virginia* does not require the Legislature to enact legislation enabling the reformation of county government upon receipt of a petition for reformation. Receipt of a request from a county commission to act upon a petition signed by ten percent of that county's voters to reform the county's government simply triggers the legislative process. The Legislature retains its discretion to approve or reject a bill authorizing a county-wide election on the requested reformation. As such, we find that upon receipt of a petition for reformation of county government pursuant to the provisions of *Article IX, Section 13 of the Constitution of West Virginia*, the Legislature may not be compelled to approve legislation authorizing a county-wide election on the reformation proposed in the petition where the Legislature concludes that the proposed reformation would violate the *Constitution of West Virginia*.

Finally, we hold that the circuit court erred in finding that a petition for reformation does not expire at the end of a legislative term. *Article IX, Section 13* specifically references the presentation of a petition for reformation to the Legislature "at its next regular session[.]" Under our law, legislative sessions occur annually, the composition of the Legislature may change every two years and bills do not automatically carry over from legislative session to legislative session. *W. Va. Const. art. 6, §§ 2*, *3*, and *18*; House Rule 92a. The framers were aware of this system at the time *Article IX, Section 13* was enacted. As such, inclusion of the phrase "at its next regular session" indicates an intent that the same Legislature that is in power at the time a petition for reformation of county government is authorized will be the Legislature which determines whether the requested reformation should be presented to the voters. Indeed, the numbers of registered voters in a county may change from legislative term to legislative term impacting the validity of the petition presented. Recognizing the impact of changes in legislative membership and voter numbers would have on a petition, a finding that a petition is valid for only the term of the Legislature in which it is initially presented is required both by the language of *Article IX, Section 13* itself and by practical realities.[12] As such, we now hold that if a petition for reformation of county government is presented to the Legislature pursuant to *Article IX, Section 13 of the Constitution of West Virginia* and the legislative process does not result in the enactment of enabling legislation prior to the end of the legislative session, then, in order for a subsequent Legislature, during its two year term, to address the issue, a new petition must be submitted.

D. Municipalities

Read Article VI, § 39(a).

WEST VIRGINIA CODE CHAPTER 8 – MUNICIPAL CORPORATIONS
(Select Provisions)

§ 8-1-1. Purpose and short title.

The purpose of this chapter is to effect a recodification of the basic municipal law of this state and of various statutory provisions relating to certain intergovernmental relations involving

[12]Though not impacting the matter currently before this Court, we recognize that during the 2008 regular legislative session, the West Virginia Legislature enacted Senate Bill 784 which sets forth guidelines governing the contents of petitions for reformation, the timing of their presentation and the scope of legislative review.

municipalities, counties and other units of government, to provide as much uniformity as possible between the powers, authority, duties and responsibilities of special legislative charter municipalities and all other municipalities, and to give effect to the "Municipal Home Rule Amendment" to the constitution of this state, being section thirty-nine-(a), article six of said constitution.

For convenience of reference, this chapter may be known and cited as the "Municipal Code of West Virginia."

§ 8-1-2. Definitions of terms.

(a) For the purpose of this chapter:

(1) "Municipality" is a word of art and shall mean and include any Class I, Class II and Class III city and any Class IV town or village, heretofore or hereafter incorporated as a municipal corporation under the laws of this state;

(2) "City" is a word of art and shall mean, include and be limited to any Class I, Class II and Class III city, as classified in section three of this article (except in those instances where the context in which used clearly indicates that a particular class of city is intended), heretofore or hereafter incorporated as a municipal corporation under the laws of this state, however created and whether operating under (i) a special legislative charter, (ii) a home rule charter framed and adopted or revised as a whole or amended under the provisions of former chapter eight-a of this code or under the provisions of article three or article four of this chapter, (iii) general law, or (iv) any combination of the foregoing; and

(3) "Town or village" is a term of art and shall, notwithstanding the provisions of section ten, article two, chapter two of this code, mean, include and be limited to any Class IV town or village, as classified in section three of this article, heretofore or hereafter incorporated as a municipal corporation under the laws of this state, however created and whether operating under (i) a special legislative charter, (ii) general law, or (iii) a combination of the foregoing. ...

(b) For the purpose of this chapter, unless the context clearly requires a different meaning:

(8) "Ordinance" shall mean the ordinances and laws enacted by the governing body of a municipality in the exercise of its legislative power, and in one or more articles of this chapter, ordinances enacted by a county court;

(9) "Inconsistent or in conflict with" shall mean that a charter or ordinance provision is repugnant to the constitution of this state or to general law because such provision (i) permits or authorizes that which the constitution or general law forbids or prohibits, or (ii) forbids or prohibits that which the constitution or general law permits or authorizes[.] . . .

§ 8-1-3. Classification of municipal corporations.

Pursuant to the mandate of the "Municipal Home Rule Amendment" to the constitution of this state, all municipal corporations are hereby classified by population into four classes, as follows:

(1) Every municipal corporation with a population in excess of fifty thousand shall be a Class I city;

(2) Every municipal corporation with a population in excess of ten thousand but not in excess of fifty thousand shall be a Class II city;

(3) Every municipal corporation with a population in excess of two thousand but not in excess of ten thousand shall be a Class III city; and

(4) Every municipal corporation with a population of two thousand or less shall be a Class IV town or village.

Transition from one to another class shall occur automatically when the requisite population qualification has been met, effective as of the effective date of the census, as specified in section four of this article.

The Legislature hereby declares its interpretation of the said "Municipal Home Rule Amendment" to be that a single classification by population of municipal corporations in this state

is required which shall exclude any other classification of municipal corporations by population for any purpose. It is, therefore, the intention of the Legislature that the classification established in this section shall give effect to the constitutional mandate and shall be the only classification by population applying to municipal corporations in this state. It is the further intention of the Legislature that subsequent legislation affecting municipal corporations in this state shall treat municipal corporations differently upon the basis of population, only in accordance with the general classification established in this section. . . .

§ 8-1-7. Construction of powers and authority granted.

The enumeration of powers and authority granted in this chapter shall not operate to exclude the exercise of other powers and authority fairly incidental thereto or reasonably implied and within the purposes of this chapter; and the provisions of this chapter shall be given full effect without regard to the common-law rule of strict construction, and particularly when the powers and authority are exercised by charter provisions framed and adopted or adopted by revision of a charter as a whole or adopted by charter amendment under the provisions of this chapter.

Any charter provision framed and adopted or adopted by revision of a charter as a whole or adopted by charter amendment under the provisions of former chapter eight-a of this code or under the provisions of this chapter which is beyond the power and authority of a city and any ordinance provision which is beyond the power and authority of a municipality shall be of no force and effect. . . .

§ 8-3-2. . . . [F]orm of city government.

. . . It shall be the duty of the charter board to provide in the charter so drafted for a form of city government in accordance with one of the following plans:

Plan I -- "Mayor-Council Plan." Under this plan:

(1) There shall be a city council, elected at large or by wards, or both at large and by wards, by the qualified voters of the city; a mayor elected by the qualified voters of the city; and such other elective officers as the charter may prescribe; and

(2) The mayor and council shall be the governing body and administrative authority.

Plan II -- "Strong-Mayor Plan." Under this plan:

(1) There shall be a mayor elected by the qualified voters of the city; and a city council elected at large or by wards, or both at large and by wards, by the qualified voters of the city;

(2) The council shall be the governing body;

(3) The mayor shall be the administrative authority; and

(4) Other officers and employees shall be appointed by the mayor or by his order in accordance with this chapter, but such appointments by the mayor or by his order may be made subject to the approval of the council.

Plan III -- "Commission Government." Under this plan:

(1) There shall be, except as hereinafter in this plan provided, a commission of five members elected at large by the qualified voters of the city;

(2) The members of the commission shall be a commissioner of public affairs, a commissioner of finance, a commissioner of public safety, a commissioner of public works and a commissioner of streets: Provided, That a charter for a Class I or Class II city may, and a charter for a Class III city shall, provide for a commission of three members, viz., a commissioner of finance, a commissioner of public works and a commissioner of public safety;

(3) The members of the commission shall elect a mayor from among their membership;

(4) The commission shall be the governing body and administrative authority; and

(5) Officers and employees, other than members of the commission, shall be appointed in accordance with this chapter by the commissioners or by each commissioner with respect to his department, as the charter may prescribe.

Plan IV -- "Manager Plan." Under this plan:

(1) There shall be a council of not less than five nor more than eleven members, elected either at large or from such geographical districts as may be established by the charter, or partly at large and partly from such geographical districts, and the charter may empower the council to change, from time to time, such districts without amending the charter: **Provided,** That the change of such districts shall not take effect during the terms of office of the members of such council making such change;

(2) There shall be a mayor elected by the council from among its membership who shall serve as the presiding officer of the council; and a city manager who shall be appointed by the council;

(3) The council shall be the governing body; and

(4) The manager shall be the administrative authority. He shall manage the affairs of the city under the supervision of the council and he shall be responsible to such council. He shall appoint or employ, in accordance with this chapter, all subordinates and employees for whose duties or work he is responsible to the council.

Plan V -- "Manager-Mayor Plan." Under this Plan:

(1) There shall be a council of not less than five nor more than eleven members, elected either at large or from such geographical districts as may be established by the charter, or partly at large and partly from such geographical districts, and the charter may empower the council to change, from time to time, such districts without amending the charter: **Provided,** That the change of such districts shall not take effect during the terms of office of the members of such council making such change.

(2) There shall be a mayor elected at large by the qualified voters of the municipality as may be established by the charter, who shall serve as a member and the presiding officer of the council; and a city manager who shall be appointed by the council;

(3) The council shall be the governing body; and

(4) The manager shall be the administrative authority. He shall manage the affairs of the city under the supervision of the council and he shall be responsible to such council. He shall appoint or employ, in accordance with this chapter, all subordinates and employees for whose duties or work he is responsible to the council.

