CHAPTER 6. THE LEGISLATURE

A. The Legislative Power

Read Article VI, § 1.

NOTES

1. Article VI of the Constitution is the legislative article. Generally speaking, §§ 2-15 prescribe the composition of the Legislature, §§ 16-34 state the procedural rules governing the exercise of legislative power, and §§ 35-54 deal (for the most part) with the Legislature's substantive powers and impose both limits and duties regarding their exercise.

2. "[The West Virginia] Constitution being a restriction of power rather than a grant of power as is the Federal Constitution, the Legislature may enact any measure which is not specifically prohibited by the State or Federal Constitution.

"This proposition has been succinctly stated by this Court. Quoting from *Harbert v. The County Court of Harrison County*, 129 W.Va. 54, 39 S.E.2d 177, the Court, in *Tanner v. Premier Photo Service, Inc.*, 147 W.Va. 37, 125 S.E.2d 609, said: '* * * The Legislature of this State, unlike the Congress of the United States under the Federal Constitution, does not depend for its authority upon the express grant of legislative power. The Federal Constitution is a grant of power; a State Constitution is a restriction of power. The Constitution of a State is examined to ascertain the restraints, if any, which the people have imposed upon the Legislature, not to determine the powers they have conferred. The Legislature of this State possesses the sole power to make laws and it is necessarily invested with all the sovereign power of the people within its sphere. *Booten v. Pinson*, 77 W.Va. 412, 89 S.E. 985.'" *Robertson v. Hatcher*, 148 W.Va. 239, 250-51, 135 S.E.2d 675 (1964).

3. "[T]he power of the Legislature to enact laws relating to the public welfare is 'almost plenary' under W.Va. art. 6, § 1," and "its powers are limited only by express restriction or restrictions necessarily implied by a provision or provisions of our Constitution." *Thorne v. Roush*, 164 W.Va. 165, 261 S.E.2d 72 (1979).

STATE ex rel. DYER v. SIMS,
134 W.Va. 278, 58 S.E.2d 766 (1950),
rev'd, 341 U.S. 22 (1951).

FOX, Judge.

[In 1949, the] Legislature of this State made an appropriation of $12,250 as a contribution to the Ohio River Valley Water Sanitation Commission for [the 1950 and 1951 fiscal years]. A requisition to make such appropriation effective for the current fiscal year was made upon Edger B. Sims, Auditor of the State of West Virginia, and refused by him. This proceeding in mandamus is instituted in this Court to compel the said auditor to honor the requisition so made.

This proceeding was instituted by the State of West Virginia, at the relation of Dr. N. H. Dyer and W. W. Jennings, commissioners for the State of West Virginia to the Ohio River Valley Water Sanitation Commission; D. Jackson Savage, Chairman of the State Water Commission of West Virginia; and Dr. N. H. Dyer, W. W. Jennings, Dan B. Fleming and Dr. C. F. McClintic, members of the State Water Commission.

The State Water Commission of the State of West Virginia was created by [the Legislature in 1929]. . . . The general purpose of the creation of the State Water Commission was to provide against the pollution of the streams of the State, and it would serve no useful purpose to further define the duties of that commission.

By reason of the geographical location of the State of West Virginia and other states, in relation

to the Ohio River and its tributaries, a movement was inaugurated as early as 1929, the purpose of which was to promote a compact between the several states whose territories, in whole or in part, were drained by the Ohio River and its tributaries, for the purpose of the abatement and prevention of the pollution thereof. As a result of this movement, what is termed the Ohio River Valley Water Sanitation Compact was prepared for execution by the respective states. The approval of the Congress of the United States, as required by Section 10 of Article I of the Constitution of the United States, was later obtained. To make effective this compact on the part of the State of West Virginia, the Legislature [in 1939] enacted a statute, Section 1 of which reads: "The following Ohio River Valley Water Sanitation Compact, which has been negotiated by representatives of the states of Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Tennessee and West Virginia, is hereby approved, ratified, adopted, enacted into law, and entered into by the state of West Virginia as a party thereto[.]" . . .

Section 2 of [the 1939 Act] provides that there should be three members of the Ohio River Valley Water Sanitation Commission from the State of West Virginia, and that the Governor, by and with the advice and consent of the Senate, should appoint two persons as two of such commissioners[.] . . . Section 3 of the Act provided that:

> 'There is hereby granted to the commission and commissioners thereof all the powers provided for in the said compact and all the powers necessary or incidental to the carrying out of said compact in every particular."

. . . The sole question to be determined in this proceeding is the power of the Legislature of this State to enact [the 1939 Act]. The appropriation under attack must necessarily depend upon the validity of the said Act from the standpoint of legislative power. We are not here concerned with any question of policy, for, admittedly, that question rests with the Legislature, and its determination is not the proper function of the judicial department of the State government. If the Legislature did not have power to make the enactment, the appropriation in question must fall. If it possessed such power, then the policy involved in the appropriation, and the amount thereof, was, for all practical purposes, within the exclusive jurisdiction of the Legislature.

The validity of the Act is attacked on four grounds: (1) The title of the Act fails to properly define the purpose thereof; (2) the appropriation involved was not for a public purpose; (3) it violates Sections 3, 4 and 6 of Article X of the Constitution of this State; and (4) the Legislature was without power to delegate to persons and agencies, outside the State, and beyond the control of the Legislature, the police powers of the State. We shall consider these points of attack in the order stated.

[The Court held that the title to the Act was sufficient, that the law served a valid public purpose, and that it did not violate either § 3 or § 6 of Article X.]

[Section 4 of Article X] raises a more serious question. In effect, it provides that no debt shall be contracted by the State except to meet casual deficits and other specified situations. Ordinarily, the creation of a State board or commission which requires an appropriation of public funds to carry out its purposes is not treated as the creation of a debt, although its generally contemplated continuation from year to year, and for an indefinite period, must necessarily involve future appropriations. Practically all agencies created by the Legislature require appropriations from time to time, and that was necessarily contemplated at the time they were created.

But the Act before us involves an entirely different situation. We are here dealing with a compact between sovereign states and the Federal Government, treated as a contract which the Supreme Court of the United States, in a suit between states has power to enforce. If the compact creating the Ohio River Valley Water Sanitation Commission be upheld, then it creates what is in legal effect a contract binding on all the parties thereto, the obligation of which continues so long as that contract exists. . . .

Treating the compact enacted into Law by [the 1939 Act] as valid and enforceable, the question arises whether by entering into the same the Legislature did not bind itself to make future

appropriations for its enforcement, and thereby create an obligation or debt binding upon future Legislatures.

In this connection, it may be well to discuss some general principles involving the power of the Legislature as one of the three branches of our State government. As every one knows, when the Declaration of Independence was adopted each of the thirteen colonies became sovereign and independent states, possessing all of the powers necessary to the government of the people residing therein, and including what is known as police power of the State. That power still rests in the states, except to the extent that it has been delegated to the Federal Government by the original Constitution of the United States, or the Amendments thereto. It is generally assumed that the states did not, by the delegation of powers to the Federal Government, limit themselves in respect to the police power they then possessed; but from a practical standpoint, it cannot be denied that in the delegation of powers to the Federal Government some of the police powers of the states were included as incidental to the powers delegated. There was, of course, no specific delegation of police power by the states to the Federal Government.

All this being true, the states, being vested with the police power, adopted Constitutions which operated as a restraint of power and not a grant of power. . . . In this State, it is provided by Section 1 of Article VI of our Constitution that: "The legislative power shall be vested in a Senate and House of Delegates." So that with us all legislative power is vested in the Legislature. But it is not an absolute or unlimited power, because under our theory of government, which recognizes that all power rests in the people, there are certain rules which even a Legislature with its vast legislative power cannot transgress. To illustrate: A Legislature does not possess power to collect revenues or expend the same except for a public purpose; it cannot bind the action of future Legislatures; it cannot grant, delegate or barter in perpetuity the police power of the State. These restrictions are not constitutional. There is nothing in our State Constitution which inhibits such actions; but they are, nevertheless, as much a part of the restraints upon the Legislature as if they were specifically inhibited by the Constitution in express terms. This question was discussed by Judge Cooley in 1 Cooley's Constitutional Limitations (8th Ed.) 436, where it is stated: 'Equally incumbent upon the State legislature and these municipal bodies is the restriction that they shall adopt no irrepealable legislation. No legislative body can so part with its powers by any proceeding as not to be able to continue the exercise of them. It can and should exercise them again and again, as often as the public interests require. Such a body has no power, even by contract, to control and embarrass its legislative powers and duties.'...

As stated above, the thirteen colonies existing at the date of the Declaration of Independence became independent and sovereign states, and the states which have been since admitted into the Union, under the Constitution, are likewise independent and sovereign states, but all are subject to the powers delegated to the Federal Government by the original Federal Constitution, and the Amendments thereto adopted from time to time. After the adoption of our Constitution, any one of the thirteen states could have entered into a compact with another without any interference on the part of the remainder of the other states. However, when our Federal Constitution was adopted, it was provided by Section 10 of Article I thereof that: 'No State shall, without the Consent of Congress * * * enter into any Agreement or Compact with another State, * * *' . . .

[W]e are driven to the conclusion that if the challenged act and compact be upheld, the Legislature has, in all reasonable probability, bound future Legislatures to make appropriations for the continuation of the activities of the Sanitation Commission, and this, we think, amounts to the creation of a debt inhibited by Section 4 of Article X of our State Constitution.

The final, and, as we view it, the most important question raised on this record, relates to the power of the Legislature to delegate to the Ohio River Valley Water Sanitation Commission a part of the police power of the State. We think a reading of the compact creating such commission will disclose that this State has delegated and vested in such commission, in perpetuity, a substantial part

of its police power, so far as that power relates to the control of our streams, which power may be exercised by the said commission as a whole, and by which, with one exception to be hereafter noted, can if so desired be controlled and used by commissioners from other states in conjunction with commissioners appointed by the Federal Government.

One of the best definitions of the police power of the State is found in 11 Am.Jur. 966, where it is stated: 'The police power is an attribute of sovereignty and a necessary attribute of every civilized government. It is a general term used to express the particular right of a government which is inherent in every sovereignty. Consequently, it is inherent in the states of the American Union, possessed by every one of them as sovereign, and is not a grant derived from or under any written Constitution. In connection with this latter principle, the point of view has been expressed that the police power is a grant from the people to their governmental agents. It has also been affirmed, however, in discussing the source of the power, that the right of the legislature to exercise the police power is not only not referable to any single provision of the Constitution, but inheres in, and springs from, the nature of our institutions; and so the limitations upon it are those which spring from the same source, as well as those expressly set out in the Constitution. It is very generally regarded not as a delegated, but a reserved, power.' . . .

By common sense and necessity, the use of the police power of the State is vested in that branch of the government through which the people speak, namely, the Legislature; but it is a power, which, being within legislative control, cannot be permanently bartered away or alienated by any one Legislature. It is a power which must always remain in existence, and subject to legislative use when necessity arises. This being true, when a Legislature undertakes to delegate to any citizen, any municipality, or any other agency of the government inside the State, in perpetuity, or attempts to make a compact with another state or states, or with the Federal Government, by which it so delegates a part of its police power to be used within this state or outside that state, it attempts to do something which it does not possess the power to do. While it possesses the power to delegate the police power to governmental agencies within the State, it does not, in our opinion, possess the power to delegate any portion of that power to another state or to the Federal Government or to a combination of the two. We say this for two reasons: (1) The Legislature of the State of West Virginia has no extra-territorial power, and its attempted transfer of a part of the police power of the State vested in it is void and of no effect, as the power to delegate such police power is one which can only be exercised within this State; and (2) when exercising the police power within this State, it cannot be so delegated as to place it beyond the power of future Legislatures to withdraw such delegation at its will and pleasure. . . . [T]he police power is something which must be always available for the use of the people, as represented by the Legislature. Any other interpretation of legislative power in respect thereto is unthinkable.

It is true that under the provisions of Article IX of the proposed compact it is provided that the order therein authorized to be made should not go into effect until it received the assent of at least a majority of the commissioners of at least a majority of the signatory states; and that no such order upon a municipality, corporation or person in any State should go into effect until it received the assent of not less than a majority of the commissioners from such state. This, in effect, provides that commissioners of any state may veto any proposed project within their state. This provision is not sufficient to take the act out of the inhibitions to which we have referred above. The authority to approve the project is delegated, and whether the same shall be vetoed depends upon the judgment of the commissioners who may be in office at the time the project is proposed and ordered.

Here we have a most worthy enterprise[.] . . . We realize that in this instance the purpose in view can only be worked out through cooperation between the states drained in whole or in part by the Ohio River and its tributaries. We would not be understood as desiring to stand in the way of such cooperation; but it must be such cooperation as does not surrender or barter away the rights of this State as one of the sovereign states of the Union. The police power must always be at the call of our Legislature to be used by it, or delegated to agencies of the government, to meet public emergencies

as they arise. We cannot in safety surrender any part of that power to the Federal Government or to other states. To the extent that such power can be reserved to us within our borders, we can and probably should cooperate in the purposes which the Ohio River Valley Water Sanitation Commission was designed to promote. But the proposed legislation goes too far, and surrenders too much. The Legislature of this State did not possess the power to authorize the compact here involved, and so far as this State is concerned the same is null and void. That being true, there was no basis for the appropriation, the payment of which is sought to be enforced in this proceeding. It follows that the writ must be denied. . . .

GIVEN, Judge (dissenting).

State compacts are in authority based on Clause 3 of Section 10 Article I of the Federal Constitution[.] . . . Such compacts are now so embedded in our form of government as to constitute an essential part thereof. The compact under consideration affords a clear example of the necessity for such compacts. It proposes to operate in a field necessary for the health and general welfare of the people, wherein the Federal government has not acted, and possibly cannot act at this time, and wherein it is impossible for the individual states to operate efficiently or successfully because of territorial limitations. Such compacts are not unusual. They have served well in fields of irrigation, conservation, boundary line disputes and many others. . . . For these reasons, and because of well established applicable principles of law, which need no citation of authority, the legislation under consideration, which includes the compact, should be liberally construed to save its constitutionality.

The majority opinion, as I understand it, concedes the necessity for such a compact, and that the accomplishment of the purposes of such a compact may be best obtained by joint action of the several states concerned. It also concedes the constitutionality of the compact under consideration except in the two respects hereinafter considered. . . .

The Court now holds this compact unconstitutional for the reasons that the Legislature has exceeded its power in the delegation of police powers, and that the [1939 Act adopting the compact] attempts to bind future Legislatures of this State, in perpetuity, in the exercise of its police powers, and as to making appropriations in aid of carrying out the purposes of the compact. Thus, this State is placed in the unenviable position of being unable to become a member of such a compact.

Does the compact in effect bind in any manner future Legislatures of this State, or does the compact grant any power or right in perpetuity? Article VII of the compact provides: 'Nothing in this compact shall be construed to limit the powers of any signatory State,***.' In the face of this clear reservation to 'any signatory State' of the 'powers' of such state, I cannot believe that the intention to grant, in perpetuity, any power whether the police power or the power to make appropriations, can be read into the compact. The plain meaning of the language seems to be that the compact shall be so construed that no limit shall be placed upon any power of any signatory state as to any future action thereof. If this be correct, then there is no granting of any police power or any other power, in perpetuity, and no future Legislature is bound or attempted to be bound as to any such police power or as to the making of any future appropriation.

A further argument of the majority in support of the unconstitutionality of the compact is that the delegation of police power of the State cannot be made to some agency or commission set up in conjunction with other states. This doctrine would practically close the doors of this State to participation in any compact with any other state where the compact could not be made operative without aid of the police power. The compact here, however, restricts the use of the police power of the State to the authorized representatives of this State, the members of the commission appointed by this State, residents of this State, responsible only to the authority of this State and subject to removal as such commissioners by the Governor of this State. The only possible use of the police power granted to the commission would be in connection with the enforcement of orders of the

commission as provided for in Article IX of the Compact. After proper investigation and hearing, the commission could issue orders requiring municipalities or persons to conform as to the disposition of sewage. In that article is found this limitation on the use of exercise of the power delegated: 'No such order shall go into effect unless and until it receives the assent of at least a majority of the commissioners from each of not less than a majority of the signatory States; and no such order upon a municipality, corporation, person or entity in any State shall go into effect unless and until it receives the assent of not less than a majority of the Commissioners from such State.' Thus, it will be seen that the compact itself vests in the commissioners representing this State, as such commissioners and not as individuals, the sole and absolute power to exercise and control the police power delegated. That power is not to be, and in the nature of things cannot be, exercised beyond the territorial limits of this State, and only courts within the jurisdiction of this State would have original jurisdiction in proceedings to enforce such orders. This being true, there could be no unlawful use or any unconstitutional delegation of any police power of this State. No language in the compact or the act can be construed to 'grant' or perpetually 'alienate' any police power. That intent is read into the legislation by the majority of the Court from the results which they believe will be brought about by the operation of the compact. . . .

In the expenditure of [the appropriation declared invalid], there would not be involved any of the police powers of this State, and such expenditure does not call for any future appropriation by the present or any future Legislature. Such further appropriations may become advisable, but that is a question that the future alone must determine. There is here involved no actual exercise of any police power or any effort to force any future appropriation. . . .

Being of the views herein indicated, I respectfully dissent.

I am authorized to say that Judge RILEY concurs in this dissent.

NOTE

Following their loss in of the West Virginia Court, the relators in *Dyer* petitioned the United States Supreme Court for a writ of certiorari. The Court granted the writ and reversed. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951). Writing for the Court, Justice Frankfurter acknowledged that "[t]he Supreme Court of West Virginia of Appeals of the State of West Virginia is, for exclusively State purposes, the ultimate tribunal in construing the meaning of her Constitution." Nevertheless, Justice Frankfurter said, the U.S. Supreme Court was "free to examine determinations of law by State courts in the limited field where [an interstate] compact brings in issue the rights of other States and the United States."

That concluded, Justice Frankfurter then turned to the state court's reasoning:

> That a legislature may delegate to an administrative body the power to make rules and decide particular cases is one of the axioms of modern government. The West Virginia court does not challenge the general proposition but objects to the delegation here involved because it is to a body outside the State and because its Legislature may not be free, at any time, to withdraw the power delegated. We are not here concerned, and so need not deal, with specific language in a State constitution requiring that the State settle its problems with other States without delegating power to an interstate agency. What is involved is the conventional grant of legislative power. We find nothing in that to indicate that West Virginia may not solve a problem such as the control of river pollution by compact and by the delegation, if such it be, necessary to effectuate such solution by compact. If this Court, in the exercise of its original jurisdiction, were to enter a decree requiring West Virginia to abate pollution of interstate streams, that decree would bind the State. The West Virginia Legislature would have no part in determining the State's obligation. The State Legislature could not alter it; it could not disregard it, as West Virginia on another occasion so creditably recognized. The obligation would be fixed by this Court on the basis of

> a master's report. Here, the State has bound itself to control pollution by the more effective means of an agreement with other States. The Compact involves a reasonable and carefully limited delegation of power to an interstate agency. Nothing in its Constitution suggests that, in dealing with the problem dealt with by the Compact, West Virginia must wait for the answer to be dictated by this Court after harassing and unsatisfactory litigation.

The Court also held that "the obligation of the State under the Compact is not in conflict with Art. X, § 4 of the State Constitution."

Justice Reed concurred in the judgment but "disagree[d] with the assertion of power by this Court to interpret the meaning of the West Virginia Constitution. This Court must accept the State court's interpretation of its own Constitution unless it is prepared to say that the interpretation is a palpable evasion to avoid a federal rule." He concluded, instead, that, "Under the Compact Clause . . ., the federal questions are the execution, validity and meaning of federally approved state compacts. The interpretation of the meaning of the compact controls over a state's application of its own law through the Supremacy Clause and not by any implied federal power to construe state law."

Justice Jackson also concurred. He wrote:

> West Virginia officials induced sister States to contract with her and Congress to consent to the Compact. She now attempts to read herself out of this interstate Compact by reading into her Constitution a limitation upon the powers of her Governor and Legislature to contract.
>
> West Virginia, for internal affairs, is free to interpret her own Constitution as she will. But if the compact system is to have vitality and integrity, she may not raise an issue of ultra vires, decide it, and release herself from an interstate obligation. The legal consequences which flow from the formal participation in a compact consented to by Congress is a federal question for this Court.
>
> West Virginia points to no provision of her Constitution which we can say was clear notice or fair warning to Congress or other States of any defect in her authority to enter into this Compact. It is a power inherent in sovereignty limited only to the extent that congressional consent is required. . . . Whatever she now says her Constitution means, she may not apply retroactively that interpretation to place an unforeseeable construction upon what the other States to this Compact were entitled to believe was a fully authorized act.
>
> Estoppel is not often to be invoked against a government. But West Virginia assumed a contractual obligation with equals by permission of another government that is sovereign in the field. After Congress and sister States had been induced to alter their positions and bind themselves to terms of a covenant, West Virginia should be estopped from repudiating her act. For this reason, I consider that whatever interpretation she may put on the generalities of her Constitution, she is bound by the Compact[.]

Justice Black concurred in the result without opinion.

STATE v. GRINSTEAD,
157 W. Va. 1001, 206 S.E.2d 912 (1974).

HADEN, Justice

[Grinstead was convicted for the possession, delivery and sale of LSD under the Dangerous Drugs Act of 1965, West Virginia Code 16-8B-1, et seq., which made it a crime to possess, deliver, or sell a dangerous drug, as defined by the Act.]

She appeals the conviction and an indeterminate sentence of one to five years in prison imposed by the court because . . . she asserts that if the Board of Pharmacy acted within the scope of powers delegated to it by the Legislature, that the pertinent section of the Act itself is unconstitutional as an ineffectual attempt at delegation of a purely legislative power to another branch of the State government or to the federal government for "completion" of a criminal law. . . .

[Section 1 of the Act, as it appeared at the time of Grinstead's indictment, provided in pertinent part]:

"(1) The term 'dangerous drug or drugs' means . . . (d) any drug which, under the regulations promulgated in accordance with the Federal Food, Drug and Cosmetic Act of [1938], or any amendment thereto, is designated as dangerous or habit forming[.] . . .

. . . [A]s of the date [Grinstead] was indicted, the West Virginia Legislature had not seen fit to explicitly proscribe, prohibit or regulate the possession, sale or delivery of . . . LSD. . . . [T]he federal government also had taken no action in respect to the control of this particular hallucinogen prior to the enactment of the West Virginia Dangerous Drugs Act. ...

[W]hile a statute may be sufficiently definite in specifying criminal acts so as to provide notice of proscribed conduct, it may be invalid as incomplete if it is left to a body other than the Legislature to determine without benefit of legislative standards what shall and shall not be an infringement of the law. Tested in this manner, a statute, purporting to make a delegation to a body with expertise in a particular area, may be unconstitutional. . . .

Nevertheless, constitutional powers of the Legislature are particularly broad in matters of health: "This Court has passed upon and recognized the right of the Legislature to delegate its police powers to regulate certain matters to boards and commissions under standards proscribed in the statute or inherent in the subject matter, and wider latitude is given to such delegation of power where public health, morals, safety and welfare are involved. This is particularly true where, as in the case of drugs, the expertise of a board or commission is required in a specific scientific field." *State ex rel. Scott v. Conaty*, [155 W. Va 718, 187 S.E.2d 119 (1972)].

Accordingly, we apprehend no disability in the Dangerous Drugs Act as it delegates to the Board of Pharmacy the right to expand the list of proscribed drugs by adding thereto substances developed and derived from barbituric acid, amphetamines or any other substance which the Board of Pharmacy after investigation has found and declared to be "habit forming because of its stimulant effect on the central nervous system; . . . ." See [§ 16-8B-1(1) (a), (b), and (c).] We reaffirm without elaboration that those three subsections contain adequate standards and limitations to protect the delegation of legislative prerogatives.

However, in subsection (d), the Legislature also said that the term dangerous drug or drugs means "any drug which, under the regulations promulgated in accordance with the [Federal Food, Drug and Cosmetic Act], or any amendment thereto, is designated as dangerous or habit forming: . . . ." As recognized by the Court in [State ex rel. Scott v. Conaty, 187 S.E. 119, 122 (1972)], "[S]tatutes adopting laws or regulations of the federal government effective at the time of enactment of the statute adopting the same, are valid." As that general rule correctly expresses, it is permissible for the West Virginia Legislature or any legislative body to adopt by incorporation and reference conduct which previously has been declared to be unlawful by the United States Congress, so-called model or uniform legislation, or general enactments of other legislative bodies. There is no inhibition, constitutional or otherwise, to this "incorporation by reference" principle as it applies to law in existence at the time of the adoption of the "incorporating" legislation, so long as the delegate agency follows the directions of its creator and due process requirements are given recognition in the promulgation of effectuating regulations.

On the other hand, when a legislative body delegates its legislative powers so loosely as to permit another legislative body or an executive board or agency to redefine and expand the criminal acts in futuro and without limitation, such attempt at delegation is constitutionally invalid. . . .

Considering that it was not unlawful to possess, deliver or sell LSD under federal law until January 1968 and considering also that the West Virginia Legislature previously had not declared hallucinogenic drugs generally, or LSD specifically, to be controlled drugs, it appears from the language of the regulation adopted by the Board of Pharmacy in March 1968 that the indictment in this case emanated from the 1968 amendment of the federal law. Implicitly, the Board's action was not supported by authority of West Virginia legislation passed in 1965 and silent on regulation of

this chemical substance. This point has been brought forcefully to our attention now and we cannot overlook it even in the face of our own recent Contra decision in the Scott v. Conaty case, supra.

Only the Legislature can enact malum prohibitum laws. West Virginia Constitution, Article VI, Section 1, reposes the legislative power in the legislative department and only it can declare criminal, acts of persons which would be otherwise lawful. The Legislature cannot delegate its authority to enact criminal laws to an agency which is a unit of the executive branch of State government, nor can it, under the guise of a colorable delegation, permit the Board of Pharmacy to adopt a federal law which has not been given prior approval by the Legislature. Unfortunately, the Scott case must be overruled on this point, and it is our further opinion that [§ 16-8B-1(1) (d)] is unconstitutional on its face in that it purports to delegate to the Board of Pharmacy the power to declare unlawful drugs which may be designated as dangerous or habit forming by the federal government prospectively, in futuro, and without limitations. . . .

Under the West Virginia Constitution, Article VI, Section 1, and Article V, Section 1 -- the latter insuring separation of powers among the legislative, the executive and judicial branches of government -- enactment of criminal statutes is solely a legislative function. See State ex rel. Davis v. Oakley, 156 W.Va. 154, 191 S.E.2d 610 (1972); State ex rel. Myers v. Wood, 154 W.Va. 431, 175 S.E.2d 637 (1970); State v. Lantz, 90 W.Va. 738, 111 S.E. 766 (1922). The authority to enact laws, being exclusively a legislative function, cannot be transferred or abdicated to others. State v. Harrison, 130 W.Va. 246, 43 S.E.2d 214 (1947). The constitutional prerequisite to a valid statute is that the law shall be complete when enacted. State ex rel. West Virginia Housing Development Fund v. Copenhaver, 153 W.Va. 636, 171 S.E.2d 545 (1969).

As the section of the statute under which [Grinstead] was indicted is void, so too, the indictment founded thereon is void. For these reasons, the judgment of the Circuit Court of Wood County is reversed and the case is remanded with directions that the indictment . . . be quashed.

NOTES

1. *Woodring v. Whyte*, 161 W.Va. 262, 242 S.E.2d 238 (1978). Inmates at Huttonsville challenged W. Va. Code 28-5-28 as being an unlawful delegation of power. The statute created a "classification committee" and directed it "as soon as practicable" to "classify all prisoners according to their industry, conduct and obedience in three classifications." Justice Miller's opinion for the Court explained its rejection of the challenge:

"The circumstances under which this Court will find an impermissible delegation of legislative powers have been recently discussed at some length in *State ex rel. West Virginia Housing Development Fund v. Waterhouse*, [212 S.E.2d 724 (W.Va. 1974)], and *State ex rel. West Virginia Housing Development Fund v. Copenhaver*, 153 W. Va. 636, 171 S.E.2d 545 (1969). In Copenhaver, this Court stated that the delegation of power has to be of "purely legislative power" in order to render a statute constitutionally defective. Purely legislative power was described as the authority to make a complete law. In Waterhouse, this Court noted the modern trend is to allow the Legislature to set standards broadly and to require less exactness. . . .

"At issue was the delegation of discretionary power to an administrative agency. Such is the present case, except that in addition to the standard of "industry, conduct and obedience," the Legislature has designated the number of credit days per month to be given in each of the classes."

Although admitting there was "some ambiguity in the statute," the Court nevertheless found it, when read as a whole, to be constitutional.

2. *City of Charleston v. Southeastern Construction Co.*, 134 W.Va. 666, 64 S.E.2d 676 (1950). The City of Charleston sued to enjoin construction of a state building for its noncompliance with municipal building and zoning regulations. The construction had been authorized and initiated by the State Office Building Commission, an entity created by the legislature to purchase land and build

a facility to house state agencies. The City argued that the statutes creating its power to prescribe zoning and related ordinances constituted a legislative delegation to the City, which enabled it to dictate on such matters to the state commission. The Court responded:

> If we should hold that the zoning ordinance should apply, we would thereby give to the Council of the City of Charleston and to future councils thereof unbridled power to enact ordinances as to building zones, such as they might deem proper. Such delegation would make the Legislature subservient to every future action of the Council of the city of Charleston, and thus reside in the authorities of that city future indefinite powers without any standards whatsoever to guide or control them, in which event the Council of the City of Charleston could act arbitrarily and capriciously. Moreover, the Legislature is without power to bind future Legislatures, and it cannot grant or delegate the right to exercise in perpetuity the police power of the State. Such delegation would be violative of Section 1, Article VI of our Constitution . . ..

3. *State ex rel. Charleston v. Bosely*, 268 S.E.2d 590 (W.Va. 1980). The City sought a writ of mandamus against its city manager, Hugh Bosely, to compel him to take certain steps toward financing and implementing plans for construction of a convention center in Charleston. Bosely contended that compliance with the council's directives would have violated the Constitution. Among other arguments in defense of his position, Bosely maintained that the authorizing legislation upon which the city relied was an improper delegation of legislative power to municipalities. "The gist" of his argument, according to Justice McGraw's opinion for the Court, was "that all power to legislate on matters of legitimate state concern is vested in the state legislature, and that it cannot be handed down to any lesser authority." The Court rejected the contention:

> The weakness of [the above quoted] generalization is illustrated by the facts of this case. The legislature has decided that development of convention facilities is a matter of statewide import, but at the same time is most efficiently effectuated by implementation at the local level. This is not infirm. Having exercised the legislative power over the substantive issue, the legislature is free to delegate the administrative authority over local development to the affected communities' governing bodies. It has long been settled that the legislature is free to delegate authority to municipal corporations on matters of purely local concern. *See State ex rel. City of Charleston v. Coghill*, 156 W.Va. 877, 207 S.E.2d 113 (1973), and sources cited therein.

4. *State ex rel. Callaghan v. Civil Service Commission*, 166 W.Va. 117, 273 S.E.2d 72 (1980). K.L. Painter, an employee of the Department of Natural Resources, filed a complaint with the Civil Service Commission claiming DNR discriminated against him because he had testified before a legislative committee. The Department challenged the Commission's jurisdiction to hear and decide complaints about non-merit discrimination. After canvassing the "conglomeration of statutes" affecting civil service, Justice Harshbarger's opinion for the Court observed that to deliver on the legislature's primary concern with providing a merit-based personnel system, the Commission had to provide "classified employees or applicants with appeals from agency decisions made on non-merit factors." Further, the Court found the Commission's conclusion supportable and within the "proper and necessary" enforcement of the statute.

DNR also argued that the legislative delegation to the Commission violated the *Grinstead* principle because it authorized the CSC to make rules to comport with as yet unwritten federal standards. The Court distinguished *Grinstead*, however, because here the Commission was not issuing criminal regulations. The procedure specified by the statute did "not enlarge, amend or repeal substantive rights created by statute: it [did] not 'make law'; nor [was] it a simple transposition of federal law into state regulations. At most, the federal standards serve to define the merit-based system that the Legislature has required. The specific delegation," the Court concluded, was "not an unconstitutionally broad delegation of power. In *Woodring v. Whyte*, 161 W.Va. 262, 242 S.E.2d 238, 243-44 (1978), we adhered to the modern trend of requiring less exactness in standards set for

administrative agency rule making."

5. *State ex rel. Mountaineer Park, Inc v. Polan*,190 W.Va. 276, 438 S.E.2d 308 (1993). Article VI, § 36 of the Constitution precludes the Legislature from authorizing "lotteries or gift enterprises" except, according to a 1984 amendment, "the legislature may authorize lotteries which are regulated, controlled, owned and operated by the State of West Virginia in the manner provided by general law[.]" Pursant to that authority, the Legislature enacted the State Lottery Act, W.Va.Code 29-22-1 through 29-22-28, to establish the State lottery and to create the Lottery Commission to administer the Act and the Lottery. The Act further provided that the "commission shall proceed with operation of such additional lottery games, including the implementation of games utilizing a variety of existing or future technological advances at the earliest feasible date" and to promulgate regulations on "electronic video lottery systems." W. Va. Code 29-22-9. Relying on that section, the Commission shortly entered into a contract with Mountaineer Park in Hancock County for the operation of video "lottery games" – "video poker, keno and blackjack."

The Purchasing Division in the Department of Administration refused to approve the contract, and both the Commission and Mountaineer Park sued the Director of the Division for a writ of mandamus to compel him to approve the contract. In an opinion by Justice McHugh, the Court denied the writ, concluding that the statutory grant of authority in § 29-22-9 was an unconstitutional delegation of power and that the Commission lacked the authority to authorize the video games. McHugh explained:

> [T]he legislature must prescribe adequate standards to guide administrative agencies in the exercise of their power under enabling statutes in order for the delegation of authority to be constitutional. . . . [The] legislature cannot vest the Lottery Commission with unbridled or uncontrolled authority in connection with the administration of the State Lottery Act. While [§ 29-22-9(b)(2)] authorizes the Lottery Commission to promulgate rules and regulations with regard to "electronic video lottery systems," this provision is clearly not an adequate standard, with respect to electronic video lottery, for guidance of the Lottery Commission in the exercise of its delegated authority under the State Lottery Act.
>
> Moreover, while the State Lottery Act gives the Lottery Commission the authority to "[s]elect the type and number of public gaming systems or games," W.Va.Code, 29-22-5(a)(3) [1985], and to implement "games utilizing electronic computers and electronic computer terminal devices and systems," W.Va.Code, 29- 22-9(c) [1990], we do not believe that the term "games" as used in these subsections can mean the video gambling devices which are contemplated at Mountaineer Park. This is particularly true in light of the language in both W.Va.Code, 29-22-9(b)(4) [1990], which states that "[n]o lottery utilizing a machine may use machines which dispense coins or currency[,]" and W.Va.Code, 29-22-9(b)(5) [1990], which states that "[s]election of a winner must be predicted totally on chance." In view of these restrictions and the lack of any clear statement in W.Va.Code, 29-22-1, et seq. authorizing video gambling devices, we find that the legislature has not delegated such authority to the Lottery Commission.

STATE EX REL. WEST VIRGINIA CITIZENS ACTION GROUP v. WEST VIRGINIA ECONOMIC DEVELOPMENT GRANT COMMITTEE,
213 W. Va. 255, 580 S.E.2d 869 (2003).

Albright, Justice.

[The background on this case is included in the portion of the case that appears in Chapter 5, *supra*.]

B. Delegation of Legislative Power

1. Circuit Court's Ruling

CAG argues that the circuit court erred in determining that the Legislature's grant of authority to the Committee was not an unconstitutional delegation of its powers in violation of article six, section one of the state constitution. Dispensing quickly with the fact that the Legislature had not delegated a pure legislative function to the Grant Committee, the trial court correctly framed the issue in terms of whether the Legislature delegated authority to the Committee without adequate guidance or guidelines to accomplish the designated statutory objectives. . . .

Looking first to *State ex rel. West Virginia Housing Development Fund v. Copenhaver,* 153 W.Va. 636, 171 S.E.2d 545 (1969), the trial court noted that this Court upheld a broad grant of discretion to the Housing Development Fund concerning discretionary determinations of who should receive loans designated for "persons and families of low and moderate income." After recognizing that "'the delegation by the legislature of broad discretionary powers to an administrative body, accompanied by fitting standards for their exercise, is not of itself unconstitutional,'" we rejected the constitutional challenge to the subject legislation. *Id.* at 649, 171 S.E.2d at 553 (quoting Syl. Pt. 8, *Chapman v. Huntington, W. Va., Hous. Auth.*, 121 W.Va. 319, 3 S.E.2d 502 (1939)). In explanation of our holding, we stated:

> The legislature enacted the law here in question and has not delegated to the Fund any purely legislative authority. It has, perhaps as a matter of absolute necessity, clothed the Fund with a power and duty, in a limited area, to exercise a degree of discretion or judgment in determining who are 'persons and families of low and moderate income.' *The legislature has not failed to set forth guidelines or standards to guide the Fund in the exercise of its judgment or discretion in this limited area*. We note that the phrase 'low and moderate income' is used conjunctively rather than disjunctively. By legislative definition 'persons and families of low and moderate income' are encompassed in a single definition embraced in Section 3(8) . . . .

153 W.Va. at 650, 171 S.E.2d at 553 (emphasis supplied . . .).

In . . . *State ex rel. Marockie v. Wagoner* (*Wagoner II*), 191 W.Va. 458, 446 S.E.2d 680 (1994), we examined whether the Legislature set forth adequate standards in giving the school building authority discretion to issue bonds and to choose which projects should be funded. *Id.* at 469, 446 S.E.2d at 691. Likening the discretion at issue to that considered in *Copenhaver,* we held that "the legislature out of necessity gave the SBA certain discretionary powers and provided sufficient guidelines to guide the SBA in its exercise of discretion." *Id.* Without identifying a specific provision of the legislation at issue, West Virginia Code § § 18-9D-1 *et seq.*, we found the necessary legislative guidance had been provided in the cumulative provisions of the subject statutes to reject a finding of wrongful delegation of legislative powers.

In determining that the West Virginia Legislature had set forth sufficient guidelines to withstand a constitutional challenge on wrongful delegation grounds, the trial court looked to the statement of purpose provided in the statute:

> The Legislature finds and declares that in order to attract new business, commerce and industry to this state, to retain existing business and industry providing the citizens of this state with economic security and to advance the business prosperity of this state and the economic welfare of the citizens of this state, it is necessary to provide public financial support for constructing, equipping, improving and maintaining economic development projects, capital improvement projects and infrastructure which promote economic development in this state.

W.Va. Code § 29-22-18a(d).

Based on this statutory language, the trial court found that the Grant Committee "selects the recipients of public monies based on statutory criteria," while acknowledging that those "recipients are chosen on the basis of somewhat broad statutory prescriptions." Likening the statutory grant of discretion as similar to that at issue in *Wagoner II,* the circuit court concluded that the statutory guidelines were "not so broad as to constitute unbridled discretion." Noting additionally that the four-pronged criteria adopted by the Grant Committee appear "directed toward determining whether or

not a project will contribute to economic development," the trial court found that the evaluation criteria "constituted a valid exercise of its discretion."

2. Lack of Adequate Statutory Guidance

As we announced in syllabus point three of *Quesenberry v. Estep,* 142 W.Va. 426, 95 S.E.2d 832 (1956):

> As a general rule the Legislature, in delegating discretionary power to an administrative agency, such as a board or a commission, must prescribe adequate standards expressed in the statute or inherent in its subject matter and such standards must be sufficient to guide such agency in the exercise of the power conferred upon it.

In comparison to the statutory guidance given to the school building authority in *Wagoner II,* we cannot concur with the trial court's ruling that the statutory guidelines provided in West Virginia Code § 29-22-18a(d)(3) are sufficient to withstand a challenge predicated on wrongful delegation of legislative powers. *See* W.Va. Const. art. VI, § 1. The following statutory guidance was provided for selecting among the various entities competing for school construction funds in *Wagoner II*:

> (a) It is the intent of the Legislature to empower the school building authority to facilitate and provide state funds for the construction and maintenance of school facilities so as to meet the educational needs of the people of this state in an efficient and economical manner. The authority shall make funding determinations in accordance with the provisions of this article and shall assess existing school facilities and each facility's plan in relation to the needs of the individual student, the general school population, the communities served by the facilities and facility needs statewide.

W.Va. Code § 18-9D-15(a) (1993).

Whereas the statute in *Wagoner II* gave a comprehensive listing of funding standards along with a clear statement of legislative intent, thereby avoiding the concern [that] caprice would control the decision making process in the absence of clear guidelines, the statute currently under scrutiny contains no comparable guidance. . . . And, unlike the specificity included in that statute at issue in *Wagoner II,* the State Lottery Act provisions at issue here contain only the broadest statement of legislative intent and fail to include even a hint of standards for the Grant Committee's use in exercising its statutorily specified duties. *See* W.Va. Code § 29-22-18a(d). The Committee had no measuring stick, other than its self-created criteria, to rely upon in attempting to fulfill the legislative objective of economic development. Critically, the evaluative criteria adopted by the committee itself cannot constitute the legislative guidance necessary to withstand a wrongful delegation of powers challenge.

To be clear, we do not imply a need to return to the days when courts sometimes imposed onerous requirements on the legislative and executive departments, thereby limiting the legislative branch's capacity to assign functions to the executive branch with only broad directives for implementing public policy. Nonetheless, the Legislature must articulate with sufficient clarity its public policy objectives to permit the executive department to effectuate those policy objectives and to educate the public as to the legislature's intentions.[35] We made clear in *Polan* that the Legislature cannot "grant . . . unbridled authority in the exercise of the power conferred upon . . . [an administrative agency]." Syl. Pt. 2, in part, 190 W.Va. at 277, 438 S.E.2d at 309.

At the core of CAG's contention is the fact that the Committee is authorized to select largely undefined projects *without the benefit of any legislative guidance* and that such projects, while required to serve a public purpose, in some instances clearly appear to also involve private undertakings or interests. Add to this concern, the fact that the legislatively approved expenditure of 215 million dollars of public funds involves borrowing - through the sale of bonds - and that the

[35]Even a cursory review of the projects approved by the Grant Committee reveals that not all of those projects can result in the statutory objective of economic development. *See* W.Va. Code § 29-22-18a(d).

repayment of such public moneys is secured only by the "excess profits" of the state lottery over a lengthy period of time. Of further concern to those objecting to this economic development plan is the fact that the funds at issue will be largely extended by means of grants, rather than loans, and that little, if any, of such funds may be required to be repaid.[36] . . .

In this Court's opinion, the legislation at issue has conferred "uncontrolled discretion" upon the Grant Committee by virtue of the lack of legislative guidance provided for determining the bases by which the grant applications should be considered. *See Polan,* 190 W.Va. at 280, 438 S.E.2d at 312. Accordingly, we hold that when an enabling statute such as West Virginia Code § 29-22-18a(d)(3) extends discretion to the executive branch in contemplation of an expenditure of public funds with only a broad statement of legislative intent and insufficient legislative guidance for the execution of that legislative intent, the Legislature has wrongfully delegated its powers to legislate in violation of article six, section one of the state constitution. *See* W.Va. Const. art. VI, § 1. Before the Grant Committee, upon its reconstitution, proceeds to implement the statute at issue, the Legislature is required to amend the subject legislation to provide the necessary standards that the Committee must apply in identifying and certifying projects selected for receipt of state funds pursuant to West Virginia Code § 29-22-18a(d).

While we do not intend to identify what those standards should be - as that is a legislative determination - we emphasize that to withstand constitutional scrutiny the Legislature must provide the Committee with sufficient guidance so that the Committee's allocation decisions can be made with a clear understanding of the type of contemplated economic development it should be seeking to fund. As it stands now, the Legislature has failed to instruct the Committee even as to the general nature of projects which are encompassed within the statutory purview of economic development. In short, suitable legislative standards for achieving the laudable goal of economic development have simply not been provided.

B. Legislative Composition and Apportionment

Read Article VI, §§ 2, 4-10, 50

ROBERTSON v. HATCHER,
148 W.Va. 239, 135 S.E.2d 675 (1964).

CAPLAN, Judge.

This proceeding involves the constitutionality of Chapter 158 of the Acts of the Legislature, Regular Session, 1963, hereinafter sometimes referred to as the Act. Passed by the Legislature on March 1, 1963, this Act related to the division of the State into senatorial districts, apportionment of the membership of the house of delegates and congressional districts.

The issue was raised in a declaratory judgment action instituted in the Circuit Court of Kanawha County by C. Donald Robertson as a resident, citizen and taxpayer of Harrison County and as the Attorney General of the State of West Virginia, together with certain prosecuting attorneys of this state[.] . . . Named as defendants therein were [circuit clerks of the state], each individually and as members of the class.

. . . [The plaintiffs alleged that the Act], which apportions the membership of the House of Delegates of the State of West Virginia and the Senate of the State of West Virginia, and gives to each county a delegate and representative in the House of Delegates, and which gives to Kanawha

[36]A related financial concern is that the resulting obligations, while not formally secured by the state's tax revenues, will nonetheless bear on the overall evaluation of the state's credit worthiness.

County two additional Senators, and makes Kanawha County the Eighth and Seventeenth Senatorial Districts, is unconstitutional[.] . . .

It is further alleged in the petition that if the Act were allowed to take effect, not only the plaintiffs, but all other citizens and residents of the respective counties named, and other citizens, residents and taxpayers similarly situated, will be adversely affected in that these counties will be denied their fair representation in the Legislature. . . .

We come now to the principal issue in this proceeding, namely, the constitutionality of [the Act]. [It] consists of three sections. Section 1 relates to the creating of senatorial districts; Section 2 provides for the apportionment of the membership of the house of delegates; and Section 3 creates congressional districts. No question having been raised as to congressional districts, Section 3 will not be considered herein.

. . . [T]he Circuit Court of Kanawha County held that Section 1 of the Act was constitutional. In their appeal from that ruling the plaintiffs' petition contains one assignment of error. They allege that the designation of Kanawha County as the Eighth and Seventeenth Senatorial Districts is violative of Article VI, Section 4 of the Constitution of West Virginia in that the Seventeenth District is superimposed upon the Eighth. It may be noted here that the only amendment of the former apportionment law by Section 1 of the 1963 Act was the addition of the Seventeenth Senatorial District. . . .

For the creation of a senatorial district [Article VI, § 4 of the Constitution] prescribes that such district shall be compact, formed or contiguous territory, bounded by county lines and, as nearly as practicable, equal in population. That the Seventeenth District, consisting of the whole of Kanawha County, is compact and is bounded by county lines can not be questioned. Since the Seventeenth District consists entirely of one county, the territory which forms it is necessarily contiguous. In accordance with the language of the above quoted constitutional provision, that district is formed of contiguous territory.

The fourth requirement in Section 4 is that districts shall be, as nearly as practicable, equal in population. The official census of 1960 reveals that Kanawha County had a population of 252,925, or more than 13.5 per cent of the entire population of the state. It then and still does constitute the Eighth Senatorial District. The other fifteen senatorial districts had a percentage of the population of the state ranging from 3.99 per cent in the Second District to 7.36 per cent in the First. With the addition of a senatorial district in Kanawha County, each district therein will represent 6.79 per cent of the state's population. Certainly such addition will bring a greater balance in representation to the senatorial districts of the state.

We are of the opinion that the Legislature, in establishing the Seventeenth Senatorial District, has complied with the four requirements enumerated in Article VI, Section 4 of the Constitution of West Virginia.

The plaintiffs contend that superimposition of the Seventeenth Senatorial District upon the Eighth Senatorial District constitutes a violation of Article VI, § 4, of the West Virginia Constitution, although no reasons are given nor are any authorities cited in support thereof. An examination of § 4 fails to reveal any inhibition against the superimposing of one senatorial district upon another. Our State Constitution being a restriction of power rather than a grant of power as is the Federal Constitution, the Legislature may enact any measure which is not specifically prohibited by the State or Federal Constitution. . . .

There being no interdiction in Article VI, Section 4 of the West Virginia Constitution against the superimposition of one senatorial district upon another and, having determined that the requirements of said Section 4 have been fulfilled, we find, and so hold, that Section 1 of [the Act] is constitutional.

The defendants here contend that the Circuit Court of Kanawha County erred in holding unconstitutional Section 2 of [the Act]. . . . It is sufficient to note, without setting it out in full, that

Section 2, Apportionment of Membership of the House of Delegates, provides that the House shall consist of one hundred six members and that by the provisions thereof each county in the state is allocated at least one delegate. The issue here is whether, in these circumstances, the Legislature has complied with Article VI, Sections 6 and 7 of the Constitution of West Virginia.

A determination of the number of which the House of Delegates shall consist is entirely within the province of the Legislature. Nothing in the Constitution limits this power. Therefore, the Legislature properly exercised its authority when it designated that the House shall consist of one hundred six members. We must now look to the Constitution to determine if this membership was apportioned in conformity with the pertinent provisions thereof. . . .

The application of the clear and unambiguous language of [Article VI, §§ 6 and 7] to the population figures contained in the journal of the House of Delegates clearly reveals whether the apportionment provided in Section 2 of the Act was done in conformity with [those sections]. The population of the state, 1,860,421, is divided by 106, the number of which the House is to consist. The result is 17,551, which is the ratio of representation for the House of Delegates, referred to in Article VI, Section 6. Three-fifths of such ratio of representation is 10,530 which, in accordance with the provisions of Section 6, is the number of persons a county must have if it is to be entitled to a delegate in the Legislature. The clear language of Section 6 unequivocally provides that any county with a population of less than three-fifths of the ratio of representation for the House of Delegates, 10,530 in this instance, shall be attached to some contiguous county or counties to form a delegate district. It is difficult to see how this could be more graphically stated to mean, in the circumstances of these proceedings, that if a county's population is less than 10,530, such county is not entitled to a delegate but must become a part of a delegate district.

An examination of the Official House Journal for February 5, 1963, which contains the official 1960 census, reveals that there are twelve counties in West Virginia, each of which has a population of less than 10,530. Clearly, under the provisions of Article VI, Section 6, these counties are not entitled to a delegate in the Legislature and the Act which so provided is patently unconstitutional. . . .

The clear intention of the electorate as embraced in the language of Article VI, Sections 6 and 7 of our Constitution, is to accomplish a just and equitable apportionment of the membership in the House of Delegates after each official census. The necessity for establishing delegate districts in this case is couched in unquestionable language.

The defendants have relied primarily upon State ex rel. Armbrecht, et al. v. Thornburg, et al., 137 W.Va. 60, 70 S.E.2d 73, in their efforts to sustain the constitutionality of [the Act]. The issue in that case was the constitutionality of the Apportionment Act of 1951. There the relators asserted that the Act was unconstitutional [because it] disregarded Article VI, Section 6 of the State Constitution in that it apportioned one delegate to certain counties not having three-fifths of the ratio of representation for the House of Delegates.

The Thornburg case, supra, is readily distinguishable from the instant case and is, therefore, not decisive here. In that case there was a complete absence of any matters in the legislative journals which in any manner made questionable the legislative findings. In other words, the Court held that it would not inquire into the truth or falsity of legislative findings when there was no ambiguity in the legislative records. When the 1951 Apportionment Act was passed, . . . nothing appeared in the journal or legislative records which disputed the finding that all counties had a sufficient population to warrant the apportionment to each county of at least one delegate.