The purpose of the provisions of this section pertaining to Plan I, Plan II, Plan III, Plan IV and Plan IV is to establish basic requirements of alternative plans of structure and organization of city government. The structure and organization of a city government may be specified by the charter in respects other than those enumerated, and in elaboration of the basic requirements, insofar as such charter provisions do not conflict with the purpose and the provisions of the alternative plans prescribed.

§ 8-11-1. Ordinances to make municipal powers effective . . .

(a) To carry into effect the powers and authority conferred upon any municipality or its governing body by the provisions of this chapter, or any past or future act of the Legislature of this state, the governing body has plenary power and authority to:

(1) Make and pass all needful ordinances, orders, bylaws, acts, resolutions, rules and regulations not contrary to the constitution and laws of this state; and

(2) Prescribe reasonable penalties for violation of its ordinances, orders, bylaws, acts, resolutions, rules and regulations, in the form of fines, forfeitures and confinement in the county or regional jail or the place of confinement in the municipality, if there is one, for a term not exceeding thirty days.

. . .

§ 8-12-2. Home rule powers for all cities.

(a) In accordance with the provisions of the "Municipal Home Rule Amendment" to the constitution

of this state, and in addition to the powers and authority granted by (I) such constitution, (ii) other provisions of this chapter, (iii) other general law, and (iv) any existing charter, any city shall have plenary power and authority by charter provision not inconsistent or in conflict with such constitution, other provisions of this chapter or other general law, or by ordinance not inconsistent or in conflict with such constitution, other provisions of this chapter, other general law or any existing charter, to provide for the government, regulation and control of the city's municipal affairs, including, but not limited to, the following:
(1) The creation or discontinuance of departments of the city's government and the prescription, modification or repeal of their powers and duties;
(2) The transaction of the city's business;
(3) The incurring of the city's obligations;
(4) The presentation, ascertainment, disposition and discharge of claims against the city;
(5) The acquisition, care, management and use of the city's streets, avenues, roads, alleys, ways and property;
(6) The levy, assessment, collection and administration of such taxes and such special assessments for benefits conferred, as have been or may be specifically authorized by the Legislature;
(7) The operation and maintenance of passenger transportation services and facilities, if authorized by the public service commission, and if so authorized, such transportation system may be operated without the corporate limits of such city, but may not be operated within the corporate limits of another municipality without the consent of the governing body thereof;
(8) The furnishing of all local public services;
(9) The government, protection, order, conduct, safety and health of persons or property therein;
(10) The adoption and enforcement of local police, sanitary and other similar regulations; and
(11) The imposition and enforcement of penalties for the violation of any of the provisions of its charter or of any of its ordinances.
(b) By charter provision, a civil service system may be provided for all or any class of city employees in addition to those classes for which a civil service system is made mandatory by general law.
(c) Any city is hereby authorized and empowered to require, for the purpose of inquiring into and investigating matters of concern to the city or its inhabitants, the attendance and testimony of witnesses and the production of evidence. In case of the failure or refusal of a witness to appear and testify or to produce evidence, the governing body may invoke the aid of the circuit court of the county in which the city or the major portion of the territory thereof is located. Upon proper showing, the circuit court shall issue an order requiring the witness to appear and give testimony and produce evidence concerning the matter in question. A person who fails or refuses to obey the order of the circuit court may be punished by the court as for contempt. A claim that any such testimony or evidence may tend to incriminate the person giving the testimony or evidence shall not excuse the witness, but such testimony or evidence shall not be used against the witness in any criminal prosecution.
(d) Any city is hereby authorized and empowered to provide for a sealer of weights and measures who shall exercise his powers in accordance with the provisions of article one, chapter forty-seven of this code.

§ 8-12-5. General powers of every municipality and the governing body thereof.
In addition to the powers and authority granted by: (I) The Constitution of this state; (ii) other provisions of this chapter; (iii) other general law; and (iv) any charter, and to the extent not inconsistent or in conflict with any of the foregoing except special legislative charters, every municipality and the governing body thereof shall have plenary power and authority therein by ordinance or resolution, as the case may require, and by appropriate action based thereon:
. . .
(13) To prevent injury or annoyance to the public or individuals from anything dangerous, offensive

or unwholesome;

. . .

(44) To protect and promote the public morals, safety, health, welfare and good order[.]

McCALLISTER v. NELSON,
186 W. Va. 131, 411 S.E.2d 456 (1991).

Brotherton, Justice:

This appeal is before the Court on the issue of whether a municipal charter provision, which provides the mayor with the power to veto ordinances and resolutions of city council, is a valid exercise of municipal power under W.Va. Code § 8-1-7 (1990).

On October 23, 1989, a member of the Huntington City Council introduced a proposed ordinance in council entitled "An Ordinance Protecting the Proposed East-West Corridor from 17th Street to 1st Street." The ordinance stated that: BE IT ORDAINED BY THE COUNCIL OF THE CITY OF HUNTINGTON, CABELL AND WAYNE COUNTIES, WEST VIRGINIA, that the proposed east-west corridor running from 17th Street West to 1st Street, said area being better known as the old B&O Right-of-Way, be protected from further development in order to preserve the intent of the City's comprehensive plan. The Mayor contends that, contrary to the stated intent of the proposal, this ordinance was enacted in order to block the development of a 20-unit apartment complex for the mentally disabled which was planned to be built on that strip of land.

The Huntington City Council approved the ordinance by a vote of seven to four on November 13, 1989. However, the Mayor vetoed the ordinance pursuant to section 2.7 of the City of Huntington Charter.[1] Shortly thereafter, the appellee, a member of the Charter Board, filed a declaratory judgment action in the Circuit Court of Cabell County. In his complaint, the appellee requested "a judgment declaring and adjudicating the rights and duties of the defendant to veto ordinances legally adopted by Huntington City Council under the provisions of the Huntington City Charter and applicable state law."

On February 13, 1990, an attempt by the Council to override the veto failed because they did not obtain the required two-thirds majority. On April 23, 1990, the Cabell County Circuit Court issued an opinion which stated that a mayor may not have the power to veto in West Virginia. It is from that ruling that the Mayor filed this petition for appeal.

In 1985, a new charter was adopted by the City of Huntington. Under West Virginia law, a municipality may choose their government from four separate plans. W.Va. Code § 8-3-2. The city chose the strong mayor plan, which is defined as: (1) There shall be a mayor elected by the qualified voters of the city; and a city council elected at large or by wards, or both at large and by wards, by the qualified voters of the city; (2) The council shall be the governing body; (3) The mayor shall be the administrative authority; and (4) Other officers and employees shall be appointed by the mayor or by his order in accordance with this chapter, but such appointments by the mayor or by his order may be made subject to the approval of the council. Id.

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[1]The Mayor states that the "old B&O Right-of-Way" is owned primarily by CSX. He contends that the old proposed street plan had been resurrected only when the Evergreen Project, Inc., had decided to develop a supervised apartment-style housing complex for the severely mentally disabled on that site. Area residents campaigned against the project. Since the area was zoned R-2, single family, a special exception was required to provide for a multi-family zoning of R-3 or R-4. Counsel for the Board of Zoning Appeals advised that a denial of special exception would possibly violate federal law by discriminating against the handicapped in the area of housing. 42 U.S.C. § 3604(f)(1), 24 C.F.R. 100.50(b)(3) and 24 C.F.R. 100.70(a) and (c) forbid discriminating in housing based upon, among other reasons, handicapped status. Thus, the Board of Zoning Appeals approved the special exception.

The new charter provided the mayor with the ability to veto decisions of city council. The veto provision in the new Charter provides as follows:

SECTION 2.7 SUBMISSION OF
ORDINANCE TO MAYOR;
VETO POWER

> Within ninety-six hours after the adjournment of any Council meeting, the City Clerk shall present to the Mayor the record of proceedings of the meeting and all ordinances and resolutions adopted at the meeting. The Mayor, within seven days of receipt by him or her of an ordinance or resolution, shall return it to the City Clerk with his or her approval signature, with his or her written veto, or the Mayor may not act. If the ordinance or resolution is signed by the Mayor, it shall become operative as specified in the ordinance. If the ordinance is disapproved by veto, the Mayor shall attach thereto a written statement explaining the reasons for his or her veto. If the mayor does not act, the ordinance or resolution shall become operative at noon on the seventh calendar day after it is received by the Mayor. Ordinances or resolutions vetoed by the Mayor shall be presented by the City Clerk to Council for its consideration at its next regular meeting and should Council then or thereafter adopt the ordinance or resolution by an affirmative vote of at least two-thirds of all its members, it shall be operative upon the date specified by Council, but in no event less than fifteen days after the date of final passage. If no operative date is so specified, it shall become operative at noon on the fifteenth calendar day after the date of final passage. The Mayor's veto power shall extend to disapproving or reducing any individual appropriation item in the budget or any ordinance or resolution, but shall not extend or apply to any appropriation or resolution authorized pursuant to Section 3.16 of the Charter.

The Mayor used the veto provision from its adoption, without objection, until the handicapped complex was proposed.

The appellee [McCallister] contends that the circuit court was correct in ruling that veto power is not included in those powers which were granted by the legislature. He points to our opinion in Sharon Steel Corp. v. City of Fairmont, 175 W.Va. 479, 334 S.E.2d 616 (1985), in which this Court reiterated that a municipal corporation has only those powers granted to it by the legislature, and if any reasonable doubt exists, the power is to be denied. Id. at 624. However, the appellee's argument ignores the fact that in Sharon Steel, we overcame the objections to the municipal ordinance directed at abating a public nuisance by finding the authority to abate the nuisance within a general statute section permitting "elimination of hazards to public health and safety." Id. at 624-15. Thus, the municipality had the power to identify the improper disposal of hazardous waste as a nuisance even though the statute did not specifically refer to "hazardous wastes." Id. at 625.