This is not so in the case now under consideration. The entry in the journal of the House of Delegates of February 5, 1963, setting out the official census, certified by the Director of the Bureau of Census, creates an ambiguity in the legislative findings. . . .

The Court found no ambiguity in the legislative journals in the Thornburg case while, in the instant case, an ambiguity did exist by reason of the inclusion of the official census figures. This

circumstance opened the door to a juristic determination of whether the pertinent constitutional provisions were being observed. From that evidence, the census figures in the journal, it is readily determinable that the House of Delegates was in error in its findings that each county in the state was entitled to a delegate. Clearly, this action was contrary to the plain language of Article VI, Sections 6 and 7 of the West Virginia Constitution. . . .

Certain language in [Thornburg] indicates that since each county in the state has been allocated at least one delegate for the past fifty years, the court may not question the constitutionality of the apportionment act. The defendants contend that such language supports their position here. We find no merit in the defendants' contention, inasmuch as the language referred to constitutes dictum with which we disagree and which we now disapprove.

Custom and usage are resorted to only as an aid in construing an ambiguous statute or constitutional provision. When the language thereof is clear and without ambiguity the courts will apply, not construe, such language. ... The language of [§§ 6 and 7] is clear ... and will be applied by this Court, not construed.

Having held herein that Section 1 of the Act is constitutional and Section 2 is unconstitutional, we must now determine whether such provisions are severable. It is noted that no severability clause is contained in the Act. In order to make this determination we must look to the intent of the Legislature in enacting this statute.

This Act was passed by the Legislature pursuant to the obligation imposed upon it by Article VI, Sections 4 and 7, namely, to reapportion the Senate and House after each official census. With the relatively minor alteration of the senatorial districts, it appears clear that the principal inducement for the passage of this Act was the reapportionment of the membership of the House of Delegates. Where that part of a statute which contains the principal inducement for the passage thereof is declared invalid, the whole act must fall. . . .

The portion of the statute containing the principal inducement for its enactment being declared invalid, we hold that the Act is not severable and that it is unconstitutional in its entirety. . . .

STATE EX REL. COOPER v. TENNANT,
229 W.Va. 585, 730 S.E.2d 368 (2012).

McHugh, J.,

[A combination of petitioners seek writs of prohibition in this Court's originial jurisdiction barring enforcement of and challenging] the constitutionality of House Bill 201 ("HB 201"), which is redistricting legislation regarding the West Virginia House of Delegates that was adopted by the West Virginia Legislature (hereinafter "Legislature"), effective August 21, 2011[, and] of Senate Bill 1006 ("SB 1006"), which is redistricting legislation regarding the West Virginia Senate that was adopted by the Legislature, effective August 5, 2011. Petitioner Cooper challenges the constitutionality of both the House of Delegates and Senate redistricting plans. . . .

[After briefing and oral argument,] this Court entered an order on November 23, 2011, concluding that neither HB 201 nor SB 1006 violates the West Virginia Constitution. We now issue this opinion to explain the basis for our November 23, 2011, order.

I. Factual and Procedural History

On August 5, 2011, the Legislature enacted SB 1006, West Virginia Code § 1-2-1 (2011), and on August 21, 2011, the Legislature enacted HB 201, West Virginia Code § 1-2-2 (2011). These legislative redistricting plans were prompted by the 2010 census results regarding the population of this state. According to the 2010 census, the overall population of West Virginia increased slightly from 1,808,344 (per the 2000 census) to 1,852,994. Notably, the official population counts of each of the state's fifty-five counties revealed there to be significant losses in population in the Northern

Panhandle and Southern counties and significant growth in population in Monongalia County and the Eastern Panhandle counties.

The House of Delegates redistricting process began with the appointment of a House Select Committee on Redistricting (hereinafter "Committee"), comprised of thirty members from all regions of the state, with Majority Leader Brent Boggs serving as the Committee Chair. The Committee [undertook gathering facts and public opinion, eventually producing a plan that] was adopted by the Legislature and made effective August 21, 2011. The resulting statute, West Virginia Code § 1-2-2, created sixty-seven delegate districts. Of those sixty-seven districts, twenty are multi-member districts and forty-seven are single-member districts, an increase over the prior forty-three single-member districts. The twenty multi-member districts include one district with five members; two districts with four members; six districts with three members; and eleven districts with two members. The West Virginia population of 1,852,994 was divided among the 100 delegates for an ideal population size of 18,530 per delegate. The deviation from that ideal population under the House of Delegates redistricting plan ranges from -5% to +4.99% for a total deviation of 9.99% from ideal population.[1] HB 201 does not include any explanation regarding the Legislature's rationale underlying its various decisions in creating the districts, combining and splitting counties, or assigning multiple multi-member delegate districts.[2] . . .

Redistricting of the Senate was initiated on or about March 31, 2011, when Acting Senate President Jeffrey Kessler formed a bipartisan redistricting task force which was comprised of one member from each of the seventeen senatorial districts. The task force conducted twelve public hearings throughout the state during which it solicited public comment on Senate redistricting. . . .

Following the public hearings, legislation proposing redistricting of the state senatorial districts was adopted by both legislative chambers and, effective August 5, 2011, SB No. 1006, the "Senate Redistricting Act of 2011," was enacted. SB 1006 clearly sets forth the policy interests the Legislature sought to serve in the redistricting plan, providing, in relevant part, as follows:

> (c) The Legislature recognizes that in dividing the state into senatorial districts, the Legislature is bound not only by the United States Constitution but also by the West Virginia Constitution; that in any instance where the West Virginia Constitution conflicts with the United States Constitution, the United States Constitution must govern and control, as recognized in section one, article I of the West Virginia

---

[1]"The maximum population deviation is calculated by determining the range of population deviation between the largest and smallest districts from the 'ideal population' of a district. Thus, where a plan includes no district with a population more than 5% under or 5% over the 'ideal district population,' the plan is within the 10% range and thus meets Federal population equality requirements (+/- 5% standard)." *McClure v. Sec'y of Commonwealth*, 436 Mass. 614, 766 N.E.2d 847, 851 (Mass. 2002) (footnotes and citations omitted).

However, as discussed in more detail below, state legislative redistricting plans with maximum population deviations in excess of 10%, *prima facie*, violate equal protection, "and the burden shifts to the state to show that the plan 'may reasonably be said to advance' consistently applied, rational and legitimate state policies." *Deem v. Manchin*, 188 F. Supp. 2d 651, 656 (quoting *Mahan v. Howell*, 410 U.S. 315, 328, 93 S. Ct. 979, 35 L. Ed. 2d 320 (1973)).

[2]Moreover, given this matter's presentation in original jurisdiction, this Court does not have the benefit of a record, trial testimony, exhibits, or expert opinion. Thus, our consideration of Petitioners' constitutional challenges of the redistricting legislation is limited to our review of the parties' arguments and the submitted appendices, including, *inter alia*, maps and data relating to both the House of Delegates and Senate districting set forth in HB 201 and SB 1006. No testimonial evidence from participating legislators or experts explaining the specific process undertaken by the Legislature in the formulation and passage of the House and Senate bills is before this Court. As discussed in more detail below, SB 1006 sets forth those interests the Legislature intended to serve in its redistricting plan. In contrast, as previously stated, the Legislature did not present any written explanation of its policy interests or rationale for particular decisions regarding crossing county lines or creating certain multi-member districts with regard to HB 201. A judicial determination of the constitutionality of the ultimate legislative plan would have been significantly assisted by written findings similar to those produced by the Legislature with regard to SB 1006.

> Constitution; that the United States Constitution, as interpreted by the United States Supreme Court and other federal courts, requires state legislatures to be apportioned so as to achieve equality of population as near as is practicable, population disparities being permissible where justified by rational state policies; and that the West Virginia Constitution requires two senators to be elected from each senatorial district for terms of four years each, one such senator being elected every two years, with one half of the senators being elected biennially, and requires senatorial districts to be compact, formed of contiguous territory and bounded by county lines. The Legislature finds and declares that it is not possible to divide the state into senatorial districts so as to achieve equality of population as near as is practicable as required by the United State Supreme Court and other federal courts and at the same time adhere to all of these provisions of the West Virginia Constitution; but that, in an effort to adhere as closely as possible to all of these provisions of the West Virginia Constitution, the Legislature, in dividing the state into senatorial districts, as described and constituted in subsection (d) of this section, has:
>
> (1) Adhered to the equality of population concept, while at the same time recognizing that from the formation of this state in the year 1863, each Constitution of West Virginia and the statutes enacted by the Legislature have recognized political subdivision lines and many functions, policies and programs of government have been implemented along political subdivision lines;
>
> (2) Made the senatorial districts as compact as possible, consistent with the equality of population concept;
>
> (3) Formed the senatorial districts of 'contiguous territory' as that term has been construed and applied by the West Virginia Supreme Court of Appeals;
>
> (4) Deviated from the long-established state policy, recognized in subdivision (1) above, by crossing county lines only when necessary to ensure that all senatorial districts were formed of contiguous territory or when adherence to county lines produced unacceptable population inequalities and only to the extent necessary in order to maintain contiguity of territory and to achieve acceptable equality of population; and
>
> (5) Also taken into account in crossing county lines, to the extent feasible, the community of interests of the people involved.

W.Va. Code § 1-2-1. . . .

II. Standard of Review

. . . In examining the authority granted to the Legislature by the West Virginia Constitution and specifically within the context of a challenge to legislative redistricting, this Court stressed in *Robertson v. Hatcher*, 148 W.Va. 239, 135 S.E.2d 675 (1964), that the West Virginia Constitution is "a restriction of power rather than a grant of power." 148 W.Va. at 250, 135 S.E.2d at 682-83. Consequently, the "test of legislative power in this State is constitutional restriction, and what the people have not said in the organic law their representatives shall not do, they may do." *Id*. at 251, 135 S.E.2d at 683 (quoting *Harbert v. County Court*, 129 W.Va. 54, 39 S.E.2d 177 (1946) and emphasis supplied). When considering a challenge to the constitutionality of an act of the legislature, the '"negation of legislative power must be manifest beyond reasonable doubt.'" Syl. Pt. 4, in part, *State ex rel. Metz v. Bailey*, 152 W.Va. 53, 54, 159 S.E.2d 673, 674 (1968) (citation omitted).

The precise question to be examined in the evaluation of a constitutional challenge is whether the legislative act is prohibited by the West Virginia Constitution. This concept was also elucidated in syllabus point one of *Metz*, as follows: "Inasmuch as the Constitution of West Virginia is a restriction of power rather than a grant of power, as is the federal Constitution, the Legislature may enact any measure not interdicted by that organic law or the Constitution of the United States." 152 W.Va. at 53, 159 S.E.2d at 673. . . .

Moreover, in addressing the constitutional restraints under which the Legislature acted in these

matters, this Court must also be cognizant of the political considerations surrounding legislative decisions. As the United States Supreme Court recognized in *Gaffney v. Cummings*, 412 U.S. 735 (1973), "[p]olitics and political considerations are inseparable from districting and apportionment." 412 U.S. at 753. In *Stone v. Hechler*, 782 F. Supp. 1116 (N.D. W.Va. 1992), the federal district court rejected a challenge to the legislative redistricting plan in West Virginia and explained that "[t]he Supreme Court has repeatedly stated that 'redistricting and reapportioning legislative bodies is a legislative task which the [courts] should make every effort *not* to preempt.'" 782 F. Supp. at 1124 (quoting *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) and emphasis supplied). Thus, as Intervenor Richard Thompson, Speaker of the West Virginia House of Delegates, stated in his response in this case, "[o]nce one recognizes the inherent political nature of the redistricting process, the idea that the political branches should have plenary power unless they contravene clear constitutional limitations becomes unassailable."

With these standards of review as guidance, this Court proceeds to an evaluation of the issues presented in this case.

III. Summary of Challenges to House of Delegates Redistricting

A. Petitioner Cooper

Petitioner Cooper requests that this Court issue a writ of mandamus requiring the implementation of his proposed redistricting plan, rather than the plan adopted by the Legislature. He posits that his redistricting proposal contains certain features which render it preferable to the redistricting plan adopted by the Legislature, with specific regard to the preservation of existing precinct and county boundaries and the utilization of multi-member districts.[8] Specifically, Petitioner Cooper contends that his plan, creating 100 single-member districts, would have preserved existing precinct boundaries, minimized county boundary crossing in the creation of districts, and created only one-member districts.

Petitioner Cooper further asserts that the redistricting plan, as adopted by the Legislature, violates Article VI, Sections 6 and 7[9] of the West Virginia Constitution by failing to require that a county remain whole when it is attached to another county or counties, pursuant to the requirements of article VI, section 6, and by permitting the splitting of counties into various delegate districts. Petitioner Cooper also claims that the legislative plan violates Article II, Section 4 of the West Virginia Constitution and the Fourteenth Amendment to the United States Constitution. Article II, Section 4 of the West Virginia Constitution provides for equal representation[.] [The Court quoted that provision and the Equal Protection Clause.]

Petitioner Cooper further challenges the "delegate residency dispersal" provision of HB 201 for House of Delegate District 28, a multi-member district, which specifies that no more than one delegate may be nominated, elected or appointed who is a resident of a single county within the district. District 28 consists of portions of Monroe, Raleigh, and Summers Counties. Petitioner Cooper contends that this delegate residency dispersal violates the provisions of Article IV, Section 4 and Article VI, Sections 12 and 39 of the West Virginia Constitution. [The Court quoted each of those constitutional provisions.]

B. Petitioner Andes

Petitioner Stephen Andes, a County Commissioner for Putnam County, and other named officials and citizens of Putnam and Mason, (hereinafter collectively referred to as "Petitioner Andes") also seek a writ of prohibition enjoining the implementation of HB 201. Petitioner Andes asserts that portions of Mason and Putnam Counties have been impermissibly joined with of other adjacent

---

[8]Compared to the legislative plan that resulted in a 9.99% overall deviation from ideal population per delegate, Petitioner Cooper's plan would have resulted in a 7.55% deviation from that ideal population.

[9][The Court's footnote 9 quoted the entirety of Article VI, § 6 and 7. – Editor]

counties to form delegate districts. In similar fashion to the arguments raised by Petitioner Cooper, Petitioner Andes asserts that adherence to county boundaries should be a paramount consideration except where equal representation principles dictate otherwise. Specifically, Petitioner Andes suggests that article VI, section 6 envisions keeping each county whole when it is attached to another county or counties where necessary to satisfy population variances.[11]

Petitioner Andes further suggests that the redistricting plan enacted by the Legislature is the result of partisan gerrymandering. Petitioner essentially asserts that this Court should ignore the jurisprudence of the United States Supreme Court in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), which held that no identified judicially manageable criteria exist governing a determination of issues of alleged partisan gerrymandering claims, and should invalidate the redistricting adopted by the Legislature.

C. Petitioner Monroe County Commission

Petitioner Monroe County Commission asserts challenges to the House of Delegates redistricting plan similar to those asserted by Petitioners Cooper and Andes. It alleges a violation of article VI, sections 6 and 7 based upon the Legislature's splitting of counties with insufficient (less than the 3/5 threshold of 11,117) population when combining such counties with other counties for purposes of redistricting. Petitioner maintains that because Monroe County's population was not appreciably altered during the most recent census period, it should not be subjected to splitting. Specifically, the 2010 census indicated that Monroe County has a population of only 13,502. Thus, to create a district, it needed to be combined with an additional 4,103 people to achieve the ideal population of 18,530. Petitioner also contends that an implied preference exists in the West Virginia Constitution for single-member districts.

IV. Historic Perspective in Analysis of Challenges to Legislative Redistricting

At the outset of this Court's examination of the legislative redistricting plans presently at issue, it must be acknowledged that, ordinarily, challenges to such plans have been adjudicated in federal court because violations of federal constitutional provisions are often alleged. Thus, the jurisprudence which guides our consideration of these issues is derived, in part, from the analyses undertaken in that federal realm.

The federal equal representation principles, commonly referenced as "one person, one vote," were articulated by the United States Supreme Court in *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963). Those principles, with foundations in the Equal Protection Clause of the Fourteenth Amendment, are aimed at prohibiting the dilution of individual voting rights through state redistricting plans that assign delegates to districts in a manner which results in wide variances in population per district. In *Reynolds v. Sims*, 377 U.S. 533 (1964), the United States Supreme Court held that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." 377 U.S. at 568. The *Reynolds* Court, in an attempt to assure that each person's vote is given the same weight, required states to "make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Id*. at 577. In *Reynolds*, the United States Supreme Court established that "the overriding objective must be substantial equality of population among the various districts."[14]

---

[11]Petitioner Andes' brief suggests that "[t]he culmination of provisions in Article VI are plainly written to indicate that 'delegate district' means 'county' or 'counties', but not mere portions of a county or counties, are to be combined for purposes of representation in the House."

[14]However, as the United States Supreme Court explained in *Reynolds*, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution authorizes legislative redistricting to be subject to a test of practicality.

> By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that

Importantly, a principle established in *Gaffney* and guiding this Court in the present case is that a total deviation from an ideal district size of less than 10% in state legislative redistricting was *prima facie* constitutional under the Equal Protection Clause of the Fourteenth Amendment.[15][15] 412 U.S. at 745. As the principles of "one person, one vote" evolved, the United States Supreme Court observed that although population equality should be a primary goal, some flexibility must be granted to states in the formulation of redistricting plans, and only "substantial" population equality is required. The United States Supreme Court also articulated this allowance for state legislative redistricting deviation in *Brown v. Thomson*, 462 U.S. 835 (1983), explaining as follows:

> In view of these considerations, we have held that minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State. Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations.

462 U.S. at 842. Through the *Gaffney* and *Brown* decisions, the United States Supreme Court acknowledged that states are permitted a substantial degree of latitude in evaluating factors which may affect the division of states into voting districts. For instance, in *Bush v. Vera*, 517 U.S. 952 (1996), the United States Supreme Court found that redistricting responsibility has been delegated to the political branches of the states and that the Supreme Court has "accorded substantial respect to . . . traditional principles (as those, for example, meant to preserve the integrity of neighborhood communities, to protect incumbents, to follow existing political boundaries, to recognize communities of interest, and to achieve compactness and contiguity). . . ." . . .

[I]n *Goines v. Heiskell*, 362 F. Supp. 313 (S.D. W.Va. 1973), the United States District Court reviewed the redistricting legislation that resulted [after a 1972 decision had invalidated a prior, badly malapportioned redistricting plan]. The 1973 redistricting examined in *Heiskell* involved the creation of eleven multi-county districts, twenty-five multi-member districts, and twelve districts crossing county lines, resulting in a 16.179% maximum population variance among the delegate districts. 362 F. Supp. at 318.[17] Similar to arguments presented in the case *sub judice*, the plaintiffs in *Heiskell* argued that the Legislature's failure to observe county boundaries was constitutionally flawed under article VI, sections 6 and 7. *Id*. at 321. The district court rejected the challenges to the 1973 legislation, finding that the 16.179% variance was "tolerable and acceptable when considered with other legitimate interests. . . ." *Id*. at 323.

With specific regard to the crossing of county boundary lines, such practice was approved by the court in *Heiskell*, and it was determined that by crossing such lines, "the percentage population variance in the two districts has been reduced." *Id*. at 321. Several districts were also required to have delegate residency dispersal among the counties thereof, an issue also raised in the challenges asserted in the case *sub judice*. In explanation for the conclusion that the statute at issue in *Heiskell*

> it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.

[15]The parties do not dispute that legislative redistricting plans enacted by the West Virginia Legislature and at issue in this case are within that range articulated by federal standards. . . .

[17]In *Heiskell*, one district was underrepresented by approximately 8% and another district was overrepresented by approximately 8%, with an average percentage population variance of only 4.479%. No violation of equal representation principles was found. . . .

was valid, the district court noted that the county boundary crossing was permissible[18] and that the delegate residency dispersal requirement was also allowed and favored by the West Virginia Attorney General, as counsel for defendant, who explained that the plan would "'assure every geographic area of having a more effective voice in the Legislature.'" . . .

Furthermore, the *Heiskell* court reiterated the restrained role of judicial review of legislative redistricting and concisely articulated that the legislative process of redistricting is a *political* function premised upon innumerable factors. 362 F. Supp. at 317. The *Heiskell* court "noted that a myriad of plans may be presented. Benefits and advantages of a good plan may be lost when another good plan with other benefits and advantages is adopted." *Id*. "The many tangible and intangible factors to be considered in a legislative apportionment plan point to the inevitable conclusion that perfection cannot be attained in a workable plan satisfactory to all areas of our population today and tomorrow." *Id*. The *Heiskell* court concluded that "[t]he record before us does not warrant intrusion on or interference with the judgment and discretion vested in and exercised by the Legislature in the discharge of its legislative responsibility. . . ." . . .

In *Holloway v. Hechler*, 817 F. Supp. 617 (S.D. W.Va. 1992), the United States District Court for the Southern District of West Virginia again addressed constitutional challenges to the West Virginia House of Delegates redistricting plan. The 1991 redistricting plan created twenty-three multi-member delegate districts and thirty-three single-member districts. 817 F. Supp. at 620.[19] The plaintiffs in *Holloway*, like Petitioner Cooper in the present case, contended that the Legislature should have created 100 single-member delegate districts. *Id*. The district court in *Holloway* rejected that contention and stated that multi-member delegate districts have been in existence in West Virginia since 1872 and are not unconstitutional. The court specified that multi-member districts do not offend the concept of equal representation. *Id*. at 624, n.8. The *Holloway* court expounded that "[m]ulti-member districts have been held not to be unconstitutional *per se*." *Id*. at 624 (citing *City of Mobile v. Bolden*, 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980); *Whitcomb v. Chavis*, 403 U.S. 124, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971)). The *Holloway* court further noted the historical significance of the multi-district construct, explaining as follows:

> Moreover, there is Constitutional precedent for the existence of both single-member and multi-member districts in West Virginia. Article 6, sections 8 and 9, of the Constitution of the State of West Virginia, ratified in 1872, established the first delegate districts in the State, all to exist until the next census conducted under the authority of the United States, five of which were multi-member districts, two of them consisting of a single county, and the others consisting of two or more counties, and the remainder of them consisting of single-member districts.

817 F. Supp. at 624, n.8; *see also Simkins v. Gressette*, 631 F.2d 287, 291 (4th Cir. 1980) (finding that "[t]he authorities do not interdict multi-member districts").

The *Holloway* court also addressed the delegate residency dispersal requirement. The court found that multi-member districts in which a member is required to be from a certain portion of the district, referred to as delegate residency dispersal or proviso districts, have been traditionally utilized and have been approved and do not violate the principle of equal representation. 817 F. Supp. at 624-27. In *Holloway*, the district court ultimately concluded that because the population variance from an ideal district did not exceed plus or minus 5%, or a 10% range, the redistricting plan at issue in that

---

[18]The *Heiskell* court also examined the reasoning of the United States Supreme Court in *Mahan v. Howell*, 410 U.S. 315, 93 S. Ct. 979, 35 L. Ed. 2d 320 (1973). In *Mahan*, the Supreme Court had upheld Virginia's House of Delegates redistricting plan which created 52 single member, multi-member, and floater delegate districts, with a maximum percentage population variance of 16.4%. In response to a challenge to the crossing of county boundaries in the redistricting plan, the *Mahan* Court found that Virginia had delineated a specific intent to maintain the integrity of political subdivision lines, a policy "consistently advanced by Virginia as a justification for disparities in population among districts. . . ." 410 U.S. at 329.

case *prima facie* satisfied constitutional equal representation standards. *Id*. at 623. The court also found that a legislature's political goal of attempting to minimize the number of contests between present incumbents is not unconstitutional where the redistricting does not result in "a population malapportionment of unconstitutional magnitude." *Id*. at 628. . . .

In *Deem v. Manchin*, 188 F. Supp. 2d 651 (2002), the United States District Court for the Northern District of West Virginia addressed the 2001 West Virginia State Senate legislative redistricting plan and found that it was constitutionally sound despite the fact that it had a greater than 10% population variance and thus lacked *prima facie* constitutional validity. The *Deem* court explained that "[t]here is a strong policy of deference to state legislatures in devising redistricting plans. Redistricting and reapportioning legislative bodies is a legislative task which [courts] should make every effort *not* to preempt." 188 F. Supp. 2d at 655 (emphasis supplied). The *Deem* court also held that a "redistricting exercise is . . . a balancing process in which one objective must sometimes yield to serve another. This is an exercise peculiarly suited to the give and take of the legislative process. Courts, as a consequence, should be reluctant to substitute their judgment for the legislature's choices." . . .

The extensive precedent analyzing the effect of state constitutional provisions upon legislative redistricting plans demonstrates that the act of redistricting is an inherently political process. Both the complexity in delineating state legislative district boundaries and the political nature of such endeavors necessarily preempt judicial intervention in the absence of a clear, direct, irrefutable constitutional violation. The federal equal protection standards, while not mandating any precise methodology to be utilized by the states in redistricting plans, have articulated one ineluctable prerequisite: where a state legislative redistricting plan results in less than 10% deviation in district populations from the ideal, the plan is not *per se* violative of the principle of equal representation. *Deem*, 188 F. Supp. 2d at 655-56. Furthermore, in the absence of a policy delineated by the Legislature or a constitutional amendment mandating such, this Court will not endeavor to apply a standard more strict than the 10% deviation standard commonly adopted throughout the jurisprudence of this country.[21] As suggested by Respondent Secretary of State in this matter,

> Once the inquiry goes beyond equal representation (and certain other immutable, historically suspect, and objective criteria like race), other authorized or permissible redistricting factors like compactness, community interest, protection of incumbency, partisan advantage, single-member vs. multi-member, political boundary lines, and even contiguity in some instances, are just that -- factors -- that are properly part of the legislative balancing process, but only very rarely if ever can serve as the basis for a successful court challenge to redistricting legislation.

Those factors, while relevant to the political discourse underlying the Legislature's determinations and preeminently fascinating to the political and legal scholar, are within the legislative rather than the judicial domain.

V. Discussion of Specific Challenges to House of Delegates Redistricting

Having thoroughly examined the extensive precedent related to the process of legislative redistricting, this Court first addresses the Petitioners' specific constitutional challenges with regard to HB 201.

A. Adherence to County Boundaries

A central theme throughout Petitioners' challenges to the House redistricting plan is the importance of adherence to county boundaries. Petitioner Cooper contends that the article VI, section 6 requirement that a county containing a population of less than 60% of the ratio of representation be attached to some contiguous county or counties to form a district requires the attachment of a "whole" county to another county or counties. However, the modifier "whole" does not appear in the constitutional provision, and the common law addressing these constitutional provisions, as observed above, does not require the attachment of "whole" counties. *See, e.g., Heiskell*, 362 F. Supp. at 318. Furthermore, there is no authority prohibiting the division of a county into portions and thereafter attaching those portions to contiguous portions of adjacent counties to form delegate districts.

Petitioner Andes[23] contends that support for the argument against splitting counties is found in the United States Supreme Court opinion of *Mahan v. Howell*, 410 U.S. 315 (1975). Indeed, as explained above, although *Mahan* held that a state's adherence to county boundary lines is not unconstitutional, the *Mahan* opinion must be read in the context in which the decision was made. The *Mahan* Court premised its conclusion upon a Virginia *state policy* regarding legislative redistricting. That finding, however, does *not* translate into a mandate that failure to abide by county boundary lines in a redistricting plan renders such plan unconstitutional. The Virginia Legislature had specifically relied upon that policy of intent to maintain the integrity of political boundaries in an attempt to justify its 16.4% deviation from ideal population. The West Virginia Legislature has advanced no such policy and does not, to the knowledge of this Court, have such an intent or policy underlying its redistricting determinations. The *Mahan* Court's approval of a particular Virginia redistricting plan as a rational exercise of the state's intent to apportion districts to maintain the integrity of political subdivision lines does not necessitate implementation of a similarly designed plan in West Virginia, either by legislative determination or edict of this Court.

A system premised upon representation of independent, distinct political subdivisions has been highly favored in some jurisdictions, and a respect for the integrity of county lines has been approved by the courts in multiple cases. The United States Supreme Court, in *Reynolds*, observed that "[s]everal factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained."

> However, permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population. Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-population principle in that legislative body. This would be especially true in a State where the number of counties is large and many of them are sparsely populated, and the number of seats in the legislative body being apportioned does not significantly exceed the number of counties. Such a result, we conclude, would be constitutionally impermissible.

Id. at 581 (footnote omitted).

The West Virginia Legislature is competent to assess the myriad of alternatives available in redistricting decisions and is charged with the duty to do so. If, however, a particular policy is to be advanced in the creation of legislation or in the evaluative process, its genesis is properly within the chambers of the West Virginia Legislature, rather than the chambers of the Supreme Court of Appeals of West Virginia. In the absence of a constitutional prohibition against splitting counties, this Court will not intervene in the political process of the legislative redistricting decisions on this matter.

B. Multi-Member Delegate Districts

Petitioners Cooper and Monroe County Commission also assert that the utilization of multi-member districts should be minimized and that the plan selected by the Legislature is deficient in that regard. Petitioner Cooper contends that his proposed plan is preferable to the plan adopted by the Legislature because it would have eliminated multi-member delegate districts. HB 201, as adopted by the Legislature, includes twenty multi-member delegate districts.

---

[23]Petitioner Andes emphasizes the degree to which Putnam and Mason Counties were divided. Putnam County, with a population of 55,486, was divided among five districts in HB 201, having been divided among only three districts prior to this most recent redistricting. Mason County, with a population of 27,324, was divided between two districts. Petitioner Monroe County Commission also asserts that counties should remain whole when combined with other counties and specifies that Monroe County has a population of 13,502 and is split between two delegate districts under the challenged redistricting plan.

As stated throughout this opinion, the utilization of such districts has existed in the State of West Virginia for almost a century and a half and has withstood numerous constitutional challenges. There is no constitutional, statutory, or other authority prohibiting the utilization of such districts. In fact, as outlined above, several courts addressing redistricting and surrounding issues have specifically approved multi-member districts. *See, e.g., Holloway*, 817 F. Supp. at 624 (finding that multi-member delegate districts are not *per se* unconstitutional).

Petitioners contend that a process utilizing single-member districts has numerous advantages, and indeed, several arguments on this issue have been advanced by scholars nationally. Potential advantages of single-member districting include maintaining communities of interest, respect for local county policies, and geographical compactness. Single-member districts have also been lauded as a method of reducing campaign costs, equalizing the voting process, and increasing accountability to constituents. Again, however, these are inherently political issues to be developed and debated in the legislative realm. The employment of multi-member delegate districts and the splitting of county boundaries in the redistricting process are not *per se* unconstitutional. While single-member districts and adherence to county lines may arguably be preferable from a policy standpoint, this Court will not engage in revision of a legislative decision on redistricting unless constitutional infirmity exists. Simply put, our state constitution does not prohibit a plan containing multi-member delegate districts.

C. Delegate Residency Dispersal Requirement

Petitioner Cooper also asserts that the delegate residency dispersal requirement included in the House of Delegates redistricting plan for District 28, including parts of Monroe, Summers, and Raleigh Counties, is constitutionally impermissible. As noted above, delegate residency dispersal requirements have been a consistent feature of legislative redistricting in West Virginia, have been upheld and have withstood equal protection challenges in numerous cases, and satisfy valid and legitimate constitutional and public policy interests. *See Holloway*, 817 F. Supp. at 627 (holding that delegate residency dispersal requirements do not violate Equal Protection Clause or any other constitutional provision); *Heiskell*, 362 F. Supp. at 320 (rejecting argument that delegate residency dispersal provisions were arbitrarily discriminatory and finding that "[t]he Court cannot say that the Legislature lacked rational reasons and bases for the delegate residency dispersal provisions. . . .").

Petitioner Cooper concedes that the delegate residency dispersal does not violate the Equal Protection Clause. Instead, he relies on this Court's decision in a county board of education case to support the contention of unconstitutionality. In *Sturm v. Henderson*, 176 W.Va. 319, 342 S.E.2d 287 (1986), this Court addressed a statutory residency requirement that provided that no more than two members of a county board of education could be elected from the same magisterial district. This Court found that such limitation violated West Virginia Constitution Article IV, Section 4, as quoted above, by imposing qualifications for holding office that were not prescribed in the constitution.

Immediately after this Court's invalidation of that methodology in *Sturm* and "[i]n apparent response to *Sturm*," an amendment was ratified to explicitly permit the use of residency dispersal requirements in connection with school board elections, thus establishing a public policy permitting utilization of such a mechanism. . . .

Petitioner Cooper, using the *Sturm* rationale, contends that the delegate residency dispersal requirement challenged in the present legislation violates Article IV, Section 4 and Article VI, Section 12, of the West Virginia Constitution [by] imposing requirements in excess of those identified by the constitutional provisions as sufficient to permit a candidate to run for public office. The foundation for invalidation of the excess residency requirements in *Sturm* can be distinguished from the circumstances of this case. Of primary importance, *Sturm* was not a redistricting case, in which judicial deference is to be afforded to the Legislature in the complex balancing tasks and policy considerations inherent in the redistricting process. "We have repeatedly and unequivocally stated that we will not find a statute to be unconstitutional unless its constitutional defect appears

beyond any reasonable doubt." *State v. Legg*, 207 W.Va. 686, 693-94, 536 S.E.2d 110, 117-18 (2000).

The delegate dispersal requirements included in HB 201 serve legitimate public purposes, as noted by Respondent Secretary of State. In her brief, the Secretary explains that the use of delegate residency dispersal is a long-standing practice in West Virginia in multi-member districts and that such dispersal has been repeatedly approved as a valid tool of the legislative process, designed to accomplish the very types of goals Petitioners Cooper and Andes embrace, such as enhancing the potential for residents of a county to elect a delegate from their own county. As noted above, these considerations were addressed by the federal district court in *Heiskell*, quoting from the Attorney General of West Virginia's memorandum submitted in that case, as follows: "'Residency is merely a qualification added by the Legislature in order to assure every geographic area of having a more effective voice in the Legislature. Such a residence requirement has a long well-based history in West Virginia government.'" *Heiskell*, 362 F. Supp. at 320. . . .

D. Gerrymandering

Petitioner Andes asserts that although the United States Supreme Court has not articulated any defined standards for determining the constitutionality of partisan gerrymandering, this Court should find that the challenged legislation in the case *sub judice* constitutes unconstitutional partisan gerrymandering.[29] Racially-motivated gerrymandering has consistently been overturned when utilized in the manipulation of district lines. *See Hunt v. Cromartie*, 526 U.S. 541 (1999) (finding that evidence supported conclusion that state drew lines with impermissible racial motive); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (overturning Alabama's attempt to exclude virtually all of Tuskegee's black population from an election district). The type of partisan or political gerrymandering alleged to be in existence in this case presents more complex issues, and many courts have concluded that the issues are beyond judicial cognizance.[30] In *Gaffney*, for instance, the United States Supreme Court explained: "We have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States." 412 U.S. at 754. The *Gaffney* Court ultimately approved the drawing of a plan for the purpose of equalizing political strengths of two parties. Thereafter, in *Davis v. Bandemer*, 478 U.S. 109 (1986), although a plurality of the United States Supreme Court found that partisan gerrymandering is justiciable, the justices could not agree on an appropriate test for determining whether the partisan gerrymandering was unconstitutional. A majority of the justices agreed that, at the very least, relief may only be available upon a showing of discriminatory effect. . . .

In *Vieth*, the United States Supreme Court examined the precedent concerning gerrymandering,

---

[29]The term "political gerrymander" has been defined as "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength." Black's Law Dictionary 696 (7th ed.1999). Petitioner Andes asserts that the layout of districts in Putnam and Mason Counties appears to be the result of political gerrymandering and an attempt to protect historically Democratic districts while disbanding Republican districts.

[30]The following intriguing history was presented in *Vieth*, as follows:

> The political gerrymander remained alive and well (though not yet known by that name) at the time of the framing. There were allegations that Patrick Henry attempted (unsuccessfully) to gerrymander James Madison out of the First Congress. *See* 2 W. Rives, Life and Times of James Madison 655, n. 1 (reprint 1970); Letter from Thomas Jefferson to William Short, Feb. 9, 1789, reprinted in 5 Works of Thomas Jefferson 451 (P. Ford ed.1904). And in 1812, of course, there occurred the notoriously outrageous political districting in Massachusetts that gave the gerrymander its name--an amalgam of the names of Massachusetts Governor Elbridge Gerry and the creature ("salamander") which the outline of an election district he was credited with forming was thought to resemble. *See* Webster's New International Dictionary 1052 (2d ed.1945).

and the plurality acknowledged that no discernable standards for assessing partisan gerrymandering had emerged, explaining as follows:

> Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandemer* exists. As the following discussion reveals, no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.

541 U.S. at 281. As reflected in the above quote, the *Vieth* plurality would have held that such challenges were simply nonjusticiable political questions, but a majority declined to do so. *Id*. at 306. Thus, as aptly noted by the amici curiae brief of the West Virginia AFL-CIO and West Virginia Citizens Action Group, "the lack of judicially manageable standards has made any challenge to a political gerrymander a political question." . . .

Courts and commentators have uniformly struggled with this amorphous issue and have typically concluded that "partisan gerrymanders are justiciable yet unsolvable." David Schultz, *The Party's Over: Partisan Gerrymandering and the First Amendment*, 36 Cap. U.L.Rev. 1 (Fall 2007); *see, e.g., Kidd v. Cox*, 2006 U.S. Dist. LEXIS 29689, 2006 WL 1341302 at *15 (N.D. Ga. 2006) ("[T]he Court cannot ascertain from the materials submitted what manageable or politically-neutral standards might exist in this case that would make a political gerrymandering dispute based on the Equal Protection Clause justiciable."); *Shapiro v. Berger*, 328 F. Supp. 2d 496, 504 (S.D. N.Y. 2004) (dismissing political gerrymandering claim because Plaintiff had "not suggested any manageable standard under which I could evaluate such a claim if one had been advanced").

Likewise, this Court will not intrude upon the province of the legislative policy determinations to overturn the Legislature's redistricting plan based upon the assertion of partisan gerrymandering. As noted by the plurality in United States Supreme Court in *Bandemer*,

> [T]he mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect representatives of its choice does not render that scheme constitutionally infirm. . . . [A] group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.

478 U.S. at 131-32. Gerrymandering, in and of itself, is not unconstitutional and has clearly been deemed acceptable in legislative redistricting decisions. Lacking any authoritative standard by which to definitively judge such matters and absent compelling evidence that any unconstitutional partisan gerrymandering occurred in this matter, no relief is warranted, and Petitioners' claims of gerrymandering must consequently fail.

VI. Summary of Challenges to Senate Redistricting

Petitioners contend that SB 1006 fails to comport with West Virginia Constitution Article VI, Section 4 insofar as that provision requires senatorial districts to be compact, bounded by county lines and, as nearly as practicable, equal in population.[32] Petitioners also contend that the plan violates West Virginia Constitution Article II, Section 4[.] . . .

VII. Discussion of Challenges to Senate Redistricting

A. Equality in Population

First, we note that the parties agree that SB 1006 satisfies the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which "independently imposes an equal representation requirement on electoral districting." *McClure v. Sec'y of Commonwealth*, 436 Mass.

[32][The Court's footnote 32 quoted West Virginia Constitution Article VI, Section 4 . – Editor]

614, 766 N.E.2d 847, 851 (Mass. 2002) (*citing Reynolds*, 377 U.S. at 577). As referenced above, this Court is mindful that under federal case law, where the maximum population deviation of a state legislative redistricting plan is less than 10%, such plan falls within the category of "'minor deviations from mathematical equality among state legislative districts [which] are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.'" *Brown*, 462 U.S. at 842 (quoting *Gaffney*, 412 U.S. at 745); *see Holloway*, 817 F. Supp. at 623. In this case, the parties agree that the ideal district population in each of the seventeen senatorial districts is 109,000. The parties further agree that under SB 1006, the maximum deviation from the ideal population is 9.998%, which satisfies the constitutional requirements of the Equal Protection Clause.

Even though SB 1006 satisfies federal equal protection requirements, Petitioner Cooper urges this Court to construe our state's equal representation provisions set forth in West Virginia Constitution Article II, Section 4 and Article VI, Section 4 more strictly than federal courts have construed the Equal Protection Clause. *See Pauley v. Kelly*, 162 W.Va. 672, 679, 255 S.E.2d 859, 864 (1979) (stating that "we may interpret our own Constitution to require higher standards of protection than afforded by comparable federal constitutional standards.") . . .

Petitioner Cooper urges this Court to follow the United States Supreme Court's decision of *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), in which the State of Missouri argued that the population variances among the congressional districts created in the state's 1967 congressional redistricting plan were "so small that they should be considered de minimis and for that reason to satisfy the 'as nearly as practicable'[33] limitation and not to require independent justification." *Id*. at 530 (footnote added). Ultimately, the Court in *Kirkpatrick*

> reject[ed] Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered de minimis and to satisfy without question the "as nearly as practicable" standard. The whole thrust of the "as nearly as practicable" approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. The extent to which equality may practicably be achieved may differ from State to State and from district to district. Since "equal representation for equal numbers of people (is) the fundamental goal for the House of Representatives," the "as nearly as practicable" standard requires that the State make a good-faith effort to achieve precise mathematical equality. *See Reynolds v. Sims*, 377 U.S. 533, 577 84 S.Ct. 1362, 1389, 12 L.Ed.2d 506 (1964). Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small."

Kirkpatrick, Id. at 530-31.

Though Petitioner Cooper seeks to have this Court adopt the reasoning of the United States Supreme Court in *Kirkpatrick* with respect to how West Virginia Constitution Article II, Section 4 and Article VI, Section 4 should be construed, we are not compelled to do so. *Kirkpatrick* involved judicial review of a United States congressional redistricting plan and not that of one or more state legislative bodies as is the case now before this Court. This distinction is not insignificant and was explained in *Karcher v. Daggett*, 462 U.S. 725, 732-33 (1983). In *Karcher*, a congressional redistricting case, the United States Supreme Court specifically noted the rigorous equal population standards of both *Wesberry* and *Kirkpatrick* as applicable to congressional redistricting plans, but not to state redistricting plans. The *Karcher* Court stated that under *Wesberry* and *Kirkpatrick*, "we have required that absolute population equality be the paramount objective of apportionment only in the case of congressional districts, for which the command of Art. I, § 2, as regards the national legislature outweighs the local interests that a State may deem relevant in apportioning districts for representatives to state and local legislatures . . . [.]" 462 U.S. at 732 (emphasis added).

Moreover, in *Brown*, the United States Supreme Court explained that a maximum population deviation of a state legislative redistricting plan of less than 10%, *prima facie*, satisfies the Equal Protection Clause because "some deviations from population equality may be necessary to permit

the States to pursue other legitimate objectives such as 'maintain[ing] the integrity of various political subdivisions' and 'provid[ing] for compact districts of contiguous territory.'" 462 U.S. at 842 (quoting *Reynolds*, 377 U.S. at 578). The *Brown* Court further recognized that "'[a]n unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.'" *Brown*, 462 U.S. at 842 (quoting *Gaffney*, 412 U.S. at 749 and emphasis added); *see also Mahan*, 410 U.S. at 327 (observing that strict population equality rule which applied to congressional redistricting plans did not apply to plans redistricting state legislatures.)

As indicated above, SB 1006 specifically states that "[t]he Legislature finds and declares that it is not possible to divide the state into senatorial districts so as to achieve equality of population as near as is practicable as required by the United States Supreme Court and other federal courts" while also comporting with the state constitutional provisions requiring, in relevant part, senatorial districts to be compact, contiguous in territory and bounded by county lines. W.Va. Code § 1-2-1. Thus, "in an effort to adhere as closely as possible to" the applicable provisions of the state constitution, the Legislature, in redrawing the senatorial district lines, has "[a]dhered to the equality of population concept, while at the same time recognizing . . . political subdivision lines" and further recognizing the fact that government "functions, policies and programs of government have been implemented along" such lines; "[m]ade the senatorial districts as compact as possible, consistent with the equality of population concept;" and "[f]ormed the senatorial districts of 'contiguous territory.'" *Id*.; *see Deem*,188 F. Supp. 2d at 656. Other stated policy interests identified in SB 1006 as part of the Legislature's effort to achieve equality of population while also adhering to the requirements of our state constitution include that the plan at issue deviated from political subdivision lines by crossing county lines when necessary to ensure all districts "were formed of contiguous territory or when adherence to county lines produced unacceptable population inequalities and only to the extent necessary in order to maintain contiguity of territory and to achieve acceptable equality of population;" the Legislature also took into account in crossing county lines, "the community of interests of the people involved." *See* W.Va. Code § 1-2-1; *see Deem*, 188 F. Supp.2d at 656. Still, it must be acknowledged that the foregoing policy interests articulated by the Legislature in SB 1006

> will not always be consistent. In some circumstances, they will compete. The redistricting exercise is therefore a balancing process in which one objective must sometimes yield to serve another. This is an exercise peculiarly suited to the give and take of the legislative process. Courts, as a consequence, should be reluctant to substitute their judgment for the legislature's choices.

Id. at 657.

In *Deem*, the policy interests set forth by the Legislature in the senatorial redistricting plan then at issue were virtually identical to those set forth in SB 1006 and described above. As previously discussed, in *Deem*, the maximum deviation from the ideal population was 10.92%, which exceeded the 10% maximum deviation permissible to be *prima facie* constitutional under equal protection. Thus, the respondents therein were required to demonstrate that the redistricting plan "'may reasonably be said to advance' consistently applied, rational and legitimate state policies." *Deem*, 188 F. Supp. 2d at 656 (quoting *Mahan*, 410 U.S. at 328). The court in *Deem* ultimately upheld the plan, stating that its

> inquiry is limited to whether *this* plan meets the constitutional requirements. Our quest is not to find the best plan, but rather to assess the constitutionality of the plan the legislature has chosen. Here, the deviation from the ideal exceeds only slightly 10%. The legislature has adopted five rational and legitimate policy goals to justify a deviation in excess of 10%. In many respects these goals are competing and must be balanced by the legislature. We cannot conclude from the facts of this case that, in this balancing process, the legislature has failed to meet the requirement that the policies be consistently applied.

Deem, 188 F. Supp. 2d at 658.

As already established, the present Senate redistricting plan (unlike the plan at issue in *Deem*) does not exceed the 10% maximum population deviation and, thus, satisfies federal equal protection requirements. Moreover, in the case of SB 1006, its stated policy interests clearly illustrate the balancing exercise necessarily conducted by the Legislature in formulating the parameters of each district, a fact not seriously challenged by Petitioners.

In contrast, Petitioner Cooper's proposed plan emphasizes raw population figures, "a mere nose count in the districts," without due consideration of "factors that in day-to-day operations are important to an acceptable representation and apportionment arrangement." *Brown*, 462 U.S. at 842. Simply put, Petitioner Cooper's mechanistic approach did not involve any legislative "give and take." *Deem*, 188 F. Supp. 2d at 657. "While population is the basic factor to be considered in a legislative apportionment plan, other factors are to be examined and weighed." *Heiskell*, 362 F. Supp. at 317. The *Heiskell* court also recognized that there are "many tangible and intangible factors to be considered in a legislative apportionment plan[.]" *Id*. Thus, although Petitioner Cooper's proposed plan may deviate from the ideal population to a lesser degree than SB 1006, the fact that another possibly valid plan may exist does not compel a finding by this Court that the Legislature's chosen plan is unconstitutional.

As previously stated in the discussion of HB 201, this Court is unwilling to disavow the "strong policy of deference to state legislatures in devising redistricting plans. Redistricting and reapportioning legislative bodies [are] a legislative task which . . . courts should make every effort not to preempt. State policies and state preferences are for a state's elected representatives to decide[,]" and courts should not intercede unless there is a direct constitutional violation. *Deem*, 188 F. Supp. 2d at 655 (internal citations omitted)

Accordingly, we find no merit in Petitioners' argument that SB 1006 violates the equality in population provisions of West Virginia Constitution Article II, Section 4 and Article VI, Section 4.

B. County Line Boundaries

Second, Petitioners contend that SB 1006 unjustifiably divides thirteen counties between and among the seventeen senatorial districts and also improperly divides thirty-seven of the state's 1,856 existing election precincts. According to Petitioners, the plan's division of counties and existing election precincts violates West Virginia Constitution Article VI, Section 4, which provides that senatorial districts shall be, *inter alia*, "bounded by county lines." Petitioner Cooper points out that under his proposed plan, no existing election precincts are divided and, furthermore, although his plan divides seven counties in order to achieve acceptable equality in population, the fact that it divides fewer counties than does SB 1006 proves that the Legislature unnecessarily violated the "bounded by county lines" requirement of West Virginia Constitution Article VI, Section 4.

In response, Respondent Secretary contends that a strict adherence to county boundary lines does not supersede all other factors to be considered during the legislative process. Indeed, as previously discussed, with regard to state legislative redistricting following the previous census in 2000, the court in *Deem* stressed that the policy goals of a redistricting plan will "not always be consistent[] [and] [i]n some circumstances they will compete. The redistricting exercise is therefore a balancing process in which one objective must sometimes yield to serve another." 188 F. Supp. 2d at 657. As an "exercise peculiarly suited to the give and take of the legislative process[,]" this Court is reluctant to substitute its judgment for a plan duly chosen by the Legislature. *Id*. According to SB 1006's own stated policy interests, the Legislature crossed county boundary lines "when necessary to ensure that all senatorial districts were formed of contiguous territory or when adherence to county lines produced unacceptable population inequalities and only to the extent necessary in order to maintain contiguity of territory and to achieve acceptable equality of population[.]" W.Va. Code § 1-2-1(c)(4). The Legislature "[a]lso [took] into account in crossing county lines, to the extent feasible, the community of interests of the people involved." W.Va. Code § 1-2-1(c)(5). With no evidence before this Court indicating otherwise, we are constrained to duly consider the legislation's stated policy

interests as "the most reliable source of legislative intent." [*Deem*.]

We conclude, therefore, that Petitioners' contention that SB 1006, insofar as it divides certain election precincts and crossed county boundary lines, violates West Virginia Constitution Article VI, Section 4, is without merit.[38]

C. Compactness

Finally, Petitioners argue that the portion of SB 1006 that establishes senatorial districts 2, 6 and 12 violates the compactness requirement of West Virginia Constitution Article VI, Section 4 because these districts are, each in its own way, elongated[39] and, therefore, not "compact."

In *Stone v. Hechler*, the district court addressed the constitutionality of a congressional redistricting plan enacted following the 1990 census. 782 F. Supp. at 1118. In considering whether the plan was constitutional even though it deviated from the standard of population equality established in *Karcher*, the district court in *Stone* found that legislators who advocated certain proposed redistricting plans were concerned, among other things, with achieving compactness.[41] 782 F. Supp. at 1121. A discussion of the compactness issue as addressed in *Stone* is highly instructive.