The appellant [Mayor Nelson] maintains that the "Home Rule Amendment" of the West Virginia Constitution, Art. VI, sec. 39(a) properly authorizes the exercise of municipal authority by veto. The amendment states, in pertinent part, that:

> The legislature shall provide by general laws for the incorporation and government of cities, towns and villages and shall classify such municipal corporations, on the basis of population, into not less than two nor more than five classes. Such general laws shall restrict the powers of such cities, towns and villages to borrow money and contract debts, and shall limit the rate of taxes for municipal purposes, in accordance with section one, article ten of the Constitution of the State of West Virginia. Under such general laws, the electors of each municipal corporation, wherein the population exceeds two thousand, shall have power and authority to frame, adopt and amend the charter of such corporation, or to amend an existing charter thereof, and through its legally constituted authority, may pass all laws and ordinances relating to its municipal affairs: Provided, that such charter or amendment thereto, and any such law or ordinance so adopted, shall be invalid and void if inconsistent or in conflict with this Constitution or the general laws of the State then in effect, or thereafter, from time to time enacted.

Besides power to contract debts, borrow money, and set taxes, the amendment provides that the

municipality has the authority to exercise power unless it is "inconsistent or in conflict with this Constitution or the general laws of the State . . . ." Id.

West Virginia Code § 8-1-7 (1990) further enumerates the power granted to municipalities. That section states, in part, that:

> The enumeration of powers and authority granted in this chapter shall not operate to exclude the exercise of other powers and authority fairly incidental thereto or reasonably implied and within the purposes of this chapter; and the provisions of this chapter shall be given full effect without regard to the common-law rule of strict construction, and particularly when the powers and authority are exercised by charter provisions framed and adopted or adopted by revision of a charter as a whole or adopted by charter amendment under the provisions of this chapter.[2]

Thus, a municipality can exercise powers that are reasonably implied from or fairly incidental to the law and within the purposes of this chapter. Moreover, W.Va. Code § 8-12-2 provides municipalities with plenary power and authority if it is not inconsistent or in conflict with our Constitution or the general laws of this State:

> (a) In accordance with the provisions of the "Municipal Home Rule Amendment" to the Constitution of this State, and in addition to the powers and authority granted by (i) such Constitution, (ii) other provisions of this chapter, (iii) other general law, and (iv) any existing charter, any city shall have plenary power and authority by charter provision not inconsistent or in conflict with such Constitution, other provisions of this chapter or other general law, . . . to provide for the government, regulation and control of the city's municipal affairs . . . .

In syllabus point 1 of City of Fairmont v. Investors Syndicate of America, 712 W.Va. 431, 307 S.E.2d 467 (1983), we held that a "'municipal corporation has only the powers granted to it by the legislature, and any such power it possesses must be expressly granted or necessarily or fairly implied or essential and indispensable. If any reasonable doubt exists as to whether a municipal corporation has a power, the power must be denied.' Syllabus Point 2, State ex rel. Charleston v. Hutchinson, 154 W.Va. 585, 176 S.E.2d 691 (1970)." Similarly, in Marra v. Zink, 163 W.Va. 400, 256 S.E.2d 581 (1979), we found that "municipalities are creatures of the State who draw their powers from the law which creates them; therefore, if a city charter provision conflicts with either our constitution or our general laws, the provision, being the inferior law, must fail." Id. at 584 (citations omitted). See also State ex rel. City of Charleston v. Hutchinson, 154 W.Va. 585, 176 S.E.2d 691 (1970); Matter of City of Morgantown, 159 W.Va. 788, 226 S.E.2d 900 (1976).

However, in order to defeat the validity of a charter provision, the challenger must overcome a presumption that legislative enactments are immune from judicial interference. A municipal council or other governing body of a municipality, when acting or attempting to act in a legislative capacity, upon a subject within the scope of its powers, is entitled to the same immunity from judicial interference with the exercise of legislative discretion as in the state legislature. See, e.g., Hackney v. City of Guthrie, 171 Okla. 320, 322, 41 P.2d 705, 707 (1935). A court of equity normally may not, therefore, enjoin a municipal legislative body from exercising legislative powers by enacting a municipal ordinance. Perdue v. Ferguson, W.Va. , 350 S.E.2d 555, 559 (1986) (citations omitted).

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[2]West Virginia Code § 8-11-1 (1990) states that:

> To carry into effect the powers and authority conferred upon any municipality or its governing body by the provisions of this chapter or any past or future act of the Legislature of this state, the governing body shall have plenary power and authority to make and pass all needful ordinances, orders, bylaws, acts, resolutions, rules and regulations, not contrary to the Constitution and laws of this state . . . .

Further, W.Va. Code § 8-10-1 (1990) provides that:

> When not otherwise provided by charter provision or general law, the mayor of every municipality shall be the chief executive officer of such municipality, shall have the powers and authority granted in this section, and shall see that the ordinances, orders, bylaws, acts, resolutions, rules and regulations of the governing body thereof are faithfully executed . . . .

See also Railway Express Agency v. Commonwealth of Virginia, 282 U.S. 440, 51 S.Ct. 201, 75 L.Ed. 450 (1931).

In this case, we can find no state law or constitutional provision violated by the veto provision. The omission of a specific provision allowing a veto in the statute or Constitution does not mean it is forever forbidden. Given that W.Va. Code § 8-1-7 allows the exercise of "other powers and authority fairly incidental thereto or reasonably implied," some unenumerated powers must exist. After reviewing the evidence below, we find that the appellee has failed to prove either that a veto provision in a municipal charter violated either state law or the Constitution, or that a reasonable doubt existed as to whether the city had the power to enact the veto provision. Given that the city approved the strong mayor system, the appellee failed to overcome the presumption of immunity from judicial interference which exists in the favor of municipal legislative enactments.

A charter provision which authorizes a veto by a mayor of a municipality to an ordinance or resolution of city council is reasonably implied and fairly incidental to the granted or enumerated powers within W.Va. Code § 8-1-7 and the West Virginia Constitution. Therefore, we reverse the April 23, 1990, ruling of the Circuit Court of Cabell County and hold that the provision of the charter of the City of Huntington, which provides the mayor with the power to veto ordinances and resolutions of the city council, is a valid exercise of municipal authority under W.Va. Code § 8-1-7 (1990).

Robert M. Bastress, Jr., *Home Rule in West Virginia*,
122 W. VA. L. REV. 721, 722-34 (2020).

II. LOCAL GOVERNMENT POWERS GENERALLY

Since at least the post-Civil War period, the default rule for local government power in the United States has been that local governments are creatures of the state that derive their existence and powers from state law. (The federal Constitution makes no provision for local governmental units.) This view was solidified by the widespread adoption of "Dillon's Rule," which is named after Justice John F. Dillon of the Iowa Supreme Court, who formulated it in an 1868 decision (*Merriam v. Moody's Executors*) and in his treatise *Commentaries on the Law of Municipal Corporations*. He wrote:

> [A] municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation--against the existence of the power.

Although Dillon wrote specifically about cities, his rule was readily applied to define the powers of counties and other forms of local government. Judges were enamored with the rule because it gave courts enormous discretion to invalidate laws they considered unwise or burdensome on local taxpayers and promoted the *laissez-faire* economic philosophy dominant in the second half of the 19th century.[6]

Home rule laws were put forth as an antidote to the courts' miserly interpretation of local government powers. "Home rule" is a generic term for statutory and state constitutional provisions that attempt to bestow on local governments some degree of local autonomy and discretion and to avoid the necessity (imposed by Dillon's Rule) of having to run to the

[6]*See, e.g.*, Robert M. Bastress, Jr., *Constitutional Considerations for Local Government Reform in West Virginia*, 108 W. Va. L. Rev. 125, 145 (2005); Gerald E. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1059, 1110 (1980)[.] . . .

legislature to gain express authorization for every exercise of local power.[7] Home rule laws vary widely in design and form, but they basically either bestow the ability to initiate policies at the local level (the power of initiative) or protect against state override (the power of immunity)--or they perform both functions.

In very general terms, home rule laws have taken two shapes: *imperium in imperio* (i.e., a sovereign within a sovereign) or "legislative home rule." The former term describes the original home rule law, which was created by Missouri in 1875 for the City of St. Louis[9] and emulated by other jurisdictions.[10] This form created an initiative power and a supremacy for local governments with regards to their local "affairs" or "subjects" (or some similar term). Judicial hostility to such laws resulted in an extremely narrow construction of what were "municipal affairs" or a very broad interpretation of legislative ability to override the local law. In response to that hostility, localism advocates proposed an alternative strategy that authorized local governments to enact any law not in conflict with federal law, the state constitution, or state statute. This strategy was designed to shift the scope of defining home rule powers from the courts (and their hostility) to the legislatures (and their greater amenability). This became known as "legislative home rule."

III. WEST VIRGINIA'S HISTORY OF MUNICIPAL POWER

West Virginia was an early and faithful adherent of Dillon's Rule. Under the state's 1872 constitution, the legislature prescribed municipal charters--except for towns with populations of fewer than 2,000 people.[15] . . . In 1929, after years of calls for constitutional reform, Governor William Conley appointed a Constitutional Review Commission to study the state's constitution and recommend changes. That Commission filed its report in 1930, and either the legislature or the voters rejected all of its recommendations – save one. In 1936, the electorate approved adding the "Home Rule Amendment" to the state constitution as Article VI, Section 39a. . . .

The section obviously did away with legislative enactments chartering cities, although it took decades for gradual implementation of locally adopted charters. But that did happen. The section also set forth a form of legislative home rule: a city could enact any ordinance to promote its municipal affairs that was not in conflict with federal or state law. Yeah, right.