With regard to congressional redistricting, the district court in *Stone* astutely recognized that "[t]he West Virginia Constitution does not define compactness but imposes upon the State Legislature the obligation to consider it as a principal factor in apportioning congressional districts." 782 F. Supp. at 1127-28. This is equally true with regard to the constitutional compactness requirement applied to senatorial redistricting. The *Stone* court also recognized that the "[p]hysical characteristics of West Virginia are significant to the determination of compactness issues." *Id*. at 1123. Indeed, the court took "judicial notice of [*inter alia*] the State's unique geographical configurations[,]" specifically the "two narrow panhandles[,]" one of which "extends between the borders of Ohio and Pennsylvania" and the other as "bordered by Maryland and Virginia." *Id*. The court further noted that "[t]his is compounded, of course, by the irregular boundaries of counties within the State, which are largely determined by rivers and mountain ranges." *Id*. As recognized in *Stone*, the "State's unique geographical configurations" and "the irregular boundaries of counties" therein must be considered along with the constitutional requirements that "districts be drawn with

---

[38]We also acknowledge Petitioner Callen's contention that when Monongalia County's three senatorial districts were redrawn under SB 1006, it resulted in the division of several election precincts, including those of two specifically-identified House of Delegate members. Petitioner Callen avers that the election precincts of these delegates were divided by essentially "encircling" their respective residences and thereby moving one of the identified delegates from Senate District 14 into Senate District 13 and the other from Senate District 13 into Senate District 2, all in an effort to remove them as potential senatorial candidates in Districts 13 and 14. According to Petitioner Callen, the redrawing of the aforementioned senatorial district lines in the manner described creates a presumption that the Legislature intentionally divided these delegates' precincts and that, presumably, the thirty-five other election precincts divided under SB 1006 were also intentionally split. Petitioner Callen argues that in intentionally dividing election precincts, SB 1006 -- stating, *inter alia*, that it "requir[es] incidental precinct boundary changes" -- is inconsistent with the legislation's *intentional* division of precincts. For this reason, Petitioner Callen argues, SB 1006 is unconstitutional.

Other than submitting maps purportedly showing that the election precincts of the two delegates were divided near their respective residences, Petitioner Callen offers no evidence in support of his contention that the precinct divisions were intentionally drawn so as to preclude these delegates from participating as candidates in future senatorial elections. Petitioner Callen's bare allegations are simply not sufficient to prove an improper motive on the part of the Legislature.

[39]Senate District 2, under SB 1006, includes the counties of Calhoun, Doddridge, Ritchie, Tyler and Wetzel each in its entirety, as well as portions of Gilmer, Marion, Marshall and Monongalia Counties. Senate District 6 is comprised of all of Mercer County and portions of McDowell, Mingo and Wayne Counties. Senate District 12 consists of all of Braxton, Clay, Harrison and Lewis Counties, and a portion of Gilmer County.

[41]In *Stone*, the court also found that legislators were also concerned "with preserving as much as possible the cores of the existing four districts as they were reduced to three." 782 F. Supp. at 1121.

adherence to county lines[,]" *Id*., and, we add, along with the other constitutional requirements that districts be contiguous in territory and equal in population as nearly as practicable. *See* W.Va. Const. art. II, § 4 and art. VI, § 4.

Petitioner Cooper avers that Senate Districts 2, 6 and 12 as formulated under his proposed plan are more compact than those districts as provided for in SB 1006. However, this Court will not consider Senate Districts 2, 6 and 12 in isolation; rather, those districts and the other fourteen senatorial districts provided for in SB 1006 all are the result of a legislative balancing process to which this Court is inclined to defer, absent evidence of impropriety beyond reasonable doubt. . . . *See Gainer*, at syl. pt. 1, in part, 149 W.Va. at 746, 143 S.E.2d at 353 ("Courts are not concerned with questions relating to legislative policy. . . . In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.")[.] . . .

In the present case, whether Senate Districts 2, 6 and 12 might have been drawn to be more geometrically compact is not for this Court to decide. There is a presumption of constitutionality with regard to SB 1006, including the relative compactness of all of the senatorial districts. The shapes of the districts were crafted as a result of the legislative process, which involved the balancing of various concerns. We, therefore, conclude that Senate Districts 2, 6 and 12 do not violate the compactness requirement of West Virginia Constitution Article VI, Section 4.[42]

VIII. Conclusion

In the absence of constitutional infirmity, as the precedent evaluated above irrefutably establishes, the development and implementation of a legislative redistricting plan in the State of West Virginia are entirely within the province of the Legislature.[43] The role of this Court is limited to a determination of whether the Legislature's actions have violated the West Virginia Constitution. Upon thorough review of this matter, this Court concludes that the West Virginia House of Delegates redistricting statute, West Virginia Code, § 1-2-2 (2011), as amended by House Bill 201, adopted by the West Virginia Legislature, effective August 21, 2011, is constitutional. Furthermore, the West Virginia Senate redistricting statute, West Virginia Code § 1-2-1 (2011), as amended by Senate Bill 1006, adopted by the West Virginia Legislature, effective August 5, 2011, is constitutional.

While Petitioner Cooper's proposed redistricting plan may also satisfy constitutional criteria, that is not the issue before this Court. It is the West Virginia Legislature that is charged with the responsibility for selecting among the infinite number of geographical divisions which would satisfy constitutional requirements. In any examination of a legislative determination, it must be acknowledged that reasonable minds may differ upon such complex issues as the designation of legislative districts, and competing policy considerations may enter the fray. However, the policy choices of those elected to the judicial branch provide no legitimate basis for concluding that a statute is unconstitutional. . . . The only role of the Supreme Court of Appeals of West Virginia in determining whether a state legislative redistricting plan is constitutional is to assess the validity of

---

[42]We note that in *Stone*, the district court had the benefit of, among other things, expert witness opinions regarding the best way to calculate and measure the compactness of the congressional districts in the challenged plan and in other viable plans submitted to the Legislature. 782 F. Supp. at 1122. Both experts in that case "generally agreed that compactness, a relative measure, is difficult to achieve in West Virginia[.]" *Id*. In *Stone*, Petitioner Cooper, who is a political cartographer, testified via affidavit as an expert witness on the issue of compactness and, as in the present case, argued that the best compactness test is the so-called Reock test, which he describes herein as involving the division of the area of a district by the area of the smallest circle that circumscribes that district. If a perimeter of a district is itself a circle, the district would have a score of 1.00. In the present case, Petitioner Cooper argues that under the Reock test, Senate Districts 2, 6 and 12, as they are currently drawn, are not compact. We note, however, that in *Stone*, the district court pointed out that "the creator of the Reock test. . . has acknowledged that such geographical measure may not be probative in determining compactness in states with unusual boundary configurations." 782 F. Supp. at 1127 (footnote and citation omitted). Whether, as Respondent Secretary contends, it is therefore untenable for Petitioner Cooper to claim that his proposed Senate Districts 2, 6 and 12 are, under the Reock test, more compact than the present configuration of those districts under SB 1006, we need not now decide.

the particular plan adopted by the Legislature under both federal and state constitutional principles, rather than to ascertain whether a better plan could have been designed and adopted.

The members of the Legislature elected by the people of this state are assigned the political function of weighing the various factors and considering the multitude of acceptable goals for redistricting. The only mechanism available to this Court for overturning that decision is a finding that the legislative choice is violative of a clearly enunciated constitutional provision.[44] Because the West Virginia Constitution is a restriction of power rather than a grant of power, the Legislature may enact any statute which is not specifically prohibited by constitutional provision.

As the *Heiskell* court aptly concluded in its assessment of challenges to the constitutionality of a redistricting plan, "[a]nother legislature at another time might arrange and compose the delegate districts differently." 362 F. Supp. at 323. "The Court, if obliged to modify the present plan or to compose and effectuate a new plan, might well find logical and substantial reasons for making changes in the districts." *Id*. While "myriads of plans can be conceived and pondered and discussed," it is the duty of this Court to examine *the particular plan* enacted by the Legislature to determine whether it withstands constitutional scrutiny. *Id*. "Many suggested plans may have merit and constitutional and political appeal, but the rejection of one plan in favor of another may bring into play new factors and problems with consequent improprieties and imbalances provoking new and different challenges of validity and constitutionality." *Id*.

As Chief Justice Marshall eloquently stated two centuries ago, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803). However, "[s]ometimes . . . the law is that the judicial department has no business entertaining [a] claim of unlawfulness--because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth*, 541 U.S. at 277 (citations omitted). In the case *sub judice*, this Court finds the redistricting plans for the House of Delegates and the Senate are securely within the realm of the constitutional mandates. Accordingly, this Court denies the requested writs of mandamus and prohibition.

Benjamin, J., dissenting, in part:

In its decision, the Majority finds no constitutional violations in either of our Legislature's new redistricting plans. Though I have lingering concerns about our westernmost senatorial district which extends from Mingo County to Mercer County, when viewed as a whole I do not disagree with the Majority that the redistricting plan for the Senate, which creates only multi-member districts with two representatives from each district, satisfies minimum constitutional requirements. No matter where a voter may be in West Virginia, he or she has two, and only two, state senators.

However, I disagree with the majority's holding that the redistricting plan for the House of Delegates, which creates a strange mix of multi-member and single member districts, is constitutional. This particular mix of single and multi-member district representation in the House of Delegates – forty-seven single-member and twenty multi-member districts – impermissibly degrades the influence which a citizen may have *vis-a-vis* citizens elsewhere in the State. In my view, this mix of single and multi-member districts is constitutionally unacceptable.

Although not required by the federal Constitution, our state constitution requires that West

---

[44]Another clearly available alternative is a constitutional amendment. An amendment could be proposed stating that the Legislature must adhere to county boundaries while dividing this state into delegate districts or must allow each county to remain whole if a county is to be attached to another county or counties. A related proposal was considered subsequent to the 1960 census. A constitutional amendment, commonly termed the "Fair Representation Amendment," would have provided that every county, regardless of its population, is entitled to at least one delegate in the House of Delegates. In 1962, the West Virginia voters rejected this amendment by a vote of 176,562 to 287,957. Whether this would have withstood constitutional challenge is a question not currently before this Court.

Virginians be afforded equal representation in the state's government: "Every citizen shall be entitled to equal representation in the government, and, in all apportionments of representation, equality of numbers of those entitled thereto, shall as far as practicable, be preserved." W. Va. Const. art. 2, § 4. Tied into the requirement of equal representation is the "one person, one vote" standard. When a person is not adequately represented in the government, his vote in electing the official(s) who represent(s) him or her counts for less. In other words, the person's vote is diluted. The concept of a representative democracy is degraded. . . .

The theory of vote dilution is rooted in the premise that "voting" involves more than just casting a vote. Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 Harv. L. Rev. 1663, 1677 (2001). It recognizes that a voter's representation and voice in government is limited if his vote counts for less than his neighbor's. "Under the structure of our representative system, an individual has the best chance of influencing the political process when she acts as part of a cohesive voting group that can cast its weight behind" a particular candidate or issue. *Id*. at 1678. In West Virginia, the most logical grouping is the county in which one lives. When some groups are given an opportunity to aggregate their votes in an effective way while others are not, the votes of those who cannot aggregate their votes are diluted. When dilution is so great that a citizen's vote does not effectively count, that person has effectively lost the benefit of his right to vote.

Admittedly, it is difficult to design districts so that no vote dilution is ever present because there are many different factors that come into play, such as population, contiguity, compactness, race, preservation of communities of interest, and geography. The factor the United States Supreme Court has declared the touchstone for redistricting is population. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964)[.] The legislature is required to design districts of approximately equal population as practically as possible. *Id*. Although population is the primary consideration in developing a redistricting plan, the Legislature may not disregard all other factors. *Goines v. Heiskell*, 362 F. Supp. 313, 317 (S.D. W. Va. 1973).

The redistricting plan for the House of Delegates has a maximum population variance of 9.99%. While this maximum population variance is within acceptable bounds denoted by the federal courts, the plan fails to adequately accommodate certain communities and counties. For instance, the redistricting plan splits the population of Kanawha County among seven districts. Of those seven districts, five districts 35, 36, 37, 39, and 40--are completely within Kanawha County, and ten delegates are distributed among each of those five. Mason County, on the other hand, is split between two districts--districts 13 and 14. Three delegates are dedicated to these two districts, and none of these delegates is dedicated to only Mason County. The residents of Mason County are not currently represented in the House of Delegates by a delegate from Mason County; all three of the delegates from these two districts are residents of Putnam County (which is a more populous county).

Under the redistricting plan, the residents of Mason County are not guaranteed to ever be represented by a delegate that is a resident of that county. Residents of Kanawha County, however, can aggregate their votes through at least ten delegates who are residents of Kanawha County. The voters in Kanawha County dilute the voting power of Mason County voters. Depending on election outcomes, Mason County may yet attain a resident delegate, but even if it does, the voting power of Mason County's residents will be at maximum 30% of the voting power of Kanawha County's residents. I find that this discrepancy is incongruent with the "one person, one vote" standard annunciated in *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963). Therefore, the redistricting plan for the House of Delegates violates the right to equal representation provided by W. Va. Const. art. 2, § 4.

For this reason, I respectfully dissent.

C. Eligibility for Legislative Office

Read Article VI, §§ 12-15

WHITE v. MANCHIN,
173 W. Va. 526, 318 S.E.2d 470 (1984).

McGRAW, Justice

These two original proceedings in mandamus, consolidated for preparation of this opinion, involve challenges to the qualifications of two candidates for nomination to the office of state senator. Each requires interpretation of West Virginia Constitution art. VI, § 12, which provides, in pertinent part, that "No person shall be a senator . . . . who has not for one year next preceding his election, been a resident of the district or county from which he is elected . . . ." There are primarily three issues involved in the interpretation of this constitutional durational residency requirement. First, whether mandamus is appropriate to enforce the provisions of West Virginia Constitution art. VI, § 12. Second, whether the respondent candidates are residents of the senatorial district and the county they respectively seek to represent. Finally, whether the respondent candidates will have been residents of the senatorial district and the county they respectively seek to represent for one year prior to the November general election.

In the first mandamus action, the petitioners are residents of and registered voters in the 14th Senatorial District, which is composed of parts of Marion and Monongalia Counties. . . . Respondent A. James Manchin is Secretary of State and "chief election official of the State." . . . Respondent Joe Manchin III [hereinafter "candidate Manchin"] is currently Delegate to the West Virginia Legislature from the 31st Delegate District and has filed a certificate declaring himself a candidate for nomination on the Democratic Party ticket to the office of state senator from the 14th Senatorial District. [The remaining respondents are the Ballot Commissioners of Monogalia and Marion Counties.]

In the second mandamus action, the petitioners are residents of and registered voters in the 5th Senatorial District, which is composed of parts of Cabell and Wayne Counties. . . . Respondent Charles M. Polan, Jr. [hereinafter "candidate Polan"] is currently Delegate to the West Virginia Legislature from the 13th Delegate District and has filed a certificate declaring himself a candidate for nomination on the Democratic Party ticket to the office of state senator from the 5th Senatorial District. [Respondents are A. James Manchin and the Ballot Commissioners of Cabell and Wayne Counties.]

The petitioners in these mandamus actions seek to compel the respondent Secretary of State to withdraw certification of the respondent candidates' candidacies and to compel the respondent ballot commissioners to omit or strike the names of the respondent candidates from the official Democratic Party primary election ballot to be used on June 5, 1984.

In the mandamus action against candidate Manchin, the petitioners contend that he is not a resident of the 14th Senatorial District and that he is therefore ineligible to be elected to or to hold the office of state senator from that district under West Virginia Constitution art. VI, § 12. They further contend that candidate Manchin will not have been a resident of the 14th Senatorial District for one year prior to the November general election and that he is therefore also ineligible under the one year durational residency requirement of that same constitutional provision. Both of these assertions are supported by affidavits and other evidence submitted by the petitioners.[2]

---

[2]A total of five affidavits were submitted in support of the assertions that candidate Manchin is not a resident of the 14th Senatorial District and that he will not have been a resident for one year prior to the November general election. Two affidavits, submitted by candidate Manchin's neighbors, indicate that candidate Manchin, along with his wife and children, currently resides in a house located on Colfax Road in an area of Marion County known as Whitehall, which

In the mandamus action against candidate Polan, another constitutional provision in addition to West Virginia Constitution art. VI, § 12 is involved. West Virginia Constitution art. VI, § 4 provides that "Every district shall elect two senators, but, where the district is composed of more than one county, both shall not be chosen from the same county." Because the other state senate seat in the 5th Senatorial District is currently held by the Honorable Robert Nelson, whose present term will expire in 1986, and who resides in Cabell County, the state constitution requires that the state senator to be elected this year to represent the 5th Senatorial District reside in Wayne County. The petitioners contend that candidate Polan is not a resident of Wayne County and that he is therefore ineligible to be elected to or hold the office of state senator from that district. In addition, the petitioners contend that candidate Polan will not have been a resident of Wayne County for one year prior to the November general election. Both of these assertions are supported by affidavits and other evidence submitted by the petitioners.

I

In Syllabus Point 5 of State ex rel. Maloney v. McCartney, 159 W. Va. 513, 223 S.E.2d 607 [(1976)], this Court stated:

> In West Virginia a special form of mandamus exists to test the eligibility to office of a candidate in either a primary or general election. The proper party respondent in such special action in mandamus is the Secretary of State of the State of West Virginia in the case of an office to be filled by the voters of more than one county or the clerk of the circuit court in the case of an office to be filled by the voters of one county, and this action in mandamus, being a special creation of the evolving common law, is ripe for prosecution immediately upon a candidate's filing of his certificate of candidacy. . . .

This special form of mandamus is found in West Virginia Code § 3-1-45[,] which provides that, "Any officer or person, upon whom any duty is devolved by [Chapter Three of the Code], may be compelled to perform the same by writ of mandamus." This statute further provides that, "A mandamus shall lie from the supreme court of appeals . . . . to compel any official herein to do and perform legally any duty herein required of him." . . . Therefore, not only is the Secretary of State a proper party respondent, but the respondent ballot commissioners are also proper party respondents. . . .

In Syllabus Point 6 of State ex rel. Maloney v. McCartney, supra, this Court also made clear that it is proper to name the individual candidate, the real party in interest, as a party respondent in an election mandamus action[.]

... [As to] petitioners' standing to bring these election mandamus actions, this Court held in Syllabus Point 1 of State ex rel. Pack v. Karnes, 83 W. Va. 14, 97 S.E. 302 (1918), overruled on other grounds, Syl. pt. 12, State ex rel. Booth v. Board of Ballot Comm'rs, 156 W. Va. 657, 196 S.E.2d 299 (1973), that "A citizen, tax payer or voter has such interest as entitles him to maintain mandamus to compel a board of ballot commissioners to discharge their duties lawfully[.]" . . . The same principle applies when the Secretary of State is also named a party respondent. The respondent candidates do not challenge the standing of the petitioners to bring these election mandamus actions.

---

is situated in the 13th Senatorial District. One affidavit, submitted by the teacher of one of candidate Manchin's children, indicates that the child resides with her family at this house on Colfax Road. A fourth affidavit, submitted by a person who visited a house apparently owned by candidate Manchin in Farmington, which is located in the 14th Senatorial District, states that candidate Manchin's aunt, and not candidate Manchin, resides in this house. Finally, in an affidavit submitted by a person who searched the public records of Marion County, various indicia of candidate Manchin's nonresidency in the 14th Senatorial District are noted, including the fact that the only personal telephone listing for candidate Manchin is under his Colfax Road address. In addition to these five affidavits, the petitioners verify the accuracy of factual statements contained within their petition for a writ of mandamus which indicate that candidate Manchin does not reside in the 14th Senatorial District, but rather in the house located on Colfax Road in the 13th Senatorial District.

As previously noted, election mandamus is a special creation of the Legislature involving fundamental interests not ordinarily found in other types of mandamus actions. For example, in [State ex rel. Maloney v. McCartney], this Court stated:

> A consistent line of decisions of this Court during the last fifteen years clearly recognizes that the intelligent and meaningful exercise of the franchise requires some method of averting a void or voidable election. Consequently this Court has recognized that some form of proceeding must be available by which interested parties may challenge in advance of a primary or general election the eligibility of questionable candidates in order to assure that elections will not become a mockery. ...

This Court has also recognized that the unique interests implicated in election mandamus actions require a unique approach to their disposition. For example, in Syllabus Point 2 of State ex rel. Bromelow v. Daniel, 163 W. Va. 532, 258 S.E.2d 119 (1979), this Court stated, "Because there is an important public policy interest in determining the qualifications of candidates in advance of an election, this Court does not hold an election mandamus proceeding to the same degree of procedural vigor as an ordinary mandamus case." . . . With this perspective on the nature of election mandamus, we now address the candidates' contentions as to the appropriateness of mandamus in these cases.

The respondent candidates advance three objections to the utilization of election mandamus in these cases. First, they contend that mandamus should have first been sought in circuit court. Second, they assert that the availability of post-primary relief provides an adequate alternative remedy. Finally, they maintain that these actions are barred by the equitable doctrine of laches. ...

[The Court rejected each of the respondents' arguments and held that a mandamus action in the Supreme Court was appropriate in this case.]

II

The second major issue raised in these mandamus actions is whether the respondent candidates are residents of the senatorial district and the county they respectively seek to represent under West Virginia Constitution art. VI, § 12, which provides that "No person shall be a senator . . . . who has not for one year next preceding his election, been a resident of the district or county from which he is elected." Prior to our discussion of the meaning of the term "resident" within the context of this constitutional provision, we will first address the respective candidates' varying interpretations of the phrase "district or county."

Emphasizing the inclusion of the word "county," candidate Manchin, who allegedly resides in the 13th Senatorial District section of Marion County, contends that senators need not actually reside in the senatorial district they represent, as long as they reside in a county of which a section is contained within that senatorial district. On the other hand, emphasizing the inclusion of the word "district," Candidate Polan, who allegedly resides in Cabell County, contends that senators need not actually reside in the county they represent under West Virginia Constitution art. VI, § 4, as long as they reside in the senatorial district. We reject both interpretations.

In Howard v. Ferguson, 116 W. Va. 362, 367, 180 S.E. 529, 531 (1935), this Court held that "constitutional provisions in pari materia must . . . be read together." ...

Reading West Virginia Constitution art. VI, § 12, which provides that "No person shall be a senator . . . . who has not for one year next preceding his election, been a resident of the district or county from which he is elected," in pari material with West Virginia Constitution art. VI, § 4, which provides that "where the [senatorial] district is composed of more than one county, both [senators] shall not be chosen from the same county," it is plain and unambiguous that senators representing senatorial districts composed of more than one county must be residents of both the county and the district from which they are elected. The key language in West Virginia Constitution art. VI, § 12 is "from which he is elected." The key language in West Virginia Constitution art. VI, § 4 is "from the same county." Senators representing single county senatorial districts are elected "from" the district. Senators representing multi-county senatorial districts are elected "from" one of the counties within the district. If state senators were not required to reside in the senatorial district they represent

as long as they reside in a county of which a section is contained within that senatorial district, the lines dividing particular counties into different senatorial districts would be rendered meaningless. Similarly, if state senators were not required to reside in the county they represent as long as they resided in the senatorial district, West Virginia Constitution art. VI, § 4 would be rendered meaningless.

The above construction of West Virginia Constitution art. VI, §§ 4 and 12 is supported by the constitutional debates surrounding the adoption of predecessor provisions. Much of the debate as to both provisions centered on ensuring adequate representation for all portions of the state. For example, in expressing concern over the creation of multi-county senatorial districts, Delegate James H. Brown of Kanawha County stated:

> You find large portions of our section of the State have received no advantages. We find this section of the State that has the population -- the small section containing the political power of the State -- with railroads running through it. [. . .] [B]y reason of the railroads these counties have grown rich and populous. Now they have got the whole power of the State in their hands and the proposal is to keep it there. Now, here are other counties that need some aid; and the question is, will you adopt a system that will attach those counties to each of the larger counties and put them in their control? I oppose; I vote not. [. . .]

2 DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CON-VENTION OF WEST VIRGINIA [168]. Similarly, in support of the proposed provision limiting a county to a single senator, Delegate E.B. Hall of Marion County stated, "There is great propriety in the provision that is sought to be incorporated here with a view to have representation from the different localities in order to represent local interest and prevent the stronger counties overpowering the weaker and monopolizing . . . ."

This concern with the adequate representation of local interests is also reflected in the debates surrounding adoption of the one year durational residency requirement found in West Virginia Constitution art. VI, § 12. For example, in support of a proposed two year durational residency requirement, Delegate E.B. Hall of Marion County stated:

> I think people ought to know long, well and thoroughly the men they entrust their interest to in any of these public capacities. We know that in the very nature of the people of the country, every honest man thinks because he is honest everybody else is honest. A man approaches him is plausible, loves him and loves his children, kisses them all--and the wife too perhaps--palavers, and reaches them by a means that no man who is fit for a position would resort to. Yet that is the common machinery by which men attain positions or office. Now, sir, I want to be rid of it. I wish we could incorporate a clause that no man who ever seeks office should have it; and let offices seek men, and not men seek offices. I want to put a barrier up to these traveling politicians, and this is the very thing that will do it. Many a man can run very well for thirty days or for one year who could not stand the test of two years acquaintance to save him; and I want every man to be tried and to be known[.] [. . .]

1 DEBATES AND PROCEEDINGS OF THE FIRST CONSTITUTIONAL CONVENTION OF WEST VIRGINIA 789-90 (1861-1863). ...

Turning to the issue of the meaning of the term "resident" as used in West Virginia Constitution art. VI, § 12, we note initially that in West Virginia, the term "residence" is synonymous with the term "domicile" for election law purposes. See Irons v. Fry, 129 W. Va. 284, 40 S.E.2d 340, 343 (1946). . . . Similarly, this Court has used the terms "residence" and "domicile" interchangeably in the probate and domestic relations contexts.

Recently, in Syllabus Point 1 of Lotz v. Atamaniuk, [304 S.E.2d 20 (W. Va. 1983)], this Court defined "domicile" as follows: "Domicile is a combination of residence (or presence) and an intention of remaining." . . . Similarly, in State ex rel. Linger v. County Court, 150 W. Va. at 227, 144 S.E.2d at 702-03, quoting 77 C.J.S. Residence 295 (1952), in the context of a divorce proceeding, this Court stated:

> "Two fundamental elements are essential to create a residence, and these elements are: (1) Bodily presence in a place. (2) The intention of remaining in that place. Residence is thus made up of fact and intention, the fact of abode and the intention of remaining, and is a combination of acts and intention. Neither bodily presence nor intention alone will suffice to create a residence. There must be a combination and concurrence of these elements and when they occur, a residence is created."

We must now analyze each candidate's individual circumstances to determine their respective places of domicile under this physical presence/intent to remain standard.[5] Candidate Manchin concedes, in a memorandum submitted to this Court, that he purchased and moved into a dwelling located on Colfax Road in an area of Marion County known as Whitehall in 1970. He also confesses that "he has occupied that home from 1970 until the present." Until 1982, Whitehall was located in the 14th Senatorial District. . . . In 1982, however, Whitehall was placed in the 13th Senatorial District pursuant to the Senate Redistricting Act of 1982. . . .

Despite this admission by candidate Manchin that he occupies a dwelling, along with his wife and children as indicated by the record, in the 13th Senatorial District, he asserts that because the majority of his economic, cultural, and civic ties are in Farmington, which is located in the 14th Senatorial District, he is not disqualified under West Virginia Constitution art. VI, § 12. In essence, candidate Manchin contends that these ties make him a de jure resident of the 14th Senatorial District even though his de facto place of abode is in the 13th Senatorial District.

Candidate Manchin was born in Farmington, and lived there until the age of eighteen[.] . . . [His Colfax Road dwelling] is located seven or eight miles on a direct line, and much farther by improved road, from Farmington[.] . . . Manchin currently owns businesses in Farmington and Fairmont, from which he conducts all of his business affairs, and pays business and occupation taxes in the 14th Senatorial District. He spends a great portion of the business day in Farmington. He also owns substantial property in Farmington, including burial plots and a dwelling occupied by his aunt, where he occasionally sleeps. He rents a post office box in Farmington at which he receives the bulk of his business correspondence and which is listed as his address on his current driver's license, automobile registration, and boat registration. He is also active in business and community affairs, and attends church, in Farmington. Finally, he is registered to vote in the 14th Senatorial District.[6]

These substantial links with the community of Farmington, however, do not change the undisputed fact that candidate Manchin maintains and occupies a dwelling house only in the 13th Senatorial District. In the 1983-1984 Manual of the Senate and House of Delegates, published by the West Virginia Legislature, candidate Manchin's "home" address is listed as "Rt. 7, Box 146, Fairmont 26554," which is the address of his Colfax Road dwelling. This publication also lists candidate Manchin's "home" telephone number as "366-4761," which, according to the most recent telephone directory, corresponds to his Colfax Road address. Additionally, as of July 1, 1983, candidate Manchin's personal property was listed on the tax books of Marion County in the

---

[5]We note that there are no constitutional county or district residency requirements for officials elected on a statewide basis. Courts have held that a different domicile standard applies to such officials, who by the nature of their duties are required to work at the state capital. Such officials are ordinarily not deemed to have abandoned their original domicile even though they may be living with their family at the capital city. . . .

[6]Prior to May 3, 1983, candidate Manchin's voter's registration listed the Colfax Road dwelling as his resdence. After discovering that Whitehall had been moved into the 13th Senatorial District, however, he changed his voter's registration to the 14th Senatorial District on May 3, 1983, listing his address as his post office box in Farmington. We note that West Virginia Code § 3-1-3 (1983 Supp.) provides that, "Citizens of the State shall be entitled to vote at all elections held within the precincts of the counties and municipalities in which they respectively reside." Because candidate Manchin does not "reside" at this post office box address, he is not properly registered to vote. We also note that although voter registration can create a presumption of residing in a particular locale, it is not conclusive and may be rebutted. . . .

magisterial district in which Whitehall is located.

Unquestionably, candidate Manchin has substantial economic, cultural, and civic ties with Farmington in the 14th Senatorial District. Not surprisingly, he was able to submit several affidavits from residents of Farmington which stated, in effect, that he is frequently seen in Farmington and that he considers Farmington his "home." Even if candidate Manchin arguably considers Farmington to be his permanent place of residence, the record clearly and unequivocally demonstrates that his permanent place of physical residence is with his wife and children at the dwelling located on Colfax Road, Whitehall, Marion County.

. . . Candidate Manchin admits that he has occupied the house on Colfax Road continuously since 1970. His post office box in Farmington is not a place of residence. Candidate Manchin has failed to pass the physical presence prong of our test for domicile set forth in [Lotz v. Atamaniuk]. We therefore hold that candidate Manchin is not a "resident" of the 14th Senatorial District under West Virginia Constitution art. VI, § 12. . . .

Candidate Polan admits that he has occupied an apartment in The Prichard [in Huntington] continuously since 1972. His one room "sleeping quarters" at [Camden Road in Wayne County] is not his place of residence. Candidate Polan has failed to pass either prong of the physical presence/intent to remain test set forth in [Lotz]. We therefore hold that candidate Polan is not a "resident" of Wayne County under West Virginia Constitution art. VI, § 12.

III

The final major issue raised in these mandamus actions is whether the respondent candidates will have been residents of the senatorial district and the county they respectively seek to represent "for one year next preceding" their election under West Virginia Constitution art. VI, § 12. In construing West Virginia Constitution art. VIII, § 23, now West Virginia Constitution art. IX, § 10, governing the election of county commissioners, this Court held in the single Syllabus Point of Fansler v. Rightmire, 115 W. Va. 492, 177 S.E. 288 (1934): "The word 'election,' as used in section 23, article 8, Constitution of West Virginia, has reference to general elections--the final choice of the entire electorate--and not to the selection of candidates in a primary." As noted by the Court in Fansler, 115 W. Va. at 494, 177 S.E. at 289, "Candidates at the time of the adoption of our present Constitution were chosen by party conventions. A primary was not contemplated." . . . Likewise, the word "election," as used in West Virginia Constitution art. VI, § 12, refers to general elections and not to the selection of candidates in a primary. Therefore, in order to meet the durational residency requirement found in this constitutional provision, the respondent candidates must have established domicile in the senatorial district and the county which they respectively seek to represent one year prior to the impending November general election.

As we have already indicated, candidate Manchin is not currently domiciled in the 14th Senatorial District and candidate Polan is not currently domiciled in Wayne County in the 5th Senatorial District. Therefore, neither can become domiciled in the senatorial district and the county they respectively seek to represent for one year prior to the November general election. ...

Recognizing their inability to comply with the one year durational residency requirement, both candidates challenge its constitutionality under the equal protection clause of the fourteenth amendment, contending that it does not serve a compelling state interest.[8]

---

[8]Candidate Polan also contends that West Virginia Constitution art. VI, § 4, which requires that "where the [senatorial] district is composed of more than one county, both shall not be chosen from the same county," is unconstitutional under the equal protection clause of the fourteenth amendment. The essence of his argument is that because the Wayne County portion of the 5th Senatorial District contains a minority percentage of the total population of the district, the voters of Cabell County, as well as potential candidates for state senate also reside there, are unconstitutionally deprived of their right to be represented in proportion to their number by our state constitution's requirement that no two state senators in a multi-county senatorial district shall reside within the same county. The logical extension of this argument is that no state representative district could be composed of more than one county without

This Court has frequently recognized that the right to become a candidate for public office is a fundamental right, and that any restriction on the exercise of this right must serve a compelling state interest. See [Marra v. Zink, 163 W. Va. at 404, 256 S.E.2d at 584; State ex rel. Piccirillo v. City of Follansbee, 160 W. Va. 329, 233 S.E.2d 419 (1977)[.] . . . Therefore, strict scrutiny applies, whether under the equal protection clause of the fourteenth amendment or under the fundamental right to candidacy under our state constitution[.] . . .

In Marra v. Zink, . . . this Court invalidated a city charter provision requiring members of city council to have been city residents for one year prior to their nomination. In so doing, we explicitly rejected contentions that such a provision served a compelling state interest. [Id.] This is relatively consistent with the majority of cases throughout the country which have invalidated local durational residency requirements . . . or state statutory durational residency requirements governing local public officials[.] . . .

On the other hand, courts have consistently upheld *state* constitutional durational residency requirements . . . or state statutory requirements governing *state* officials[.]

There are primarily three reasons why courts have upheld state constitutional and statutory durational residency requirements for state offices. First, these requirements promote candidate familiarity with the needs and problems of the people to be represented. Second, these requirements promote voter familiarity with the character, intelligence, and reputation of the candidates. Finally, durational residency requirements further the goal of precluding frivolous or fraudulent candidacies by those who are more interested in public office than in public service. . . .

We . . . hold that the one year durational residency requirement for state senators found in West Virginia Constitution art. VI, § 12 serves a compelling state interest and does not violate the fundamental constitutional rights of either candidates or voters. Accordingly, under West Virginia Constitution art. VI, § 12, candidate Manchin is ineligible to be elected to or to hold the office of state senator from the 14th Senatorial District since he will not have been a resident of that district for one year prior to the general election. Similarly, under West Virginia Constitution art. VI, §§ 4 and 12, candidate Polan is ineligible to be elected to or to hold the office of state senator from the 5th Senatorial District since he will not have been a resident of Wayne County for one year prior to

---

violating the equal protection clause, since it is highly unlikely that every county in a state would have relatively equal populations. We are not of the opinion that the United States Constitution mandates single county senatorial districts. We are of the opinion that West Virginia Constitution art. VI, § 4 serves the compelling state interest of insuring meaningful representation for all of our counties in our state legislature.

On a related issue, we note that fifteen of the seventeen senatorial districts contain portions of counties within their boundaries. See West Virginia Code §§ 1-2-1(d) (1)-(17) (1983 Supp.). In fact, portions of Wayne County are included within three senatorial districts. . . . West Virginia Constitution art. VI, § 4 provides, in pertinent part, that "The [senatorial] districts shall be compact, formed of contiguous territory, bounded by county lines, and, as nearly as practicable, equal in population, to be ascertained by the census of the United States." . . . The Legislature recognized that its division of counties into separate senatorial districts was unconstitutional under this constitutional provision. It stated:

> The legislature finds and declares that it is not possible to divide the State into senatorial districts so as to achieve equality of population as near as is practicable as required by the United States Supreme Court and other federal courts and at the same time adhere to all of these provisions of the West Virginia Constitution . . . .

Noting that West Virginia Constitution art. VI, § 4 also provides that "the State shall be divided into twelve senatorial districts, which number shall not be diminished, but may be increased as hereinafter provided," we are of the opinion that senatorial districts could be drawn which would comply with both state and federal constitutional provisions. Instead of properly attacking the constitutionality of the Senate Redistricting Act of 1982, however, the respondent candidates attack the constitutionality of restraints upon that redistricting. In addition, although we are aware that the Legislature undertook its redistricting effort under the supervision of a federal district court, we are not advised of the details of its participation. Finally, we note that both respondent candidates were members of the Legislature at the time of the redistricting, and therefore must share the responsibility for its passage. Therefore, we decline to address this issue in this case.

the general election.

IV

For the foregoing reasons, we granted writs of mandamus commanding [election officials to remove] the names of Charles M. Polan, Jr. and Joe Manchin III, respectively, from the [ballot] to be used in the [June 5, 1984, primary election] and to [disregard] any vote cast [for either of the respondent candidates].

ISAACS v. BOARD OF BALLOT COMMISSIONERS,
122 W.Va. 703, 12 S.E.2d 510 (1940).

Maxwell, Judge.

This is an original proceeding in mandamus by Greely Isaacs challenging the candidacy of C.J. Marcum for the office of member of the House of Delegates from Lincoln County.

. . . [R]elator sought to require the Board of Ballot Commissioners of the county (1) to omit from the official election ballot (general election November 5, 1940), the name of Marcum as the Democratic nominee for House of Delegates, and (2) to place on the official ballot in lieu of Marcum's name that of the relator.

[O]n September 19, 1928, Marcum had been convicted in the District Court of the United States for the Southern District of West Virginia of the crime of larceny of an express package, in interstate delivery, of the value of $140.00 in violation of [18 U.S.C. § 409.] [Subsequently], there was imposed a sentence to federal prison for two years, [which Malcom served].

Because of the conviction and sentence, relator urges that Marcum is disqualified for holding the office to which he aspires and therefore was not a lawful nominee; and that the ballot commissioners were without warrant of authority to place Marcum's name on the ballot.

These contentions are grounded on [Article VI, § 14 of the West Virginia Constitution]. Relator takes the position that under federal and state law the offense for which Marcum was convicted constitutes a felony . . . and that the crime was infamous.

By [Art. VI, § 14], inhibition from legislative service is placed against one who has been convicted of an infamous crime. An offense punishable by death or penitentiary confinement is a felony. Code, 61-11-1. And generally, felonies are deemed infamous crimes. . . .

Had Marcum been convicted in a court of this state for an offense similar to that charged in the federal indictment, punishment for conviction of grand larceny – a felony – would have been imposed. Granting that such conviction in a state court would debar him from legislative service, does it follow that such interdiction results from a federal conviction?

The right of a citizen to hold office is the general rule; ineligibility the exception. Courts are hesitant to take action resulting in deprivation of the privilege to hold office, except under clear and explicit constitutional or statutory requirement. . . .

There is a difference of opinion between courts whether a state constitutional bar, such as here under consideration, extends to convictions under the laws of other jurisdictions. The question stands res integra in this state.

A state constitution is formed with respect to affairs within its bounds. Such basic law is supreme within the sphere of its authority. . . . But, since it does not assume to operate on matters beyond the realm, there would seem to arise the presumption that a constitutional restriction, such as here involved, is intended to apply only to those residents of the state who have offended against its laws, and not to one who at some time had committed an offense in another jurisdiction, domestic or foreign. This is consonant with the broad and fair principles above emphasized. We approve the holdings of those courts which have employed this approach. . . .

The inhibition of the constitution should not be given a more far-reaching meaning and effect than its wording and spirit require.

. . . Writ refused.

FOX, Judge (concurring).

I concur in the refusal of the writ, but I would base refusal on the ground that the eligibility of the respondent to a seat in the legislature is a question which, under the constitution, is for legislative determination. The right of the legislature to pass upon the election of its members, has not, so far as I know, been questioned. It has been exercised many times in election contests. The provision which gives to the legislature power over the election of its members also grants power with respect to their qualifications, and it logically follows that it has the same powers in relation to qualification as it does to election.

Article 6 of the Constitution provides, in a most comprehensive way, for the creation of the legislature and the regulation of its powers and duties. . . . Section 24 of [Article 6] provides, among other things: "***Each House shall determine the rules of its proceedings and be the judge of the elections, returns and qualifications of its own members.***" To my mind, the section from which the last quotation is made was intended to mean something. If the courts may say that one shall not be permitted to be a candidate for the legislature, then the right of the legislature to judge of "the elections, returns and qualifications of its own members", is at an end. Furthermore, the question of what conduct disqualifies a given person from a seat in the legislature is a moral and political one, rather than judicial. The paramount right of the legislature to be the judge of its membership is attested by the fact that while the majority of the Court uphold the right of the respondent to a seat in the legislature, if elected, such action will in no way bind the legislature, and if it should hereafter refuse to the respondent a seat in that body under its constitutional power, this Court would, in my opinion, be powerless to reverse the legislative decision. If this be true, why not leave the matter, in the first instance, to a body empowered by the constitution to finally determine the same?

The ground upon which the majority of the Court base their decision seems to me to be an assumption of power to control a purely legislative function. In my opinion it unduly limits the scope of an infamous crime which may justify the refusal of a seat in the legislature.

NOTES

1. *Slater v. Varney*, 136 W.Va. 406, 68 S.E.2d 757 (1951). Riley Varney served as clerk of the Circuit Court of Mingo County. An official audit of his office found that Varney had failed to account for $14,000 of public funds. He was indicted and then plead guilty to charges of embezzlement. Eventually, he repaid certain amounts but $6,000 were still left owing when he again ran as the Democratic Party candidate for circuit court clerk in the November, 1950, elections. Not surprisingly, the people of Mingo County elected him. His opponent, Clifford Slater, then filed, within ten days and pursuant to state statute, a contest to the election claiming that Varney was disqualified by Article VI, § 14, of the Constitution, which provides that "No person who may have collected or been entrusted with public money . . . shall be eligible to the Legislature, or to any office of honor, trust, or profit in this State, until he shall have duly accounted for and paid over such money according to law." Varney defended against the contest on the theory that the proceeding was premature because § 14 allowed him to rehabilitate himself by repaying the amount still owed. Varney insisted he could not, therefore, be disqualified before he was due to assume office. The Circuit Court and, on appeal, the West Virginia Supreme Court ruled that the suit was not premature but that Varney could remove his disability if he did so before his term was to begin.

The appellate court held that the "eligibility of a candidate for office under constitutional and statutory provisions affects the right to hold an office instead of the right to be elected to the office and that, if his disqualification has been removed at the time of the commencement of the term or at the time of his induction into office, his disqualification at the time of the election is immaterial."

But a contest to an election of an individual with a disability need not await his actual assumption of office. Rather, a circuit court may entertain the contest and determine if the disability exists. Section 14, however, did allow the scoundrel an opportunity to remove the disqualification. Thus, the Supreme Court remanded the case to Mingo County Circuit Court with instructions to determine if Varney had done so. "If, upon a hearing, . . . the contestee establishes that defense by competent evidence, he is entitled to hold the office and [the election contest] should be dismissed. If, however, upon such hearing, it appears that his disqualification . . . was not removed before the commencement of the regular term of the office but existed at, and has continued after, the beginning of such term, the disqualification of the contestee has become permanent and irremovable. In those circumstances he would then be ineligible to the office and . . . 'the election must be held to be a failure, and the office of clerk of the circuit court declared vacant.'"

Judge Riley, joined by Judge Lovins, dissented, believing that § 14 provided only a "conditional ineligibility" and that the contest before the Mingo Court was thus premature.

2. *State ex rel. Porter v. Bivens*, 151 W.Va. 665, 155 S.E.2d 827 (1967). While serving as a constable, Alvis Porter was removed from office by the Logan County Circuit Court because he "wilfully and repeatedly charged, received and failed to account for and pay over according to law public money to which he was not entitled." Undaunted, Porter then ran on the Democratic slate for commissioner of the county court and -- surprise! -- outpolled his Republican opponent, W.E. Brewer, in the November 1966 election. Brewer challenged the election in the county court, however, on the basis of the circuit court's earlier finding that Porter had misappropriated public funds. Two of the three incumbent commissioners on the county court refused to qualify Porter as the new commissioner. Porter then filed an original mandamus action in the Supreme Court of Appeals seeking a writ that would require the Logan County Court to accept his certificate of office and admit him as a commissioner of the county court.

The Court awarded the writ. It refused to give the circuit court's determination in the removal proceeding *res judicata* effect for purposes of the mandamus action. Moreover, the Court concluded that it was not proper to test Porter's eligibility under Article VI, § 14 in the mandamus proceeding. Having won the election, Porter was therefore entitled to the office until such time as he was lawfully removed by appropriate procedures and upon a new finding that he had taken, and failed to repay, public money.

Judge Calhoun dissented.[*] He would have found Porter disqualified by the earlier circuit court finding, and even if that decision was not *res judicata* on the Court in the mandamus action, he saw no impediment to the Court deciding the eligibility issue.

3. An Attorney General's Opinion concluded that a pardon or the completion of a sentence of imprisonment wipes out the disability imposed by the first sentence of § 14 and by similar provisions excluding convicted felons from voting or serving as a juror. 51 Op. Att'y Gen. 182 (1965).

STATE EX REL. RIST v. UNDERWOOD,
206 W. Va. 258, 524 S.E.2d 179 (1999).

JUSTICE McGRAW delivered the Opinion of the Court. JUSTICE DAVIS, deeming herself disqualified, did not participate in the decision in this case. RETIRED JUSTICE MILLER, sitting by temporary assignment. JUDGE WATT, sitting by temporary assignment. CHIEF JUSTICE

[*]The Court originally entered an order awarding the writ, and Judge Calhoun reserved the right to file a dissenting opinion. He filed it shortly thereafter. Only after the dissenting opinion was submitted, and three months after entry of the original order, did the Court majority file its opinion.

STARCHER concurs and reserves the right to file a concurring opinion. RETIRED JUSTICE MILLER and JUSTICE MAYNARD dissent and reserve the right to file dissenting opinions.

McGraw, Justice:

This case raises the issue of whether the Emoluments Clause contained in Article VI, § 15 of the West Virginia Constitution prohibits the Governor of this State from appointing the current Speaker of the West Virginia House of Delegates as a Justice of this Court, where, during the Speaker's current term of office, the Legislature enacted a pay increase with respect to such judicial office. The Emoluments Clause at issue, Article VI, § 15, provides in pertinent part:

> No senator or delegate, during the term for which he shall have been elected, shall be elected or appointed to any civil office of profit under this State, which has been created, or the emoluments of which have been increased during such term, except offices to be filled by election by the people.

We are specifically asked to determine the meaning of the exception for "offices to be filled by election by the people," and whether this language renders the current Speaker eligible to assume the office to which the Governor has appointed him.

Any examination of our Constitution--the organic law of our State--must proceed with utmost care and concern for the future impact of our decision. The ripples created by our interpretation of this important question will propagate far into the future of our jurisprudence. Before commencing, we note the counsel of Thomas Jefferson:

> On every question of construction [of the Constitution] let us carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or intended against it, conform to the probable one in which it was passed.

Letter from Thomas Jefferson to Justice William Johnson, June 12, 1823, in Thomas Jefferson on Constitutional Issues (Va. Comm. on Constitutional Government 1962). With this wisdom as our watch star, we examine the provision at issue, in the context of our constitutional history, and in the context of the history of our State.

I.

BACKGROUND

. . . On August 31, 1999, the Honorable Margaret L. Workman resigned as a Justice of this Court, thereby creating a vacancy that can be filled only by gubernatorial appointment pursuant to Article VIII, § 7 of the West Virginia Constitution. On September 9, 1999, respondent, the Honorable Cecil H. Underwood, Governor of the State of West Virginia, announced his decision to appoint the Honorable Robert S. Kiss, currently Speaker of the House of Delegates, to fill Justice Workman's unexpired term, which ends following the 2000 general election. On September 22, 1999, Governor Underwood notified the Secretary of State that the appointment of Speaker Kiss as Justice of this Court would become effective, and that Speaker Kiss would begin to serve, at 12:00 a.m. on September 23, 1999.

Speaker Kiss was a member of the West Virginia House of Delegates during the 1999 legislative session. During that session, the Legislature passed H.B. 105, which [increased] the salary of the Justices of this Court from $ 85,000 to $ 95,000, effective July 1, 1999. . . . Petitioners rely upon this event in asserting that Speaker Kiss is constitutionally disqualified from serving on this Court.

. . . John F. Rist, III, in his capacity as a citizen and taxpayer of the State of West Virginia, filed the instant petition for writ of mandamus and/or prohibition. In his petition, Rist asserts that Speaker Kiss is ineligible to serve the unexpired term created by the resignation of Justice Workman, based upon Article VI, § 15 of the West Virginia Constitution. [Later], a second petition was filed by Richard A. Robb, and others, similarly asserting that Speaker Kiss is constitutionally disqualified from serving as a Justice on this Court pursuant to Article VI, § 15. Petitioners request that this Court

issue an order directing Governor Underwood to appoint a constitutionally eligible person to fill the unexpired term of Justice Workman. [The Court consolidated the two cases.] . . .

III.

DISCUSSION

There can be no debate concerning the reach, and effect, of the basic prohibition contained in Article VI, § 15, as it provides a straightforward and absolute bar against a member of the Legislature obtaining any public office that was created, or the emoluments of which were increased, during the legislator's term of office.[3] What is at issue in this case is the meaning to be ascribed to the exception regarding "offices to be filled by election by the people." Speaker Kiss and Governor Underwood argue that this language broadly excepts offices that are elective in nature--in effect contending that the Emoluments Clause never applies to an office that will be subject to popular election at some future date. On the other hand, petitioners assert that the exception applies only to the more narrow circumstance of where a legislator is, in fact, elected by the people to a particular office. We begin our analysis with a detailed examination of the history of the constitutional provision at issue, and then turn to the more difficult task of ascertaining the meaning of the exception clause.

A. History and Context of the Emoluments Clause in Virginia and West Virginia

1. The Emoluments Clause in Antebellum Virginia.

The forerunner to Article VI, § 15 of the present West Virginia Constitution was enacted by the Virginia General Assembly in 1794. . . . The wording of the 1794 provision was taken almost verbatim from Article I, § 6, cl. 2, of the United States Constitution,[5] which was submitted for ratification by the states just seven years before.

The emoluments prohibition was given constitutional status with the adoption of the Virginia Constitution of 1830.[6] Significant for present purposes was the insertion in the 1830 provision of an

---

[3]In what appears to be a veiled portent of things to come, Governor Underwood alludes in his brief to the possibility of the Legislature's negating the effect of the Emoluments Clause by repealing the underlying judicial pay increase, or enacting legislation reducing the compensation of Speaker Kiss to the salary in effect immediately prior to the most recent increase. Other state courts have rejected such devices. See Vreeland v. Byrne, 72 N.J. 292, 297, 370 A.2d 825, 827 (1977) (striking down as special legislation measure providing that pay increase for associate justice would not apply to member of legislature appointed to such position); cf. State ex rel. Fraser v. Gay, 158 Fla. 465, 470, 28 So. 2d 901, 903 (1947) (holding that appointee "cannot avoid the constitutional prohibition by remitting the raise in salary for the period of this election to the legislature").