The Supreme Court of Appeals, in its first decision interpreting Section 39a, declared that

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[7]An unfortunate side effect of obtaining specific legislation authorizing a particular local power was that courts often interpreted the statutory grants as implicitly confining the scope of the power and thus excluding related powers not specifically granted. *See, e.g.*, Dotson v. City of Ames, 101 N.W.2d 711, 714 (Iowa 1960) ("[B]y granting control over animals running at large[,] the legislature has clearly excluded power over those confined."); *cf*. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 107 (2012) (describing the corresponding canon of statutory interpretation--viz., *expressio unius est exclusio alterius*--which holds that "[t]he expression of one thing implies the exclusion of others").

[10]This Author has previously argued that the first home rule law was enacted three years earlier with West Virginia's adoption of its 1872 constitution and the creation of what is now Article IX, Section 13, which conferred on counties the power to create their own forms of government. Robert M. Bastress, Jr., *Localism and the West Virginia Constitution*, 109 W. Va. L. Rev. 683, 707-09 (2007). Unfortunately, the Supreme Court of Appeals gutted the local supremacy provided by Section 13 in *Committee to Reform Hampshire County Government v. Thompson*, 223 W. Va. 346, 674 S.E.2d 207 (2008), and thereby refuted the contention that West Virginia pioneered home rule. Robert M. Bastress, Jr., The West Virginia State Constitution 278-82 (2d ed. 2016).

[15]W. Va. Const. art. VI, § 39. This section also denied the legislature the power to enact local or special laws regarding other local subjects, most notably to regulate or change county or district affairs. *Id*. The Supreme Court of Appeals has rendered this provision virtually useless. *See* Bastress, *supra* note 10, at 696-97; *see also* Bastress, *supra* note 6, at 141-44.

the section had constitutionalized Dillon's Rule.[21] Did the term "home rule" not mean anything? Subsequent decisions persisted to apply Dillon's Rule to municipal powers questions[22] and to ignore the intent behind and the literal language of Section 39a.

In 1969, the legislature overhauled the state's Municipal Code. In part, the legislature's purpose was to eliminate the disarray that had developed following the 1936 enactment of Article VI, Section 39a and the subsequent establishment of two separate municipal codes – one for cities with municipal charters created by the legislature prior to 1936 and another for cities that had created their own charters pursuant to the Section 39a-granted power. The dual track had brought about confusion and unfairness; one municipal code for all cities (subject to distinctions in treatment between cities based on population) promoted clarity and ease of application. A second legislative purpose, however, can readily be gleaned from several provisions of the West Virginia Code: a purpose to confer greater powers and discretion on cities and a plea to courts to let them exercise those enhancements.

Of particular note was the inclusion of Section 8-1-7, which specifically stated that the powers granted by the chapter (i.e., by the Municipal Code) "shall not operate to exclude the exercise of other powers and authority fairly incidental thereto or reasonably implied and within the purposes of this chapter." In 2007, the legislature added the language "or in accordance with the Home Rule Amendment to the constitution of this state." The section further stated that "[t]he provisions of the chapter shall be given full effect *without regard to the common-law rule of strict construction*." But this guidance mattered little to the Supreme Court of Appeals.

In its first case applying Section 8-1-7, *Rogers v. City of South Charleston*,[30] the Supreme Court of Appeals held that a statute according cities the power to sell or convey real estate did not include the power to enter into a contract creating an option for a person to buy city property (even though there was no statute precluding it). Cities enjoy only such powers as are expressly granted by the Legislature or are necessarily implied. As for Section 8-1-7, the court stated it only "relaxes the common law rule of strict construction and does not lift all restrictions on municipal power." Subsequent decisions on municipal power have continued to cite with approval Dillon's Rule of limited municipal power.[32]

The 1969 Act did not stop with Section 8-1-7. It also included within its general provisions applicable to the entire Act Section 8-1-6, which set forth rules of interpretation and attempted to codify Article VI, Section 39a. More importantly, the Act broadly defined municipal powers. Section 8-11-1(a), beginning the definition of city powers, provides:

(a) To carry into effect the powers and authority conferred upon any municipality or its

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[21]Brackman's, Inc. v. City of Huntington, 126 W. Va. 21, 24, 27 S.E.2d 71, 73 (1943); *see also* Bastress, *supra* note 6, at 145-47.

[22]*See, e.g.*, Rogers v. City of South Charleston, 163 W. Va. 285, 256 S.E.2d 557 (1979); Toler v. City of Huntington, 153 W. Va. 313, 168 S.E.2d 551 (1969); State *ex rel*. Plymale v. City of Huntington, 147 W. Va. 728, 131 S.E.2d 160 (1963); Bastress, *supra* note 6, at 145-51.

[30]163 W. Va. 285, 256 S.E.2d 557 (1979).

[32]*See* Robinson v. City of Bluefield, 234 W. Va. 209, 764 S.E.2d 740 (2014); McCallister v. Nelson, 186 W. Va. 131, 411 S.E.2d 456 (1991); Sharon Steel Corp. v. City of Fairmont, 175 W. Va. 479, 334 S.E.2d 616 (1985); City of Fairmont v. Inv'rs Syndicate of Am., Inc., 172 W. Va. 431, 307 S.E.2d 467 (1983). *McCallister* sustained a city's creation of a mayoral veto--though state law did not expressly authorize that device--and included language recognizing Article VI, Section 39a's grant of power to cities to enact any law not inconsistent with state law. 186 W. Va. at 134-35, 411 S.E.2d at 459-60. And *Sharon* allowed a city to use its common law nuisance power to affect an environmental regulation. 175 W. Va. at 489, 334 S.E.2d at 626-27. *Robinson*, however, brought back strict construction of municipal power with a vengeance. 234 W. Va. at 215, 764 S.E.2d at 746.

> governing body by the provisions of this chapter, or any past or future act of the Legislature of this state, the governing body has plenary power and authority to:
> (1) Make and pass all needful ordinances, orders, bylaws, acts, resolutions, rules and regulations not contrary to the Constitution and laws of this state; and
> (2) Prescribe reasonable penalties for violation of its ordinances, orders, bylaws, acts, resolutions, rules and regulations, in the form of fines, forfeitures and confinement in the county or regional jail or the place of confinement in the municipality, if there is one, for a term not exceeding thirty days.

There's more. In Section 8-12-2, titled "Home Rule Power for Cities," the Act in subsection (a) provides that "any city shall have plenary power and authority by charter provision ... or by ordinance not inconsistent or in conflict" with state law "to provide for the government, regulation and control of the city's municipal affairs." The section then goes on to set forth a non-exhaustive list of 11 broadly stated powers.

Later in Article 12, the Act lists the "General Powers of Municipalities and Governing Bodies." Section 8-12-5 currently sets forth 59 separate powers, including "(44) [The power to] protect and promote the public morals, safety, health, welfare and good order." That, of course, is the classic statement of the general police power, which permits governments to regulate anything in any manner not prohibited by the constitution or, in this case, by state statute.

It is difficult to imagine a state code that is clearer in its conferral of broad municipal regulatory powers.[37] Nevertheless, courts – both the Supreme Court of Appeals and the circuit courts – have refused to implement the clear legislative judgment and have instead continued to genuflect at Dillon's Rule.

IV. THE WEST VIRGINIA HOME RULE PILOT PROGRAM

Thus, despite a constitutional provision authorizing home rule for cities and despite a slew of statutory provisions expressing a vision for broad municipal powers, judicial nullification continued to make it necessary for cities to run to Charleston to get some express legislative authorization to exercise any new municipal authority--and thereby run the risk of creating a presumption that the grant of a power implies the exclusion of powers not granted.[39] In response to the limited discretion that West Virginia cities possessed, the legislature in 2007 tried again to promote greater local flexibility when it created the Municipal Home Rule Pilot Program. The law established a Municipal Home Rule Board and granted it authority to approve up to five cities to participate in the program. Cities were to submit their proposed home rule plan and explain how current state law prevented them from achieving efficient governance. With Board approval, cities could amend their plans at any time and could, in effect, receive waivers from compliance with some state laws found to be inhibiting. Only four cities – Bridgeport, Charleston, Huntington, and Wheeling – participated in the original program. In November of 2012, the Legislative Auditor Performance Evaluation and Research Division concluded its

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[37]The Code did not, however, loosen the constraints on municipal taxing powers.

[39]Even an express grant was not always a guarantee of municipal authority. In *Robinson v. City of Bluefield*, the city attempted to rely on the express grant in Section 8-12-5(26) authorizing it "[t]o regulate or prohibit the keeping of animals or fowls and to provide for the impounding, sale or destruction of animals or fowls kept contrary to law or found running at large." 234 W. Va. 209, 212, 764 S.E.2d 740, 743 (2014) (quoting W. Va. Code Ann. § 8-12-5(26)). The court held that express grant was superseded by another statute, Section 19-20-20, which authorized magistrate and circuit courts to order the destruction of vicious dogs. *Id*. at 214, 764 S.E.2d at 745. Why city courts could not exercise concurrent jurisdiction over vicious animals with the county courts is not evident. Similar cases abound. *See, e.g.*, Rogers v. City of South Charleston, 163 W. Va. 285, 289, 256 S.E.2d 557, 560 (1979) (granting cities the power to convey or sell real property did not include the power to contract for an option to buy city realty).

assessment of the program and filed a special recommendation that the legislature consider extending broad-based home rule to all of the State's Class I, II, and III cities. The legislature revisited the pilot program in 2014 and extended participation for up to 20 cities, including the existing 4. A 2015 law raised the number to 30 Class I, II, and III cities and further authorized inclusion of up to four Class IV towns. As of March 2019, 34 of West Virginia's 231 cities were operating under the home rule pilot program. Finally, the legislature in 2019 made the program permanent and extended the opportunity for participation to all West Virginia cities, although limiting the number of new Class IV admittees to four per year.

V. THE WEST VIRGINIA HOME RULE PROGRAM

A. Description

Section 8-1-5a, the "Municipal Home Rule Program," has several distinctive features, some of which are unique to the state. The legislative findings included conclusions about the Pilot Program's success for having "brought innovative results, including novel municipal ideas that became municipal ordinances which later resulted in new statewide statutes." Subsection (c)(1) extended the opportunity for home rule to all Class I, II, and III cities and provided for approval of applications for the four Class IV towns per year. A new subsection – (c)(3) – provides that participating cities shall pay an annual assessment of $2,000 "for the operation and administration of the Home Rule Board." Any balance in the fund into which the fees are paid that remains at the end of the fiscal year will remain in a special revenue account "for uses consistent with the provisions" of the home rule section.

The statute continued the practice of the more recent statutes of creating a five-member Home Rule Board consisting of the governor or a designee; the Executive Director of the West Virginia Development Office or a designee; representatives of the Business and Industry Council; representatives of the state's largest labor organization; and representatives of the American Planning Association, all appointed by the governor with the advice and consent of the senate.

The Board retains the power to grant cities relief from state laws that interfere with or obstruct their ability to advance their best interests. The city's application for special dispensation must describe how state law prevents "the municipality from carrying out its duties" in an efficient and effective manner. For example, Charles Town found burdensome a state law that prohibited alcohol sales in restaurants before 1 p.m. on Sundays.[55] This prevented the city's restaurants and bed-and-breakfast inns from competing with restaurants in Maryland and Virginia (where alcohol was available much earlier) for the lucrative Sunday brunch business. So the city asked the Home Rule Board to approve an amendment to its plan that would allow alcohol sales on Sundays after 10 a.m., notwithstanding state law. The amendment was allowed, and the legislature subsequently changed state law to permit earlier Sunday alcohol sales.

Similarly, Morgantown had a unique (within the state) problem dealing with university students' propensity to burn furniture (especially mattresses and couches) on the city's streets and sidewalks following major sporting events. These frequent fires (an average of 81 fires per year over a 10-year span) cost the city in terms of police and fire personnel overtime, damage to streets and sidewalks, and damage to reputation. The city believed that banning use and storage of indoor furniture and mattresses on porches and other exterior property would reduce the incidence of these fires, but West Virginia Code Sections 8-12-13 and 29-3-5B arguably precluded the city from enacting the sought-for ordinance. Thus, to avoid protracted and possibly costly litigation over the issues presented by state law, the city requested and received Home Rule Board authorization to enact the ordinance.

Section 8-1-5a(i) does, however, exclude certain subjects from Home Rule Board authorization to supersede or obtain a waiver from state law. It includes matters covered by federal law or the state constitution (which have preemptive effects on state lawmaking); good

government laws (FOIA, bidding on municipal contracts, and open meetings); laws relating to subjects of overriding statewide concerns (criminal laws, taxation, public employee pensions, tax increment financing, building and fire codes, annexation, and ordinances that could jeopardize the receipt of federal money); or laws relating to--of course--guns and ammunition.

B. Analysis

Section 8-1-5a accomplishes the goals of home rule but does so in a unique way. It is not the only home rule statute that mixes legislative and *imperium in imperio* home rule, but its method is singular. The section leaves in place the legislative home rule model contemplated by Article VI, Section 39a and West Virginia Code Section 8-12-2, in which a city may enact any law relating to its municipal affairs not inconsistent with state law but also creates a form of *imperio* immunity by allowing cities to address local matters and override state laws with the consent and authorization of the Home Rule Board. The section avoids the problems created by the restrictive judicial readings of the *imperio* immunity relating to what constitutes local or municipal affairs by legislatively defining the subjects that are state matters outside the local immunity and assigning the task of determining specific local needs for protection from state law to the Home Rule Board. The Board, in granting or denying immunity requests, can account for statewide concerns. This method recognizes the need for local solutions to local problems while simultaneously screening off courts from continuing to undermine home rule.

Robert M. Bastress, Jr., *Home Rule in West Virginia*,
122 W. VA. L. REV. 721, 722-34 (2020).

II. Local Government Powers Generally

Since at least the post-Civil War period, the default rule for local government power in the United States has been that local governments are creatures of the state that derive their existence and powers from state law. (The federal Constitution makes no provision for local governmental units.) This view was solidified by the widespread adoption of "Dillon's Rule," which is named after Justice John F. Dillon of the Iowa Supreme Court, who formulated it in an 1868 decision (*Merriam v. Moody's Executors*) and in his treatise *Commentaries on the Law of Municipal Corporations*. He wrote:

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In very general terms, home rule laws have taken two shapes: *imperium in imperio* (i.e., a sovereign within a sovereign) or "legislative home rule." The former term describes the original home rule law, which was created by Missouri in 1875 for the City of St. Louis[9] and emulated by other jurisdictions.[10] This form created an initiative power and a supremacy for local

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[6]*See, e.g.*, Robert M. Bastress, Jr., *Constitutional Considerations for Local Government Reform in West Virginia*, 108 W. Va. L. Rev. 125, 145 (2005); Gerald E. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1059, 1110 (1980)[.] . . .

[7]An unfortunate side effect of obtaining specific legislation authorizing a particular local power was that courts often interpreted the statutory grants as implicitly confining the scope of the power and thus excluding related powers not specifically granted. *See, e.g.*, Dotson v. City of Ames, 101 N.W.2d 711, 714 (Iowa 1960) ("[B]y granting control over animals running at large[,] the legislature has clearly excluded power over those confined."); *cf*. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 107 (2012) (describing the corresponding canon of statutory interpretation--viz., *expressio unius est exclusio alterius*--which holds that "[t]he expression of one thing implies the exclusion of others").

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governments with regards to their local "affairs" or "subjects" (or some similar term). Judicial hostility to such laws resulted in an extremely narrow construction of what were "municipal affairs" or a very broad interpretation of legislative ability to override the local law. In response to that hostility, localism advocates proposed an alternative strategy that authorized local governments to enact any law not in conflict with federal law, the state constitution, or state statute. This strategy was designed to shift the scope of defining home rule powers from the courts (and their hostility) to the legislatures (and their greater amenability). This became known as "legislative home rule."

III. West Virginia's History of Municipal Power

West Virginia was an early and faithful adherent of Dillon's Rule. Under the state's 1872 constitution, the legislature prescribed municipal charters--except for towns with populations of fewer than 2,000 people.[15] . . . In 1929, after years of calls for constitutional reform, Governor William Conley appointed a Constitutional Review Commission to study the state's constitution and recommend changes. That Commission filed its report in 1930, and either the legislature or the voters rejected all of its recommendations – save one. In 1936, the electorate approved adding the "Home Rule Amendment" to the state constitution as Article VI, Section 39a. . . .

The section obviously did away with legislative enactments chartering cities, although it took decades for gradual implementation of locally adopted charters. But that did happen. The section also set forth a form of legislative home rule: a city could enact any ordinance to promote its municipal affairs that was not in conflict with federal or state law. Yeah, right.

The Supreme Court of Appeals, in its first decision interpreting Section 39a, declared that the section had constitutionalized Dillon's Rule.[21] Did the term "home rule" not mean anything? Subsequent decisions persisted to apply Dillon's Rule to municipal powers questions[22] and to ignore the intent behind and the literal language of Section 39a.

In 1969, the legislature overhauled the state's Municipal Code. In part, the legislature's purpose was to eliminate the disarray that had developed following the 1936 enactment of Article VI, Section 39a and the subsequent establishment of two separate municipal codes – one for cities with municipal charters created by the legislature prior to 1936 and another for cities that had created their own charters pursuant to the Section 39a-granted power. The dual track had brought about confusion and unfairness; one municipal code for all cities (subject to distinctions in treatment between cities based on population) promoted clarity and ease of application. A second legislative purpose, however, can readily be gleaned from several provisions of the West Virginia Code: a purpose to confer greater powers and discretion on cities and a plea to courts to let them exercise those enhancements.

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supremacy provided by Section 13 in *Committee to Reform Hampshire County Government v. Thompson*, 223 W. Va. 346, 674 S.E.2d 207 (2008), and thereby refuted the contention that West Virginia pioneered home rule. Robert M. Bastress, Jr., The West Virginia State Constitution 278-82 (2d ed. 2016).

[15]W. Va. Const. art. VI, § 39. This section also denied the legislature the power to enact local or special laws regarding other local subjects, most notably to regulate or change county or district affairs. *Id*. The Supreme Court of Appeals has rendered this provision virtually useless. *See* Bastress, *supra* note 10, at 696-97; *see also* Bastress, *supra* note 6, at 141-44.

[21]Brackman's, Inc. v. City of Huntington, 126 W. Va. 21, 24, 27 S.E.2d 71, 73 (1943); *see also* Bastress, *supra* note 6, at 145-47.

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powers granted by the chapter (i.e., by the Municipal Code) "shall not operate to exclude the exercise of other powers and authority fairly incidental thereto or reasonably implied and within the purposes of this chapter." In 2007, the legislature added the language "or in accordance with the Home Rule Amendment to the constitution of this state." The section further stated that "[t]he provisions of the chapter shall be given full effect *without regard to the common-law rule of strict construction*." But this guidance mattered little to the Supreme Court of Appeals.