Both courses suggested by Governor Underwood would clearly run afoul of the Emoluments Clause, since there is no provision permitting the Legislature to annul operation of the rule by later decreasing the emoluments of an office. As one commentator has noted in the context of Congressional legislation aimed at circumventing the federal Emoluments Clause, "[a] statute cannot repeal history; it cannot undue the fact that the emoluments of the office had been "increased" during the [legislator's term of office] . . . ." Michael Stokes Paulsen, Is Lloyd Bentsen Unconstitutional?, 46 Stan. L. Rev. 907 (1994) (emphasis in original) (contending that the appointment of Senator Bentsen as Treasury Secretary violated the Emoluments Clause); see also John F. O'Connor, The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution, 24 Hofstra L. Rev. 89 (1995). The former dean of the West Virginia College of Law astutely observed in testimony before the Congress that such rescission measures "smack[] of clever manipulation," and makes the provision "the subject of deft maneuver." To Reduce the Compensation of the Office of Attorney General: Hearings on S. 2673 Before the Comm. On the Judiciary, 93d Cong., 1st Sess. 43 (1974) (statement of Dean Willard D. Lorenson).

[5]The Emoluments Clause of the United States Constitution provides as follows:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time . . . .

[6]Article III, § 8 of the Virginia Constitution of 1830 provided:

The members of the assembly shall receive for their services a compensation to be ascertained by law and paid out

exception for "offices as may be filled by elections by the people." The records of the constitutional convention shed no light, however, on the intended meaning of this language, as the provision was adopted without amendment or debate. . . .

The Framers of the 1830 Constitution would have understood the Emoluments Clause as primarily imposing a check on legislative corruption. A contemporary interpretation offered by Justice Story indicated that the purpose behind the federal provision was "to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of this disinterestedness." . . . In addition to protecting the public fisc from collusive and self-serving conduct by legislators, the Emoluments Clause was also recognized as playing a crucial role in maintaining separation of powers. Alexander Hamilton succinctly observed that the Emoluments Clause "guards against the danger of executive influence upon the legislative body." [The Federalist No. 76 at 459.] Madison likewise noted that this provision was intended to limit the potential of the executive using its appointive power to corrupt the Congress:

> Is there a danger apprehended from the other branches of government? But where are the means to be found by the President, or the Senate, or both? . . . . The only means, then, which they can possess, will be in the dispensation of appointments. Is it here that suspicion rests her charge. Sometimes we are told that this fund of corruption is to be exhausted by the President in subduing the virtue of the Senate. Now, the fidelity of the other House is to be the victim. . . . . But, fortunately, the Constitution has provided a still further safeguard. The members of the Congress are rendered ineligible to any civil offices that may be created, or of which the emoluments may be increased, during their term of election. No offices therefore can be dealt out to the existing members but such as may become vacant by ordinary casualties . . . .

[The Federalist No. 55.][9] Indeed, George Mason even went so far as to state that the provision provides "the corner-stone on which our liberties depend." [1 The Records of the Federal Convention of 1787 381.]

The Emoluments Clause was retained in the Virginia Constitution of 1851, although the exception language was truncated to "offices filled by elections by the people."[10] While this alteration suggests an intent to clarify that popular election was the only means of abating the impediment imposed by the Emoluments Clause, the proceedings of the constitutional convention do not indicate an intent to work any substantive changes on the provision. The Committee on the Legislative Department, which was charged with drafting the article of the constitution dealing with the legislative branch of government, reported the provision to the Committee of the Whole without recommending any alterations to the language employed in the 1830 instrument. Likewise, no amendments to the section were recommended by the Committee of the Whole, nor was there any debate concerning any proposed changes.[11]

> of the public treasury; but no law increasing the compensation of the members shall take effect until the end of the next annual session after such law shall have been enacted. And no senator or delegate shall, during the term for which he shall have been elected, be appointed to any civil office of profit under the commonwealth, which shall have been created, or the emoluments of which shall have been increased, during such term, except such offices as may be filled by elections by the people.

[9]James Madison participated in the drafting of the federal Emoluments Clause, and was also a leading figure in the convention that produced the 1830 Virginia Constitution.

[10]Article IV, § 10 of the Virginia Constitution of 1851 provided:

> . . . [N]o senator or delegate shall, during the term for which he shall have been elected, be appointed to any civil office of profit under the commonwealth, which shall have been created, or the emoluments of which have been increased, during such term, except offices filled by elections by the people.

[11]The fact that the Framers of the Constitution of 1851 did not intend to substantively alter the provision in question

2. West Virginia During Reconstruction.

The Emoluments Clause of preceding Virginia constitutions was not incorporated into West Virginia's first constitution, which was ratified in 1863. Rather, it was inserted in its present form – with only minor modifications to the language employed in earlier Virginia constitutions – in the Constitution of 1872.

[Justice McGraw mined the history of the Reconstruction Era and identified two sources of resentment that were especially prickly for the ex-Confederate delegates who dominated the 1872 Constitutional Convention. The first was the undemocratic nature of the various elections that led to adoption of the 1863 Constitution and to statehood. The second was the enactment and enforcement of the test oath of loyalty that excluded the former Confederates from public office, from using the courts, and from voting in the years after the Civil War. The "upshot" of that history, McGraw maintained, was "that the men who drafted the 1872 Constitution, and who reinserted the Emoluments Clause as contained in previous Virginia constitutions," had those events "fresh in their memories when they forged our present Constitution. Preventing the abuses and self-dealing of the 'carpetbaggers' of the Reconstruction period must have been foremost in their minds."]

B. Construction of the Election Exception

"The fundamental principle in constitutional construction is that effect must be given to the intent of the Framers of such organic law and of the people who ratified and adopted it." State ex rel. Brotherton v. Blankenship, 157 W. Va. 100, 108, 207 S.E.2d 421, 427 (1973); see also State ex rel. Mountaineer Park, Inc. v. Polan, 190 W. Va. 276, 279, 438 S.E.2d 308, 311 (1993). Accordingly, our analysis in this case begins with the language of Article VI, § 15. See Randolph County Bd. of Educ. v. Adams, 196 W. Va. 9, 15, 467 S.E.2d 150, 156 (1995); Polan, 190 W. Va. at 283, 438 S.E.2d at 315 (stressing that "as in every case involving the application or interpretation of a constitutional provision, analysis must begin with the language of the constitutional provision itself"). "Where a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed." Syl. pt. 3, State ex rel. Smith v. Gore, 150 W. Va. 71, 143 S.E.2d 791 (1965); see also Syl. pt. 1, State ex rel. Maloney v. McCartney, 159 W. Va. 513, 223 S.E.2d 607 (1976). Importantly, at this stage of interpretation, "courts are not concerned with the wisdom or expediencies of constitutional provisions, and the duty of the judiciary is merely to carry out the provisions of the plain language stated in the constitution." Syl. pt. 3, State ex rel. Casey v. Pauley, 158 W. Va. 298, 210 S.E.2d 649 (1975).

In this case, we fail to discern any unequivocal meaning from the wording of the exception language. Reasonable persons can easily disagree as to the scope of the phrase, "offices to be filled by election by the people." We are not the first court to recognize ambiguity in such a provision: The Supreme Court of California long ago recognized the ambiguity inherent in similar language contained in the California Constitution of 1849, stating that the inclusion of such an exception

> had the effect of injecting doubt and uncertainty as to limitation thereby placed upon the operation of the language which preceded it. Did the exception mean that the language preceding it should not apply to the appointment of a legislator who should run and be elected to another elective office during the term for which he had been elected a member of the senate or general assembly? Or did the exception mean that the prohibition should not apply to the appointment of a legislator to an elective office, that is, an office normally filled by election by the people?

Carter v. Commission on Qualifications of Judicial Appointments, 14 Cal. 2d 179, 182-83, 93 P.2d

---

does not necessarily support the notion that the exception was meant to broadly exempt all offices elective in nature. Indeed, the fact that the drafters of this later constitution made significant deletions without any recorded intent to substantively change the provision can certainly be construed as suggesting a then-existing acceptance of the exception clause as requiring popular election. See 1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 486 (1974) (noting that Emoluments Clause of 1830 Constitution "excepted offices filled by popular election," and "saw only minor changes [in Virginia] until 1902 . . . .").

140, 142 (1939).

"Questions of constitutional construction are in the main governed by the same general rules applied in statutory construction." Syl. pt. 1, Winkler v. State School Bldg. Auth., 189 W. Va. 748, 434 S.E.2d 420 (1993). Because the exception clause of Article VI, § 15 is ambiguous, "ordinary principles employed in statutory construction must be applied to ascertain such intent." Blankenship, 157 W. Va. at 108, 207 S.E.2d at 427. Of course, "the object of construction, as applied to written constitutions, is [always] to give effect to the intent of the people in adopting it." Syl. pt. 3, Diamond v. Parkersburg-Aetna Corp., 146 W. Va. 543, 122 S.E.2d 436 (1961).

Respondents assert that because the Emoluments Clause restricts an individual's right to hold public office, it must be construed in favor of eligibility. In support of this argument, respondents cite to State ex rel. Maloney v. McCartney, supra, where this Court stated in Syllabus point 3, in part, that "in the event of ambiguity a constitutional amendment will receive every reasonable construction in favor of eligibility for office . . . ." According to Governor Underwood, "only where a constitutional provision clearly and unambiguously precludes a gubernatorial appointment may such appointment be invalidated by the judiciary."[17] We reject this standard in the present context.

While "a strong public policy exists in favor of eligibility for public office," Oceanographic Comm'n v. O'Brien, 74 Wn. 2d 904, 914, 447 P.2d 707, 712 (1968), in this case we are faced with the competing consideration of maintaining a constitutionally-mandated separation between the executive and legislative branches of government. Again, the Emoluments Clause is aimed not just at eliminating self-dealing on the part of legislators; rather, it is also intended to forestall even the remotest possibility of executive influence over the legislature. The Emoluments Clause is therefore part of our rigorous system of interbranch separation of powers, ancillary to the fundamental directive set forth in Article V, § 1 of the West Virginia Constitution.[18]

As we stated in Syllabus point 1, in part, of State ex rel. Barker v. Manchin, 167 W. Va. 155, 279 S.E.2d 622 (1981), the doctrine of separation of powers "is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed." See also In re Dailey, 195 W. Va. 330, 333, 465 S.E.2d 601, 604 (1995) (stating that "the commitment of this Court to a strict application of the doctrine of separation of powers . . . [has] been unwavering."); State ex rel. Meadows v. Hechler, 195 W. Va. 11, 14, 462 S.E.2d 586, 589 (1995) ("The separation of powers doctrine expressly stated in our constitution is a core principle of our system of government . . . .").

Petitioner Robb is correct in pointing out that we are not concerned in this case with the right of an individual to stand for election to public office, which this Court has stressed is a "fundamental right" that can only be infringed upon by a showing of "compelling state interest," White v. Manchin, 173 W. Va. 526, 543, 318 S.E.2d 470, 488 (1984); instead, we are faced with the question of whether an individual who has already been elected to (and assumed) a position in the Legislature may thereafter be appointed to another governmental post during an existing term of office. Under these circumstances, we fail to discern any overarching public policy favoring eligibility. We therefore reject respondents' argument that the Emoluments Clause of Article VI, § 15 should be strictly construed in favor of eligibility.

In support of their basic argument that the exception language in Article VI, § 15 exempts legislators who are appointed to offices that are elective in nature (rather than offices affirmatively "filled by election by the people"), respondents point to two cases from Alabama and California. In

---

[17]Speaker Kiss similarly argues that "unless this Court concludes that the exception in question unambiguously fails to exempt elective offices from the general prohibition of the Emoluments Clause, fundamental jurisprudential considerations mandate a ruling in favor of the viability of the appointment and the eligibility of the appointee to office."

[18]. . . The Emoluments Clause [is] closely related to Article VI, § 13 of the West Virginia Constitution, which prohibits a member of the Legislature from "holding any other lucrative office or employment under this State, the United States, or any foreign government . . . ."

these cases, the courts held that since the constitutional prohibition pertains exclusively to "appointments," the exception must be construed to relate to the nature of the appointed office if it is to have any significant meaning.

The Supreme Court of Alabama concluded in Opinion of the Justices, 279 Ala. 38, 38-39, 181 So. 2d 105, 106-107 (1965), that

> [i]f the section ended just before the word "except, " no member of the Legislature could ever be *appointed*, during his term, to any office created by the Legislature of which he was a member. But the words, "except such offices as may be filled by election by the people" must have some meaning. The only reasonable conclusion is that excepted from the rule of Section 59 is an appointment to an office which "may be filled by an election by the people."

(Emphasis added.) Likewise, in Carter v. Commission on Qualifications of Judicial Appointments, 14 Cal. 2d 179, 93 P.2d 140 (1939), the California Supreme Court concluded as follows:

> If the section as originally adopted had any other meaning than the exception removed elective offices from the operation of the prohibitory clause, the inclusion of the exception was meaningless and surplusage, for the section would then mean that legislators were ineligible for appointment except when they obtained their offices by election. *There is, of course, a well-defined and fundamental difference between the acquisition of an office by appointment on the one hand, and by election on the other*. . . . Some meaning must be ascribed to the excepting clause and when we seek to ascertain it, the reasonable, if not the only logical conclusion is that the exception had the effect of describing the kind and character of the offices thereby removed from the operation of the prohibitory clause and not the method which the offices were to be filled.

Id. at 186, 93 P.2d at 142 (emphasis added).[19]

This Court has traditionally adhered to the rule that "if possible, effect should be given to every part and to every word of a constitutional provision and that, unless there is some clear reason to the contrary, no part of the fundamental law should be regarded as surplusage." Syl. pt. 2, in part, Diamond v. Parkersburg-Aetna Corp., supra. In this case, however, Article VI, § 15 proscribes election as well as appointment to office. The exception language of our Constitution can therefore be construed as requiring popular election without rendering it meaningless--i.e., the exception clause pertains to a class of election, "elections by the people."

Respondents' argument becomes more persuasive, however, when we consider the earlier Virginia constitutions upon which Article VI, § 15 was based. The Virginia Constitutions of 1830 and 1851 merely proscribed "appointment," rather than election to office. Thus, at first blush, the rationale of the Alabama and California supreme courts would appear applicable.

A distinction between the terms "elected" and "appointed" was recognized in this jurisdiction as early as 1866, when Judge Harrison noted in dissent: "The term 'elected,' generally speaking, imports popular election. The term 'appointed' excludes that idea and refers the office or trust to some other source." Ex Parte Faulkner, 1 W. Va. 269, 298-99 (1866) (Harrison, J., dissenting). However, the Virginia Constitution of 1830 apparently did not employ these words as mutually exclusive terms. For example, while the instrument used the term "appoint" to refer to the General Assembly's act of selecting the attorney general and officers of the militia (above the rank of brigadier general), it described the comparable power of the legislature to select the governor and various judges in terms of "electing."

Other courts interpreting early state constitutions have made similar observations in concluding that the term "appointed" can be broadly read as encompassing the word "elected." In State ex rel. Wagner v. Compson, 34 Ore. 25, 54 P. 349 (1898), the Oregon Supreme Court, in interpreting its

---

[19]Significantly, the emoluments provisions contained in the California Constitutions of 1849 and 1879, which were a major focus in Carter, pertained singularly to the eligibility of a legislator to be "appointed" to a civil office.

state constitution, observed that

> "The word 'appoint' was probably used as a more comprehensive term, to convey the idea of a mode of constituting or designating an officer, whether by election or otherwise. In fact, the words 'elect' and 'appoint' seem to have been regarded as synonymous by the convention." The word "elect" simply means to pick out, to select from among a number, or to make choice of, and is synonymous with the words "choose," "prefer," "select," and it was evidently used in this sense in the constitution. . . .

34 Ore. at 32-33, 54 P. at 351 (quoting People ex rel. Aylett v. Langdon, 8 Cal. 1 (1857)). See also Wagner v. City of San Angelo, 546 S.W.2d 378, 379 (Tex. Civ. App. 1977) ("The term "appointment" appears to be used in this section [of the statute] as a more comprehensive term, to convey the idea of a mode of constituting or designating the head of the department, whether selected by appointment, election, or otherwise.") (citing Compson, supra).

The insertion of the word "elected" into the West Virginia Constitution of 1872 should properly be viewed as merely clarifying the intent of the original Framers of the provision in question. Consequently, we find no merit in respondents' argument that the exception language of Article VI, § 15 would be rendered nugatory or meaningless when construed as requiring de facto popular election.

Given the long history of the emoluments clause in our jurisdiction, we are drawn back to the Virginia Constitution of 1830, where the exception language at issue today was first included. A frequently relied upon canon of construction is that statutes relating to the same subject should be construed together as far as possible to determine legislative intent: "Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syl. pt. 3, Smith v. State Workmen's Compensation Comm'r, 159 W. Va. 108, 219 S.E.2d 361 (1975); see Syl. pt. 3, Boley v. Miller, 187 W. Va. 242, 418 S.E.2d 352 (1992). The same rule applies, of course, with equal force when discerning the intent of framers of constitutions. Blankenship, 157 W. Va. at 108, 207 S.E.2d at 427.

Not only did Article III, § 8 of the Virginia Constitution of 1830 contain an emoluments clause essentially indistinguishable from that which we construe today, it also provided in the very same section that "no law increasing the compensation of the members shall take effect until the end of the next annual session after such law shall have been enacted." The striking aspect of the compensation clause is that it effectively required an intervening popular election before any increase in pay could take effect.

Viewing the Emoluments Clause in the context of this closely-related provision, it would be unreasonable to conclude that the Framers of the 1830 Constitution (or the drafters of later constitutions) on the one hand intended to expose legislative pay increases to prior electoral scrutiny, but nevertheless acquiesced in permitting legislators to obtain similar gain through non-elective appointments to office. Our jurisprudence abhors such illogic. See State v. Kerns, 183 W. Va. 130, 135, 394 S.E.2d 532, 537 (1990) (recognizing "duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results"); State ex rel. Simpkins v. Harvey, 172 W. Va. 312, 321, 305 S.E.2d 268, 277 (1983) (citing earlier cases).

Consideration of the 1830 Virginia Constitution is not an idle academic exercise. The constitutional restriction on the Legislature's ability to vote itself an immediate pay increase survived until the latter part of this century. The requirement that any legislative pay raise be preceded by a popular election was carried over into Article IV, § 10 of the Constitution of 1851. The first West Virginia Constitution, ratified in 1863, went even further by specifying the rate of pay for legislators – effectively requiring a constitutional amendment to implement any increase in compensation. See W. Va. Const. of 1863, art. IV, § 33. This approach was also employed in Article VI, § 33 of the 1872 Constitution. As we recognized in State ex rel. Holmes v. Gainer, 191 W. Va. 686, 690, 447 S.E.2d 887, 891 (1994), "this constitutional requirement made it extremely difficult to get a legislative compensation constitutional amendment to increase legislative salaries passed with any

frequency by the voters." Only two pay increases (in 1920 and 1954) were passed by constitutional amendment prior to 1970, when the section was substantially rewritten to place the responsibility for initiating pay increases in the hands of an independent citizens legislative compensation commission.

The notion that the Emoluments Clause is part of a broader design to provide the public with an advance opportunity to pass upon potentially self-serving increases in compensation is also bolstered by reference to constitutional provisions pertaining to executive pay. The 1863 West Virginia Constitution prohibited any increase or decrease in compensation during a public officer's term of office. W. Va. Const. of 1863 art. III, § 9. This prohibition remains operative in Article VI, § 38 of our present Constitution. The Court previously discussed at length the purpose underlying this provision:

> . . . It prevents attacks upon officials by those who may be possessed, at any time, of the means and the will to influence or control their course of conduct through added income at public expense; and it removes the possibility of increasing in that manner the financial burden of the people by those who possess and exercise the power of government and the authority of public office. The benefits which result from the operation of this provision of the Constitution promote sound and orderly administration of government, and this provision may not be dispensed with, circumvented, or ignored.

Harbert v. County Court of Harrison County, 129 W. Va. 54, 62-63, 39 S.E.2d 177, 185 (1946) (emphasis added); see also Delardas v. County Court of Monongalia County, 155 W. Va. 776, 781, 186 S.E.2d 847, 851 (1972). As Professor Bastress notes, this provision "provides a measure of independence and protection for public officials because they will not be influenced by the promise of a raise or the threat of a salary decrease. Conversely, the section prevents those in positions of power in the government from using that power to extract unreasonably high salaries." Robert M. Bastress, The West Virginia State Constitution 164 (1995). With respect to the latter purpose, the ultimate check as to elective officers comes from the fact that this provision ensures an intervening popular election prior to the implementation of any increase in compensation. . . .

Our reading of the language of Article VI, § 15 is further strengthened when we consider the experiences of the drafters of our present Constitution, who reintroduced the Emoluments Clause into the organic law of this jurisdiction. The abuses that occurred during Reconstruction, which resulted most notably from a lack of popular accountability, must surely have moulded the thinking of the Framers of the 1872 Constitution, such that they would have intended that true, representative democracy would hold sway whenever possible. Our construction of the provision in question faithfully takes those motivations into account.

Consequently, we hold that Article VI, § 15 of the West Virginia Constitution, with one exception, renders a member of the Legislature ineligible to be elected or appointed to a civil office for profit in this State, which has been created, or the emoluments of which have been increased, during the legislator's term of office. We also hold that the exception for "offices to be filled by election by the people," operates to allow an otherwise ineligible legislator to gain public office through popular election. In effect, only a vote of the people can overcome the impediment imposed by the Emoluments Clause. In light of such holding, we are compelled to grant the mandamus relief sought by petitioners.

We must stress, however, that the holding in this case does not pose a significant obstacle to otherwise highly qualified persons gaining appointive office. Importantly, the provision in question applies only to a legislator's current term of office. Upon the expiration of such term, a legislator again becomes eligible for appointment to civil office. Moreover, the Emoluments Clause places no disability whatsoever on a legislator who gains office through election by the people. Thus, we fail to see how our conclusion today will have any serious negative impact upon the ability of members of the Legislature to later serve the people of this State.

IV. CONCLUSION

For the reasons stated, we grant the relief requested by petitioners, and issue a writ of mandamus requiring respondent, Governor Cecil H. Underwood, to discharge his duty under W. Va. Const. art. VIII, § 7 by appointing an individual to the office of Justice of the Supreme Court of Appeals who is constitutionally qualified to hold such office, and who is not barred from such service by operation of Article VI, § 15 of the West Virginia Constitution.

Starcher, C.J., concurring.

I. Pouring Gasoline on the Fire

I am truly upset by the dissenting opinion. I have never read an opinion by a member of this Court that compared the opinion of fellow justices to a cruel act of human slaughter, like the Japanese attack on the United States of America at Pearl Harbor. In fact, I don't think I've ever seen such a vicious comparison in a judicial dissent -- anywhere.

Tension between this Court and the other branches of government is not new. It is the Court's job to interpret the West Virginia Constitution, and almost every year or two, we are required to stand in the way of some action by the executive or the Legislature because their actions have violated the Constitution.

There are two ways to react to the sparks that inevitably fly when this Court has to say "no" to an action by the executive or Legislature. One way is to try to understand the proper role of the Court, and to keep the discussion on a respectful and civil plane.

The other way to react is to do what the dissent has done -- to pour gasoline on the flames! . . .

II. Getting the Job of Being A Judge

It is people who vote who ultimately give our court system its legitimacy as an independent branch of government, protective of the rights enshrined in our laws and Constitution.

When it comes to deciding who will get to hold the powerful job of being a judge (or justice, or magistrate), we have used popular elections in West Virginia for more than 125 years. This system has by all accounts served us well.[2]

Unlike some states, we don't ordinarily hand out our judging jobs in West Virginia in a back-room swap, trade, or deal -- in the governor's office or in the Legislature -- even to highly qualified candidates. We require our judges, before they get the job and exercise power, to stand publicly for election, and to receive the direct approval of the people.

When there is a vacancy between judicial elections, we make an exception. The governor selects the person who gets the job until the next election. Not surprisingly, when this "appointment exception" to judicial selection kicks in, the role of the electorate is diminished, and the role of the politicians is enhanced.[3]

---

[2]The forces of money and power are always opposed to the popular election of judges. These forces fund so-called "good government" campaigns against the popular electoral system for judicial selection. While any system for selecting judges has its negatives, the basic arguments against judicial elections are in fact well-refuted by research comparing the electoral and appointed approaches. "Good government" arguments against the popular election of judges are in large measure a rhetorical cover-up for the fact that it is easier for the rich and powerful (who are a numerical electoral minority) to affect and control who does and does not become a judge, when the selection is by means other than popular election.

[3]Political decisions are quite American. Creating and giving people jobs and raising salaries is a normal (and legal) part of what has historically been central to the operation of the legislative and executive arenas. Consider, for example, the "Budget Digest," a mechanism whereby millions of dollars for local projects and jobs are annually passed out like holiday gifts by the West Virginia legislative leadership. This mechanism has been severely criticized by one of the dissenters in the instant case:

> What a true laboratory of horrors the majority has concocted with this lineage of back-room documents that will transform what was originally pronounced as dead and having no force and effect of law into something alive. The

But there are some restrictions on who is eligible for such appointment to office. In the case of a gubernatorial appointment to a judge's job (or any other public job), our West Virginia Constitution -- and the United States Constitution, and the constitutions of almost all other states -- say that legislators are ineligible for the job -- if the job was created or the pay for the job was increased during the term that the appointment to the office is to be made.

These constitutional limitations are "Emoluments Clauses," or "Legislative Ineligibility Clauses." See John F. O'Connor, "The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution," 24 Hofstra L.Rev. 89, 91 n.2 (1995).

The legislative ineligibility clauses in our federal constitution and dozens of state constitutions absolutely bar legislators from eligibility for offices that were created or had the pay increased during the legislator's term. Most of these clauses make no exception whatsoever for popular election to such an office. Somehow the dissent loses sight of this elementary point.

This strict ineligibility for legislators is not a diabolical invention of this Court, directed at Speaker Kiss. It is a central fixture of our American governmental system.

For example, in 1793, George Washington had to withdraw his nomination of William Paterson to the United States Supreme Court because Paterson had been in the Senate when the office of Associate Justice was created. Id. at 105. I suppose that according to the dissent, President Washington was like Admiral Tojo!