In its first case applying Section 8-1-7, *Rogers v. City of South Charleston*,[30] the Supreme Court of Appeals held that a statute according cities the power to sell or convey real estate did not include the power to enter into a contract creating an option for a person to buy city property (even though there was no statute precluding it). Cities enjoy only such powers as are expressly granted by the Legislature or are necessarily implied. As for Section 8-1-7, the court stated it only "relaxes the common law rule of strict construction and does not lift all restrictions on municipal power." Subsequent decisions on municipal power have continued to cite with approval Dillon's Rule of limited municipal power.[32]

The 1969 Act did not stop with Section 8-1-7. It also included within its general provisions applicable to the entire Act Section 8-1-6, which set forth rules of interpretation and attempted to codify Article VI, Section 39a. More importantly, the Act broadly defined municipal powers. Section 8-11-1(a), beginning the definition of city powers, provides:

> (a) To carry into effect the powers and authority conferred upon any municipality or its governing body by the provisions of this chapter, or any past or future act of the Legislature of this state, the governing body has plenary power and authority to:
> (1) Make and pass all needful ordinances, orders, bylaws, acts, resolutions, rules and regulations not contrary to the Constitution and laws of this state; and
> (2) Prescribe reasonable penalties for violation of its ordinances, orders, bylaws, acts, resolutions, rules and regulations, in the form of fines, forfeitures and confinement in the county or regional jail or the place of confinement in the municipality, if there is one, for a term not exceeding thirty days.

There's more. In Section 8-12-2, titled "Home Rule Power for Cities," the Act in subsection (a) provides that "any city shall have plenary power and authority by charter provision ... or by ordinance not inconsistent or in conflict" with state law "to provide for the government, regulation and control of the city's municipal affairs." The section then goes on to set forth a non-exhaustive list of 11 broadly stated powers.

Later in Article 12, the Act lists the "General Powers of Municipalities and Governing Bodies." Section 8-12-5 currently sets forth 59 separate powers, including "(44) [The power to] protect and promote the public morals, safety, health, welfare and good order." That, of course, is the classic statement of the general police power, which permits governments to regulate anything in any manner not prohibited by the constitution or, in this case, by state statute.

It is difficult to imagine a state code that is clearer in its conferral of broad municipal

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regulatory powers.[37] Nevertheless, courts – both the Supreme Court of Appeals and the circuit courts – have refused to implement the clear legislative judgment and have instead continued to genuflect at Dillon's Rule.

IV. THE WEST VIRGINIA HOME RULE PILOT PROGRAM

Thus, despite a constitutional provision authorizing home rule for cities and despite a slew of statutory provisions expressing a vision for broad municipal powers, judicial nullification continued to make it necessary for cities to run to Charleston to get some express legislative authorization to exercise any new municipal authority--and thereby run the risk of creating a presumption that the grant of a power implies the exclusion of powers not granted.[39] In response to the limited discretion that West Virginia cities possessed, the legislature in 2007 tried again to promote greater local flexibility when it created the Municipal Home Rule Pilot Program. The law established a Municipal Home Rule Board and granted it authority to approve up to five cities to participate in the program. Cities were to submit their proposed home rule plan and explain how current state law prevented them from achieving efficient governance. With Board approval, cities could amend their plans at any time and could, in effect, receive waivers from compliance with some state laws found to be inhibiting. Only four cities – Bridgeport, Charleston, Huntington, and Wheeling – participated in the original program. In November of 2012, the Legislative Auditor Performance Evaluation and Research Division concluded its assessment of the program and filed a special recommendation that the legislature consider extending broad-based home rule to all of the State's Class I, II, and III cities. The legislature revisited the pilot program in 2014 and extended participation for up to 20 cities, including the existing 4. A 2015 law raised the number to 30 Class I, II, and III cities and further authorized inclusion of up to four Class IV towns. As of March 2019, 34 of West Virginia's 231 cities were operating under the home rule pilot program. Finally, the legislature in 2019 made the program permanent and extended the opportunity for participation to all West Virginia cities, although limiting the number of new Class IV admittees to four per year.

V. THE WEST VIRGINIA HOME RULE PROGRAM

A. Description

Section 8-1-5a, the "Municipal Home Rule Program," has several distinctive features, some of which are unique to the state. The legislative findings included conclusions about the Pilot Program's success for having "brought innovative results, including novel municipal ideas that became municipal ordinances which later resulted in new statewide statutes." Subsection (c)(1) extended the opportunity for home rule to all Class I, II, and III cities and provided for approval of applications for the four Class IV towns per year. A new subsection – (c)(3) – provides that participating cities shall pay an annual assessment of $2,000 "for the operation and administration of the Home Rule Board." Any balance in the fund into which the fees are paid that remains at the end of the fiscal year will remain in a special revenue account "for uses consistent with the provisions" of the home rule section.

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The statute continued the practice of the more recent statutes of creating a five-member Home Rule Board consisting of the governor or a designee; the Executive Director of the West Virginia Development Office or a designee; representatives of the Business and Industry Council; representatives of the state's largest labor organization; and representatives of the American Planning Association, all appointed by the governor with the advice and consent of the senate.

The Board retains the power to grant cities relief from state laws that interfere with or obstruct their ability to advance their best interests. The city's application for special dispensation must describe how state law prevents "the municipality from carrying out its duties" in an efficient and effective manner. For example, Charles Town found burdensome a state law that prohibited alcohol sales in restaurants before 1 p.m. on Sundays.[55] This prevented the city's restaurants and bed-and-breakfast inns from competing with restaurants in Maryland and Virginia (where alcohol was available much earlier) for the lucrative Sunday brunch business. So the city asked the Home Rule Board to approve an amendment to its plan that would allow alcohol sales on Sundays after 10 a.m., notwithstanding state law. The amendment was allowed, and the legislature subsequently changed state law to permit earlier Sunday alcohol sales.

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Section 8-1-5a(i) does, however, exclude certain subjects from Home Rule Board authorization to supersede or obtain a waiver from state law. It includes matters covered by federal law or the state constitution (which have preemptive effects on state lawmaking); good government laws (FOIA, bidding on municipal contracts, and open meetings); laws relating to subjects of overriding statewide concerns (criminal laws, taxation, public employee pensions, tax increment financing, building and fire codes, annexation, and ordinances that could jeopardize the receipt of federal money); or laws relating to--of course--guns and ammunition.

B. Analysis

Section 8-1-5a accomplishes the goals of home rule but does so in a unique way. It is not the only home rule statute that mixes legislative and *imperium in imperio* home rule, but its method is singular. The section leaves in place the legislative home rule model contemplated by Article VI, Section 39a and West Virginia Code Section 8-12-2, in which a city may enact any law relating to its municipal affairs not inconsistent with state law but also creates a form of *imperio* immunity by allowing cities to address local matters and override state laws with the consent and authorization of the Home Rule Board. The section avoids the problems created by the restrictive judicial readings of the *imperio* immunity relating to what constitutes local or municipal affairs by legislatively defining the subjects that are state matters outside the local immunity and assigning the task of determining specific local needs for protection from state law to the Home Rule Board. The Board, in granting or denying immunity requests, can account for statewide concerns. This method recognizes the need for local solutions to local problems while simultaneously screening off courts from continuing to undermine home rule.

Robert M. Bastress, Jr., *Home Rule in West Virginia*,
122 W. VA. L. REV. 721, 722-34 (2020).

II. Local Government Powers Generally

Since at least the post-Civil War period, the default rule for local government power in the United States has been that local governments are creatures of the state that derive their existence and powers from state law. (The federal Constitution makes no provision for local governmental units.) This view was solidified by the widespread adoption of "Dillon's Rule," which is named after Justice John F. Dillon of the Iowa Supreme Court, who formulated it in an 1868 decision (*Merriam v. Moody's Executors*) and in his treatise *Commentaries on the Law of Municipal Corporations*. He wrote:

> [A] municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation--against the existence of the power.

Although Dillon wrote specifically about cities, his rule was readily applied to define the powers of counties and other forms of local government. Judges were enamored with the rule because it gave courts enormous discretion to invalidate laws they considered unwise or burdensome on local taxpayers and promoted the *laissez-faire* economic philosophy dominant in the second half of the 19th century.[6]

Home rule laws were put forth as an antidote to the courts' miserly interpretation of local government powers. "Home rule" is a generic term for statutory and state constitutional provisions that attempt to bestow on local governments some degree of local autonomy and discretion and to avoid the necessity (imposed by Dillon's Rule) of having to run to the legislature to gain express authorization for every exercise of local power.[7] Home rule laws vary widely in design and form, but they basically either bestow the ability to initiate policies at the local level (the power of initiative) or protect against state override (the power of immunity)--or they perform both functions.

In very general terms, home rule laws have taken two shapes: *imperium in imperio* (i.e., a sovereign within a sovereign) or "legislative home rule." The former term describes the original home rule law, which was created by Missouri in 1875 for the City of St. Louis[9] and emulated

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[6]*See, e.g.*, Robert M. Bastress, Jr., *Constitutional Considerations for Local Government Reform in West Virginia*, 108 W. Va. L. Rev. 125, 145 (2005); Gerald E. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1059, 1110 (1980)[.] . . .

[7]An unfortunate side effect of obtaining specific legislation authorizing a particular local power was that courts often interpreted the statutory grants as implicitly confining the scope of the power and thus excluding related powers not specifically granted. *See, e.g.*, Dotson v. City of Ames, 101 N.W.2d 711, 714 (Iowa 1960) ("[B]y granting control over animals running at large[,] the legislature has clearly excluded power over those confined."); *cf*. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 107 (2012) (describing the corresponding canon of statutory interpretation--viz., *expressio unius est exclusio alterius*--which holds that "[t]he expression of one thing implies the exclusion of others").

by other jurisdictions.[10] This form created an initiative power and a supremacy for local governments with regards to their local "affairs" or "subjects" (or some similar term). Judicial hostility to such laws resulted in an extremely narrow construction of what were "municipal affairs" or a very broad interpretation of legislative ability to override the local law. In response to that hostility, localism advocates proposed an alternative strategy that authorized local governments to enact any law not in conflict with federal law, the state constitution, or state statute. This strategy was designed to shift the scope of defining home rule powers from the courts (and their hostility) to the legislatures (and their greater amenability). This became known as "legislative home rule."

III. West Virginia's History of Municipal Power

West Virginia was an early and faithful adherent of Dillon's Rule. Under the state's 1872 constitution, the legislature prescribed municipal charters--except for towns with populations of fewer than 2,000 people.[15] . . . In 1929, after years of calls for constitutional reform, Governor William Conley appointed a Constitutional Review Commission to study the state's constitution and recommend changes. That Commission filed its report in 1930, and either the legislature or the voters rejected all of its recommendations – save one. In 1936, the electorate approved adding the "Home Rule Amendment" to the state constitution as Article VI, Section 39a. . . .

The section obviously did away with legislative enactments chartering cities, although it took decades for gradual implementation of locally adopted charters. But that did happen. The section also set forth a form of legislative home rule: a city could enact any ordinance to promote its municipal affairs that was not in conflict with federal or state law. Yeah, right.

The Supreme Court of Appeals, in its first decision interpreting Section 39a, declared that the section had constitutionalized Dillon's Rule.[21] Did the term "home rule" not mean anything? Subsequent decisions persisted to apply Dillon's Rule to municipal powers questions[22] and to ignore the intent behind and the literal language of Section 39a.

In 1969, the legislature overhauled the state's Municipal Code. In part, the legislature's purpose was to eliminate the disarray that had developed following the 1936 enactment of Article VI, Section 39a and the subsequent establishment of two separate municipal codes – one for cities with municipal charters created by the legislature prior to 1936 and another for cities that had created their own charters pursuant to the Section 39a-granted power. The dual track had brought about confusion and unfairness; one municipal code for all cities (subject to

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[10]This Author has previously argued that the first home rule law was enacted three years earlier with West Virginia's adoption of its 1872 constitution and the creation of what is now Article IX, Section 13, which conferred on counties the power to create their own forms of government. Robert M. Bastress, Jr., *Localism and the West Virginia Constitution*, 109 W. Va. L. Rev. 683, 707-09 (2007). Unfortunately, the Supreme Court of Appeals gutted the local supremacy provided by Section 13 in *Committee to Reform Hampshire County Government v. Thompson*, 223 W. Va. 346, 674 S.E.2d 207 (2008), and thereby refuted the contention that West Virginia pioneered home rule. Robert M. Bastress, Jr., The West Virginia State Constitution 278-82 (2d ed. 2016).

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distinctions in treatment between cities based on population) promoted clarity and ease of application. A second legislative purpose, however, can readily be gleaned from several provisions of the West Virginia Code: a purpose to confer greater powers and discretion on cities and a plea to courts to let them exercise those enhancements.

Of particular note was the inclusion of Section 8-1-7, which specifically stated that the powers granted by the chapter (i.e., by the Municipal Code) "shall not operate to exclude the exercise of other powers and authority fairly incidental thereto or reasonably implied and within the purposes of this chapter." In 2007, the legislature added the language "or in accordance with the Home Rule Amendment to the constitution of this state." The section further stated that "[t]he provisions of the chapter shall be given full effect *without regard to the common-law rule of strict construction*." But this guidance mattered little to the Supreme Court of Appeals.

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Home rule laws were put forth as an antidote to the courts' miserly interpretation of local government powers. "Home rule" is a generic term for statutory and state constitutional provisions that attempt to bestow on local governments some degree of local autonomy and discretion and to avoid the necessity (imposed by Dillon's Rule) of having to run to the legislature to gain express authorization for every exercise of local power.[7] Home rule laws vary widely in design and form, but they basically either bestow the ability to initiate policies at the local level (the power of initiative) or protect against state override (the power of immunity)--or they perform both functions.

In very general terms, home rule laws have taken two shapes: *imperium in imperio* (i.e., a sovereign within a sovereign) or "legislative home rule." The former term describes the original home rule law, which was created by Missouri in 1875 for the City of St. Louis[9] and emulated

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III. West Virginia's History of Municipal Power

West Virginia was an early and faithful adherent of Dillon's Rule. Under the state's 1872 constitution, the legislature prescribed municipal charters--except for towns with populations of fewer than 2,000 people.[15] . . . In 1929, after years of calls for constitutional reform, Governor William Conley appointed a Constitutional Review Commission to study the state's constitution and recommend changes. That Commission filed its report in 1930, and either the legislature or the voters rejected all of its recommendations – save one. In 1936, the electorate approved adding the "Home Rule Amendment" to the state constitution as Article VI, Section 39a. . . .

The section obviously did away with legislative enactments chartering cities, although it took decades for gradual implementation of locally adopted charters. But that did happen. The section also set forth a form of legislative home rule: a city could enact any ordinance to promote its municipal affairs that was not in conflict with federal or state law. Yeah, right.

The Supreme Court of Appeals, in its first decision interpreting Section 39a, declared that the section had constitutionalized Dillon's Rule.[21] Did the term "home rule" not mean anything? Subsequent decisions persisted to apply Dillon's Rule to municipal powers questions[22] and to ignore the intent behind and the literal language of Section 39a.

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Of particular note was the inclusion of Section 8-1-7, which specifically stated that the powers granted by the chapter (i.e., by the Municipal Code) "shall not operate to exclude the exercise of other powers and authority fairly incidental thereto or reasonably implied and within the purposes of this chapter." In 2007, the legislature added the language "or in accordance with the Home Rule Amendment to the constitution of this state." The section further stated that "[t]he provisions of the chapter shall be given full effect *without regard to the common-law rule of strict construction*." But this guidance mattered little to the Supreme Court of Appeals.

In its first case applying Section 8-1-7, *Rogers v. City of South Charleston*,[30] the Supreme Court of Appeals held that a statute according cities the power to sell or convey real estate did not include the power to enter into a contract creating an option for a person to buy city property (even though there was no statute precluding it). Cities enjoy only such powers as are expressly granted by the Legislature or are necessarily implied. As for Section 8-1-7, the court stated it only "relaxes the common law rule of strict construction and does not lift all restrictions on municipal power." Subsequent decisions on municipal power have continued to cite with approval Dillon's Rule of limited municipal power.[32]

The 1969 Act did not stop with Section 8-1-7. It also included within its general provisions applicable to the entire Act Section 8-1-6, which set forth rules of interpretation and attempted to codify Article VI, Section 39a. More importantly, the Act broadly defined municipal powers. Section 8-11-1(a), beginning the definition of city powers, provides:

> (a) To carry into effect the powers and authority conferred upon any municipality or its governing body by the provisions of this chapter, or any past or future act of the Legislature of this state, the governing body has plenary power and authority to:
> (1) Make and pass all needful ordinances, orders, bylaws, acts, resolutions, rules and regulations not contrary to the Constitution and laws of this state; and
> (2) Prescribe reasonable penalties for violation of its ordinances, orders, bylaws, acts, resolutions, rules and regulations, in the form of fines, forfeitures and confinement in the county or regional jail or the place of confinement in the municipality, if there is one, for a term not exceeding thirty days.

There's more. In Section 8-12-2, titled "Home Rule Power for Cities," the Act in subsection (a) provides that "any city shall have plenary power and authority by charter provision ... or by ordinance not inconsistent or in conflict" with state law "to provide for the government, regulation and control of the city's municipal affairs." The section then goes on to set forth a non-exhaustive list of 11 broadly stated powers.

Later in Article 12, the Act lists the "General Powers of Municipalities and Governing Bodies." Section 8-12-5 currently sets forth 59 separate powers, including "(44) [The power

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to] protect and promote the public morals, safety, health, welfare and good order." That, of course, is the classic statement of the general police power, which permits governments to regulate anything in any manner not prohibited by the constitution or, in this case, by state statute.

It is difficult to imagine a state code that is clearer in its conferral of broad municipal regulatory powers.[37] Nevertheless, courts – both the Supreme Court of Appeals and the circuit courts – have refused to implement the clear legislative judgment and have instead continued to genuflect at Dillon's Rule.

IV. THE WEST VIRGINIA HOME RULE PILOT PROGRAM

Thus, despite a constitutional provision authorizing home rule for cities and despite a slew of statutory provisions expressing a vision for broad municipal powers, judicial nullification continued to make it necessary for cities to run to Charleston to get some express legislative authorization to exercise any new municipal authority--and thereby run the risk of creating a presumption that the grant of a power implies the exclusion of powers not granted.[39] In response to the limited discretion that West Virginia cities possessed, the legislature in 2007 tried again to promote greater local flexibility when it created the Municipal Home Rule Pilot Program. The law established a Municipal Home Rule Board and granted it authority to approve up to five cities to participate in the program. Cities were to submit their proposed home rule plan and explain how current state law prevented them from achieving efficient governance. With Board approval, cities could amend their plans at any time and could, in effect, receive waivers from compliance with some state laws found to be inhibiting. Only four cities – Bridgeport, Charleston, Huntington, and Wheeling – participated in the original program. In November of 2012, the Legislative Auditor Performance Evaluation and Research Division concluded its assessment of the program and filed a special recommendation that the legislature consider extending broad-based home rule to all of the State's Class I, II, and III cities. The legislature revisited the pilot program in 2014 and extended participation for up to 20 cities, including the existing 4. A 2015 law raised the number to 30 Class I, II, and III cities and further authorized inclusion of up to four Class IV towns. As of March 2019, 34 of West Virginia's 231 cities were operating under the home rule pilot program. Finally, the legislature in 2019 made the program permanent and extended the opportunity for participation to all West Virginia cities, although limiting the number of new Class IV admittees to four per year.

V. THE WEST VIRGINIA HOME RULE PROGRAM

A. Description

Section 8-1-5a, the "Municipal Home Rule Program," has several distinctive features, some of which are unique to the state. The legislative findings included conclusions about the Pilot Program's success for having "brought innovative results, including novel municipal ideas that became municipal ordinances which later resulted in new statewide statutes." Subsection (c)(1) extended the opportunity for home rule to all Class I, II, and III cities and provided for approval

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[37]The Code did not, however, loosen the constraints on municipal taxing powers.

[39]Even an express grant was not always a guarantee of municipal authority. In *Robinson v. City of Bluefield*, the city attempted to rely on the express grant in Section 8-12-5(26) authorizing it "[t]o regulate or prohibit the keeping of animals or fowls and to provide for the impounding, sale or destruction of animals or fowls kept contrary to law or found running at large." 234 W. Va. 209, 212, 764 S.E.2d 740, 743 (2014) (quoting W. Va. Code Ann. § 8-12-5(26)). The court held that express grant was superseded by another statute, Section 19-20-20, which authorized magistrate and circuit courts to order the destruction of vicious dogs. *Id*. at 214, 764 S.E.2d at 745. Why city courts could not exercise concurrent jurisdiction over vicious animals with the county courts is not evident. Similar cases abound. *See, e.g.*, Rogers v. City of South Charleston, 163 W. Va. 285, 289, 256 S.E.2d 557, 560 (1979) (granting cities the power to convey or sell real property did not include the power to contract for an option to buy city realty).

of applications for the four Class IV towns per year. A new subsection – (c)(3) – provides that participating cities shall pay an annual assessment of $2,000 "for the operation and administration of the Home Rule Board." Any balance in the fund into which the fees are paid that remains at the end of the fiscal year will remain in a special revenue account "for uses consistent with the provisions" of the home rule section.

The statute continued the practice of the more recent statutes of creating a five-member Home Rule Board consisting of the governor or a designee; the Executive Director of the West Virginia Development Office or a designee; representatives of the Business and Industry Council; representatives of the state's largest labor organization; and representatives of the American Planning Association, all appointed by the governor with the advice and consent of the senate.

The Board retains the power to grant cities relief from state laws that interfere with or obstruct their ability to advance their best interests. The city's application for special dispensation must describe how state law prevents "the municipality from carrying out its duties" in an efficient and effective manner. For example, Charles Town found burdensome a state law that prohibited alcohol sales in restaurants before 1 p.m. on Sundays.[55] This prevented the city's restaurants and bed-and-breakfast inns from competing with restaurants in Maryland and Virginia (where alcohol was available much earlier) for the lucrative Sunday brunch business. So the city asked the Home Rule Board to approve an amendment to its plan that would allow alcohol sales on Sundays after 10 a.m., notwithstanding state law. The amendment was allowed, and the legislature subsequently changed state law to permit earlier Sunday alcohol sales.

Similarly, Morgantown had a unique (within the state) problem dealing with university students' propensity to burn furniture (especially mattresses and couches) on the city's streets and sidewalks following major sporting events. These frequent fires (an average of 81 fires per year over a 10-year span) cost the city in terms of police and fire personnel overtime, damage to streets and sidewalks, and damage to reputation. The city believed that banning use and storage of indoor furniture and mattresses on porches and other exterior property would reduce the incidence of these fires, but West Virginia Code Sections 8-12-13 and 29-3-5B arguably precluded the city from enacting the sought-for ordinance. Thus, to avoid protracted and possibly costly litigation over the issues presented by state law, the city requested and received Home Rule Board authorization to enact the ordinance.

Section 8-1-5a(i) does, however, exclude certain subjects from Home Rule Board authorization to supersede or obtain a waiver from state law. It includes matters covered by federal law or the state constitution (which have preemptive effects on state lawmaking); good government laws (FOIA, bidding on municipal contracts, and open meetings); laws relating to subjects of overriding statewide concerns (criminal laws, taxation, public employee pensions, tax increment financing, building and fire codes, annexation, and ordinances that could jeopardize the receipt of federal money); or laws relating to--of course--guns and ammunition.

B. Analysis

Section 8-1-5a accomplishes the goals of home rule but does so in a unique way. It is not the only home rule statute that mixes legislative and *imperium in imperio* home rule, but its method is singular. The section leaves in place the legislative home rule model contemplated by Article VI, Section 39a and West Virginia Code Section 8-12-2, in which a city may enact any law relating to its municipal affairs not inconsistent with state law but also creates a form of *imperio* immunity by allowing cities to address local matters and override state laws with the consent and authorization of the Home Rule Board. The section avoids the problems created by the restrictive judicial readings of the *imperio* immunity relating to what constitutes local or municipal affairs by legislatively defining the subjects that are state matters outside the local immunity and assigning the task of determining specific local needs for protection from state

law to the Home Rule Board. The Board, in granting or denying immunity requests, can account for statewide concerns. This method recognizes the need for local solutions to local problems while simultaneously screening off courts from continuing to undermine home rule.

Robert M. Bastress, Jr., *Home Rule in West Virginia*,
122 W. VA. L. REV. 721, 722-34 (2020).

II. Local Government Powers Generally

Since at least the post-Civil War period, the default rule for local government power in the United States has been that local governments are creatures of the state that derive their existence and powers from state law. (The federal Constitution makes no provision for local governmental units.) This view was solidified by the widespread adoption of "Dillon's Rule," which is named after Justice John F. Dillon of the Iowa Supreme Court, who formulated it in an 1868 decision (*Merriam v. Moody's Executors*) and in his treatise *Commentaries on the Law of Municipal Corporations*. He wrote:

> [A] municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation--against the existence of the power.

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[37]The Code did not, however, loosen the constraints on municipal taxing powers.

[39]Even an express grant was not always a guarantee of municipal authority. In *Robinson v. City of Bluefield*, the city attempted to rely on the express grant in Section 8-12-5(26) authorizing it "[t]o regulate or prohibit the keeping of animals or fowls and to provide for the impounding, sale or destruction of animals or fowls kept contrary to law or found running at large." 234 W. Va. 209, 212, 764 S.E.2d 740, 743 (2014) (quoting W. Va. Code Ann. § 8-12-5(26)). The court held that express grant was superseded by another statute, Section 19-20-20, which authorized magistrate and circuit courts to order the destruction of vicious dogs. *Id*. at 214, 764 S.E.2d at 745. Why city courts could not exercise concurrent jurisdiction over vicious animals with the county courts is not evident. Similar cases abound. *See, e.g.*, Rogers v. City of South Charleston, 163 W. Va. 285, 289, 256 S.E.2d 557, 560 (1979) (granting cities the power to convey or sell real property did not include the power to contract for an option to buy city realty).

of applications for the four Class IV towns per year. A new subsection – (c)(3) – provides that participating cities shall pay an annual assessment of $2,000 "for the operation and administration of the Home Rule Board." Any balance in the fund into which the fees are paid that remains at the end of the fiscal year will remain in a special revenue account "for uses consistent with the provisions" of the home rule section.

The statute continued the practice of the more recent statutes of creating a five-member Home Rule Board consisting of the governor or a designee; the Executive Director of the West Virginia Development Office or a designee; representatives of the Business and Industry Council; representatives of the state's largest labor organization; and representatives of the American Planning Association, all appointed by the governor with the advice and consent of the senate.

The Board retains the power to grant cities relief from state laws that interfere with or obstruct their ability to advance their best interests. The city's application for special dispensation must describe how state law prevents "the municipality from carrying out its duties" in an efficient and effective manner. For example, Charles Town found burdensome a state law that prohibited alcohol sales in restaurants before 1 p.m. on Sundays.[55] This prevented the city's restaurants and bed-and-breakfast inns from competing with restaurants in Maryland and Virginia (where alcohol was available much earlier) for the lucrative Sunday brunch business. So the city asked the Home Rule Board to approve an amendment to its plan that would allow alcohol sales on Sundays after 10 a.m., notwithstanding state law. The amendment was allowed, and the legislature subsequently changed state law to permit earlier Sunday alcohol sales.

Similarly, Morgantown had a unique (within the state) problem dealing with university students' propensity to burn furniture (especially mattresses and couches) on the city's streets and sidewalks following major sporting events. These frequent fires (an average of 81 fires per year over a 10-year span) cost the city in terms of police and fire personnel overtime, damage to streets and sidewalks, and damage to reputation. The city believed that banning use and storage of indoor furniture and mattresses on porches and other exterior property would reduce the incidence of these fires, but West Virginia Code Sections 8-12-13 and 29-3-5B arguably precluded the city from enacting the sought-for ordinance. Thus, to avoid protracted and possibly costly litigation over the issues presented by state law, the city requested and received Home Rule Board authorization to enact the ordinance.

Section 8-1-5a(i) does, however, exclude certain subjects from Home Rule Board authorization to supersede or obtain a waiver from state law. It includes matters covered by federal law or the state constitution (which have preemptive effects on state lawmaking); good government laws (FOIA, bidding on municipal contracts, and open meetings); laws relating to subjects of overriding statewide concerns (criminal laws, taxation, public employee pensions, tax increment financing, building and fire codes, annexation, and ordinances that could jeopardize the receipt of federal money); or laws relating to--of course--guns and ammunition.

B. Analysis

Section 8-1-5a accomplishes the goals of home rule but does so in a unique way. It is not the only home rule statute that mixes legislative and *imperium in imperio* home rule, but its method is singular. The section leaves in place the legislative home rule model contemplated by Article VI, Section 39a and West Virginia Code Section 8-12-2, in which a city may enact any law relating to its municipal affairs not inconsistent with state law but also creates a form of *imperio* immunity by allowing cities to address local matters and override state laws with the consent and authorization of the Home Rule Board. The section avoids the problems created by the restrictive judicial readings of the *imperio* immunity relating to what constitutes local or municipal affairs by legislatively defining the subjects that are state matters outside the local immunity and assigning the task of determining specific local needs for protection from state

law to the Home Rule Board. The Board, in granting or denying immunity requests, can account for statewide concerns. This method recognizes the need for local solutions to local problems while simultaneously screening off courts from continuing to undermine home rule.