West Virginia (and about nine other states) have in their constitutions some sort of a "popular election exception" to the "legislator ineligibility rule." Our state's "popular election" exception, Article VI, Section 15 of the West Virginia Constitution, is the constitutional clause that is at issue in the instant case.

To summarize, then, here is how a person gets the job of judge or justice in West Virginia:

(1) the general rule for deciding who gets the judging jobs in West Virginia is this: the people decide, through popular elections;

(2) if there is a vacancy in a judicial office, there is an "appointment exception" to the rule that the people decide;

(3) however, there is a constitutional rule that makes legislators ineligible to hold any job during a particular term during which they were involved with creating or improving the salary the job; and

(4) there is a "popular election" exception to this "legislative ineligibility rule," so that such a legislator may hold an office during a term in which he was involved in creating the job or improving the salary of the job, if the people override the ineligibility through an election, even during the particular term.

III. The Benefits of Incumbency

I have gained my judicial jobs through popular election on four occasions. Twice (with the help of many people), I successfully stormed the castle from outside, as a challenger and non-incumbent. Twice I have stood on the battlements of office as an incumbent, and repelled the attempts of would-be evictors.

From this experience, I understand well the benefits of incumbency -- and I might add, I earned that incumbency in elections.

Of course incumbency does not assure victory. But the significant weight that "being in office"

> Igors of the world may rejoice at the majority's concoction. I do not, because it takes the legislative process out of the clear light of day where matters are voted on by the entire legislature and condemns it to that subterranean realm where memoranda of negotiations, compromises, and agreements exist and discussions in committee are used to validate the specific expenditure of funds through the Budget Digest.
>
> Common Cause of West Virginia v. Tomblin, 413 S.E.2d 358, 401, 186 W. Va. 537, 580 (1991). (Miller, J., dissenting).

To adopt the dissent's approach in the instant case, and to permit legislators who create or raise the salary of jobs to then take and hold those jobs without first obtaining popular approval, would surely furnish the "laboratory of horrors" with the raw materials of even more un-democratic concoctions.

brings to a popular electoral contest undoubtedly makes incumbency a rich asset and prize.

If -- to fill a judicial vacancy -- the "leg up" of incumbency must be awarded to a person who has not earned that benefit in an election, then that benefit must be awarded in adherence to the strictest possible reading of any applicable proscriptions and limitations. Otherwise, our democratic system for judicial selection would be distorted and unfair.

IV. The Error of the Dissent

The dissent does not take this approach -- quite to the contrary. The dissent would allow the mere possibility of a future popular election to permit an otherwise ineligible legislator to not only get a "free ride" on the horse of a powerful office, but also to grab the coveted "brass ring" of incumbency -- all without first "paying the fare" of submitting to the will of the people in a popular election -- and winning.

Under the dissent's laissez-faire approach to the constitutional language in question, a legislator could enjoy an otherwise prohibited office for literally years, without popular approval -- if an election was in some way forthcoming.[4] In short, the position that the dissent advocates would gut the constitutional ineligibility of legislators to hold offices that they have created or for which they have improved the pay.

V. The Majority Opinion is Correct

The majority in the instant case has staked out a position that strictly applies the constitutional legislative ineligibility rule. The majority opinion is solid and well-reasoned. The dissenting approach ignores both constitutional purpose and history.

There will always be those who cry politics in such a case -- whichever way it goes. But the law is with the majority in the instant case. Accordingly, I concur with the majority decision and opinion. . . .

Maynard, Justice, dissenting.

With the majority decision, this Court has attacked both the Legislature and the Governor with a sledgehammer. I, for one, do not believe that they will take it lying down. This decision will have far-reaching and long-lasting consequences for the entire judicial branch of government in West Virginia for many years to come.

Every eighth grade West Virginia civics student understands our system of checks and balances. When one branch of government becomes arrogant in its use of power, the system of checks and balances provides a remedy. In plain language, when one branch behaves like barracudas, another branch "reels 'em" in. In this case, the majority has stripped the Governor of his power of appointment and denied members of the Legislature their right to hold certain public offices. I fear the outcome will be grave.

This decision amounts to nothing less than a judicial Pearl Harbor. Japanese Admiral Isoroku Yamamoto is quoted as saying about the United States right after the attack, "I fear all we have done is awaken a sleeping giant and fill him with a terrible resolve." To continue the metaphor, that is precisely what this Court has done to the Legislature of West Virginia. . . .

First, the majority ignores clear constitutional language. Article VI, Section 15 of our Constitution prohibits a senator or delegate from being elected or appointed to a civil office of profit during the

---

[4]The dissent has relied upon a simplistic grammatical construction, to read the relevant constitutional language as permitting this perversion of the constitutional intent. But there is, of course, an equally permissible grammatical construction that reflects a constitutional intent to require popular election before an otherwise ineligible legislator may take an office. That grammatical construction is consistent with the fact that our West Virginia constitutional language -- "offices to be elected by the people" is mandatory -- as opposed to the language in the cases relied upon by the dissent -- "offices as may be elected by the people." The construction that the majority adopts is in accord with history and scholarship.

same term in which the civil office was created, or its emoluments increased, "except offices to be filled by election by the people." Thus, this provision expressly excludes publicly-elected offices from its prohibition. It is undisputed that the office of justice of the supreme court of appeals is constitutionally established as a publicly-elected office or one to be filled by election by the people. Article VIII, Section 2 of the Constitution provides, in relevant part, that "the justices shall be elected by the voters of the State for a term of twelve years, unless sooner removed or retired as authorized in this article." Delegate Kiss fits within the exception to the prohibition contained in Article VI, Section 15 because he was appointed to the office of justice which is an office to be filled by election by the people. The office does not temporarily shift from being an elective office to being an appointive office merely because a seat is vacated which must be filled until the next election.

Second, the majority opinion is wrong because it disregards our precedential authority which states that when we consider the constitutionality of an executive appointment, there is a strong presumption in favor of eligibility. As noted above, I believe the language of Article VI, Section 15 is clear. Even if it is not clear, however, the respondents should prevail. Our law states that "in the event of ambiguity a constitutional amendment will receive every reasonable construction in favor of eligibility for office[.]" Syllabus Point 3, State ex rel. Maloney v. McCartney, 159 W. Va. 513, 223 S.E.2d 607 (1976). This is because the governor's power of appointment, within constitutional limits, is plenary. Also, the valuable right of a citizen to hold public office should not be denied except by plain provisions of the law. In the instant case, Governor Underwood used his authority under Article VIII, Section 7 of the Constitution to appoint Speaker Kiss to fill a vacancy of this Court. During oral argument, the petitioners in case No. 26654 acknowledged that Article VI, Section 15 is susceptible of two different interpretations. Accordingly, we should construe any ambiguity in Article VI, Section 15 in favor of Speaker Kiss's eligibility for office as plainly required by well-settled law. Instead, the majority does the opposite and construes an ambiguity manufactured by these petitioners in favor of ineligibility.

Third, the majority opinion is wrong because it ignores the persuasive authority of other states. Courts which have considered this issue under state constitutions with similar provisions have ruled that such provisions do not prohibit the gubernatorial appointment of members of the legislature to a judicial office where the members of such judicial office are subject to public election. The constitutions of nine other states have constitutional provisions similar to our own which exempt offices to be filled by election by the people. See Ala. Const. Art. IV, § 59; Cal. Const. Art. 4, § 13; Ind. Const. Art. 4, § 30; Iowa Const. Art. 3, § 21; Ky. Const. § 44; Me. Const. Art. 4, Pt. 3, § 10; Miss. Const. Art. 4, § 45; Nev. Const. Art. 4, § 8; and Or. Const. Art. IV, § 30. In Opinion of the Justices, 279 Ala. 38, 181 So. 2d 105 (1965) and Carter v. Commission on Qualifications of Judicial Appointments, 14 Cal. 2d 179, 93 P.2d 140 (1939), the supreme courts of Alabama and California concluded that a legislator may be appointed to an office which is normally filled by election by the people. The Supreme Court of Alabama opined:

> If the section ended just before the word "except," no member of the Legislature could ever be appointed, during his term, to any office created by the Legislature of which he was a member. But the words, "except such offices as may be filled by election by the people" must have some meaning. The only reasonable construction is that excepted from the rule of Section 59 is an appointment to an office which "may be filled by an election by the people."

Opinion, 279 Ala. at 39, 181 So. 2d at 107. Likewise, the Supreme Court of California explained:

> If the section as originally adopted had any other meaning than that the exception removed elective offices from the operation of the prohibitory clause, the inclusion of the exception was meaningless and surplusage, for the section would then mean that legislators were ineligible for appointment except when they obtained their offices by election. . . . Some meaning must be ascribed to the excepting clause and when we seek to ascertain it, the reasonable, if not the only logical conclusion is that the exception had the effect of describing the kind or character of the offices thereby removed from the operation of the prohibitory clause and not the method by which

the offices were to be filled.
Carter, 14 Cal. 2d at 186, 93 P.2d at 144. I believe this reasoning is right on point and should have been adopted by this Court.

What truly astonishes me about the majority opinion is the fact that it is so empty of legal support. The majority admits that "the records of the constitutional convention shed no light . . . on the intended meaning of [the language of Article VI, Section 15], as the provision was adopted without amendment or debate." The majority then proceeds, however, to discern the thoughts and intentions of a disparate group of Framers from 1872 despite the nonexistent records. For example, the majority finds that the Framers of the 1830 Constitution "would have understood the Emoluments Clause as primarily imposing a check on legislative corruption." On what does the majority base such a claim? The majority also concludes that the alteration in the 1851 Virginia Constitution "suggests an intent to clarify that popular election was the only means of abating the impediment imposed by the Emoluments Clause" even though "the proceedings of the constitutional convention do not indicate an intent to work any substantive changes on the provision." Further, opines the majority, "the architects of our 1872 Constitution . . . were no doubt influenced by the Reconstruction era." Were they really? In what way were they influenced? In addition, we are informed by the majority that "preventing abuses and self-dealing of the 'carpetbaggers' of the Reconstruction period must have been foremost in the[Framers'] minds." Again, asserts the majority, "the abuses that occurred during Reconstruction, which resulted most notably from a lack of popular accountability, must surely have molded the thinking of the Framers[.]" I wish I had been invited to the seance, or had access to the majority's crystal ball, so that I too could have engaged in enlightening dialogue with the 1872 Framers.

Seriously, though, the language of this decision, such as "would have understood," "suggests," "were no doubt," "must have been," "must surely have," points to the simple fact that the majority was guessing. Finding a complete lack of legal support for its desired result, the majority made up history out of whole cloth. For thirty-seven pages the majority raises the specter of carpetbaggers and the evil of the reconstruction era, wholly irrelevant to the instant case, only to reach the conclusion that the writ is granted because the majority does not want Speaker Kiss on this Court. . . .

Now, when the Legislature votes for any increase in emoluments applicable to all state employees, regardless of how small the increase, delegates and senators are disqualified from appointment to all state offices during that term. In other words, if the Legislature votes the slightest increase to state employees in health coverage, or retirement benefits, or vacation benefits, or travel expenses, or per diem pay, all delegates and senators are now barred from appointment to any other state position which becomes vacant during that same term. The door to judicial and executive branch positions has been slammed shut to legislators for a significant period of time after any increase in emoluments. This is true even of those legislators who vote no on any increase! . . .

With this decision, the majority abandons the sure foundation of settled law; ignores plain constitutional language; rejects the authority of the Governor to fill vacancies on this Court; usurps the power of the Legislature; and disregards precedential and persuasive authority. The consequences are troubling. We are subjected to a legal opinion bereft of sound legal precedent and supported only by the majority's own spurious reasoning. This decision is on par with that of Captain Smith to go full steam ahead on that frigid night in 1912 when he steered the Titanic. Therefore, I dissent.

I am authorized to state that Justice Miller joins me in this dissent[.] . . .

D. Administration

1. The Legislative Session

Read Article VI, §§ 18-23.

STATE EX REL. HECK'S DISCOUNT CENTERS v. WINTERS,
147 W.Va. 861, 132 S.E.2d 374 (1963).

CALHOUN, Judge.

By this original proceeding in prohibition, the relators, Heck's Discount Centers, Inc., a corporation, and Pic-Way Shoes of West Virginia, a corporation, seek to prohibit the respondents, Honorable Ernest E. Winters, judge of the Court of Common Pleas of Cabell County, and Honorable Russell Dunbar, prosecuting attorney of that county, from proceeding to trial on certain indictments pending against the relators.

The basic question presented to this Court for decision is the constitutionality of Chapter 37, Acts of the Legislature, Regular Session, 1963, by which the legislature undertook to repeal Code, 1931, 61-8-17 and 18, as amended, and to enact in lieu thereof certain new provisions. The purpose of the new act was to amend and reenact the statutes of this state which inhibit certain acts and activities 'on a Sabbath day'. The amendatory act inhibits certain acts and activities 'on the first day of the week, commonly known and designated as Sunday,' and provides for more severe punishment.

The primary ground urged in support of the contention of unconstitutionality is the assertion that the amendatory act was passed after the legislative session had terminated by operation of law.

Shortly after the effective date of the 1963 act, Heck's Discount Centers, Inc., was charged in an indictment with having employed a certain person, described by name, to perform certain labor on a designated Sunday and by a separate indictment the same defendant was similarly indicted for thus having employed another person described by name. On the same date on which the two indictments were returned against Heck's Discount Centers, Inc., the same grand jury returned a similar indictment against Pic-Way Shoes of West Virginia, Inc. Promptly thereafter the relators, defendants in the indictments, appeared by counsel before the Court of Common Pleas of Cabell County, in which the indictments had been returned and were pending, and thereupon moved the court to quash and to dismiss the indictments on the ground of the alleged unconstitutionality of the 1963 act. The motions were overruled and the matters charged in the three indictments were set for trial on July 9, 1963. The prohibition proceeding was thereupon instituted in this Court.

. . . Constitution, Article VI, Section 18, provides in part: 'Regular sessions of the Legislature shall commence on the second Wednesday of January of each year * * *.' Accordingly, the legislature convened on January 9, 1963, for the regular session.

A portion of Article VI, Section 22 of the Constitution is as follows: 'The regular session of the Legislature * * * shall not exceed sixty days, * * *. All regular sessions may be extended by the concurrence of two-thirds of the members elected to each house.' A joint resolution for extension of the session, pursuant to that provision, was proposed but failed to pass.

A portion of Article VI, Section 51, Sub-Section D of the Constitution is as follows: 'If the 'Budget Bill' shall not have been finally acted upon by the Legislature three days before the expiration of its regular session, the governor may, and it shall be his duty to issue a proclamation extending the session for such further period as may, in his judgment, be necessary for the passage of such bill; but no other matter than such bill shall be considered during such extended session except a provision for the cost thereof.' The governor extended the session for three days for budgetary purposes.

In the light of the constitutional provisions referred to above, the legislature had no constitutional right, power or authority to pass, and was inhibited by the Constitution from passing any law after midnight of the sixtieth day of its session, except enactments relating to the budget.

. . . In its brief, [*amicus curiae*] West Virginia Retailers Association contends that, in computing the permissible length of the sixty-day session, we are required to exclude the first day thereof and that, therefore, the legislature was authorized to continue in regular session beyond midnight of Saturday, March 9, and at least through Sunday, March 10. Primary reliance for that contention is

placed on Code, 1931, 2-2-3, which provides that the 'time within which an act is to be done shall be computed by excluding the first day and including the last; or if the last be Sunday, it shall also be excluded.' If we were to adopt and literally apply this contention, the result would be that it was permissible for the regular session to have continued through Monday, March 11. This would be contrary to that which we believe to have been the accepted practice and interpretation of the Constitution uniformly adhered to through the past years of the state's history. We believe that the statute relied upon in this connection is not applicable. We are not concerned in this case with a determination of the 'time within which an act is to be done.' On the contrary, we are concerned with the permissible duration of the regular sixty-day legislative session. The Constitution which provides for the creation of the regular session also places a limitation on the length thereof. That is to say, Constitution, Article VI, Section 22, declares in unmistakable language that a regular session 'shall not exceed sixty days.' That clear provision of the organic law is the one directly applicable, the one we are constrained to follow, and it offers no semblance of an authorization of a continuance of the regular session beyond sixty days. It makes no provision for the exclusion of a Sunday or of any other day in the application of its clear provisions. We hold, therefore, that the regular 1963 session of the legislature could not constitutionally continue beyond midnight on Saturday, March 9, in the absence of an extension thereof 'by the concurrence of two-thirds of the members elected to each house,' in conformity with the provisions of Article VI, Section 22 of the Constitution.

It is common knowledge that over a period of years the legislature has undertaken from time to time to circumvent the constitutional provision which limits the length of a regular session, and that on occasions it has undertaken to prolong its sessions by the mere expedient of stopping the clock. In Capito v. Topping, 65 W.Va. 587, 593, 64 S.E. 845, 847, the Court referred to the 'common practice of staying the hands of the clock to enable the Legislature to effect an adjournment apparently within the time fixed by the Constitution for the expiration of the term[.]'

Doubtless it is a fact that the legislature of this state is not unique in having indulged in that practice. It is a fact, nevertheless, that when a regular legislative session ends by operation of law by reason of the expiration of the period fixed by the Constitution for its duration, the legislature becomes functus officio and ceases to have the legislative power accorded to it while in lawful, constitutional session.

This Court heretofore has been called upon to wrestle with the problem, on the one hand, of according full force to the presumption of the verity of legislative bills duly enrolled, authenticated and approved; and, on the other hand, of requiring obedience on the part of the legislature to the clear mandate of the Constitution. In its efforts to strike a proper balance in relation to these two considerations, the Court has heretofore formulated certain legal principles for our guidance.

In the seventh point of the syllabus of [Capito v. Topping], the Court stated: 'When the records of the Legislature show the time of adjournment and are clear and unambiguous respecting the same, they are conclusive; and extraneous evidence cannot be admitted to show a different date of adjournment.' In the body of the opinion[,] the Court stated: 'If the Legislature has failed to make any record of its adjournment, or its records are in such a state of confusion as to render ascertainment of the date impossible, then resort may be had to other evidence, but not otherwise.'

The seventh point of the syllabus of Capito v. Topping, supra, was applied and adopted as the first point of the syllabus of State ex rel. Armbrecht v. Thornburg, 137 W.Va. 60, 70 S.E.2d 73. In the Armbrecht case, the Court made an exhaustive review of prior decisions of this Court and of appellate courts of other jurisdictions, and stated in the body of the opinion[:] 'From these decisions it clearly appears, we believe, that this Court early adopted, and has continuously followed, a rule permitting the Court, in determining whether the Legislature has complied with the constitutional requirements in the consideration or passage of a bill, to look to the journals and to other official records and, in the event of patent ambiguity in such records, to hear and determine the question of constitutionality of the act by aid of extrinsic evidence.'

In the Armbrecht case, the Senate journal disclosed that a member of that body had stated that a

certain bill was 'considered' at approximately twenty minutes after seven o'clock on the morning of the day after the session had ended by operation of law. The Court held that no ambiguity was thereby made to appear on the face of the journal because the senator merely stated that the bill was 'considered', rather than voted upon and enacted. In that connection the Court stated:

> 'While this Court must accord to the Legislature, a co-ordinate branch of the government, every constitutional power or right possessed by it, the fact must not be overlooked that the Court is charged with the solemn duty of determining what acts of the Legislature are constitutional, and what acts have been passed by the Legislature in conformity with the demands of the Constitution, when such questions are properly presented to the Court. The mere stopping of a clock does not stop the passing of time. The sixty day provision of the Constitution does not prevent the Legislature, by 'a concurrence of two-thirds of the members elected to each house', from extending a session beyond sixty days, if necessity therefor exists. The method so provided for an extension of the session by the Constitution appears ample but, if not ample, we are not warranted in avoiding the direct and certain command of the Constitution by any sort of subterfuge, and we do not hesitate to say this Court, at least as now constituted, would adjudge any legislation invalid if it be established by a proper showing to have been enacted beyond the sixty day period, where no constitutional extension is shown to have been authorized.'

[See also State v. Heston, 137 W.Va. 375, 71 S.E.2d 481 (1952).]

. . . From prior decisions of this Court it appears that a bill duly enrolled, authenticated and approved is presumed to be correct but the courts may look to the journals of the legislature and to other official records to determine whether such an act was passed in accordance with constitutional requirements. If the legislative journals of either house of the legislature disclose on their face an omission, ambiguity or conflict in relation to the question of compliance with or failure to comply with constitutional requirements, resort may be had by a court to extrinsic evidence for the purpose of resolving such omission, ambiguity of conflict. . . .

We believe that we are warranted in the assertion that, by brief and oral argument, counsel for the proponents of the constitutionality of the amendatory act admit tacitly, though not expressly, that such act was passed after the session was terminated by operation of law. In their petition, the relators specifically allege that the act was voted upon and passed after midnight on the night of March 9-10. In their answer the respondents make no denial of such allegation except by reliance upon the legislative journal of March 9. The entire case in behalf of the respondents on this question of constitutionality is based on reliance upon the legislative journal.

With the prohibition petition there was filed as an exhibit and made a part of the petition an affidavit by Honorable C. A. Blankenship, Clerk of the House of Delegates. In that affidavit he stated that on the evening of March 9, 1963, 'he was directed by the Speaker of the House of Delegates, the Honorable Julius W. Singleton, Jr., to stop the clock, this being the official clock of the House of Delegates,' and that the act in question 'was passed when the official clock was stopped at 11:28 P.M., but the actual time was 12:15 or 12:18 A.M., March 10, 1963.' The allegation of the petition that the official clock was stopped has not been denied or contradicted by answer, affidavit or otherwise.

In both the Armbrecht case and the Heston case, the legislative journals indicated, in clear, unambiguous language, that adjournment occurred on a date when the legislature was constitutionally authorized to be in session. No ambiguity in that respect appeared. On the contrary, the journal of the House of Delegates for March 9, 1963, does not contain a clear, unequivocal or unambiguous declaration or pronouncement of the date and hour of adjournment. The language employed in the journal of the house for that day is as follows: '*Stating that according to the clock in the House Chamber it was now 11:58 P.M.*, Mr. Brotherton moved that the House of Delegates adjourn until 12:00 noon, Monday, March 11, 1963.' (Emphasis supplied.) This language is contrasted with the following unequivocal, unambiguous declaration contained in the House journal for Monday, March 11, 1963: 'At 6:55 P.M., on motion of Mr. Brotherton, the House of Delegates

adjourned sine die.' We believe, therefore, that the House journal for Saturday, March 9, 1963, omitted to disclose an affirmative declaration in clear, unambiguous language, that the adjournment was within the sixty-day period prescribed by the Constitution.

Courts of this state may take judicial notice of the journals of either house of the legislature. [State v. Heston.] From the journal of the House of Delegates for March 9, 1963, the sixtieth day of the session, it is fairly obvious that various members of that body, who opposed the enactment involved in this case, proceeded by concert of action to cause the journal of that day's proceedings to demonstrate, in conformity with prior pronouncements by this Court, that the act here in question was considered for passage and voted upon after midnight of the night of March 9-10.

The bill here in question is described in the journal as 'Eng. Com. Sub. for Senate Bill No. 125.' At page 162 of the House journal appears the following remark by Delegate J. S. Barker: 'The clock was stopped at eleven thirty and I want that in the record.' As disclosed by the journal at the same page, Mr. Baker stated: 'I voted against this bill at twelve seventeen according to my watch and I checked the time, Eastern Standard time, before I voted.'

According to the journal at page 161, Delegate Simonton stated: 'This carnival trick of stopping the clock, now showing eleven thirty, and by every other member's watch in this House right now it is at least fifteen after, is something that I, as a citizen, just simply cannot swallow.'

The following remarks of Delegate Cann appear at page 163 of the journal: 'Mr. Speaker, the clock in the House chamber now shows eleven-thirty. That clock has so shown that time for one hour and five minutes. At the time that I rose in opposition to Eng. Com. Sub. for Senate Bill No. 125, that bill had not been voted on at that time by the House of Delegates of the West Virginia Legislature. I announced that it was twelve minutes after twelve.'

According to the journal at page 163, Delegate Bailey stated: 'Mr. Speaker, I would like to explain my vote on Eng. Com. Sub. for Senate Bill No. 125 at twelve-fifteen on March 10, 1963, the clock on the wall showing eleven-thirty.'

As disclosed by page 170 of the House journal, Delegate Auvil stated: 'Mr. Speaker, I believe that by passing Eng. Com. Sub. for Senate Bill 125, the Sunday Blue Law, fifteen minutes after the hour of twelve, Sunday morning, March 10, 1963, that we have mocked the legislative process.'

The following remark by Delegate Gentile appears at page 173 of the House Journal: 'I voted for the bill. The time on my watch was 12:15 A.M., March 10, 1963.'

The following appears at page 158 of the House journal: 'Mr. Kidd stated that according to his watch it was now 12:05 A.M., Sunday, March 10, 1963, and inquired of the Speaker as to the correct time. The Speaker stated that according to the clock in the House Chamber it was now 11:28 P.M., Saturday, March 9, 1963.' At page 159 of the House journal, the following appears in relation to the bill involved in this case:

> 'Mr. White then moved that the report of the Committee of Conference be adopted.
>
> 'Mr. Simonton raised the point of order that it was now after 12:00 midnight, March 9, 1963, and for this reason the House could not constitutionally further consider the legislation.
>
> 'Which point of order was overruled by the President Officer.'

According to page 177 of the House journal, Delegate Slonaker stated that 'action was taken' on the bill in question and others after midnight.

The following appears on pages 178 and 179 of the House journal:

> 'Mr. Nuzum explained his vote on Eng.Com. Sub. for S.B. No. 125, and while occupying the floor, asked certain members to yield for questions.
>
> 'Concluding his explanation and questioning, Mr. Nuzum requested that his explanation and questions and answers be incorporated in the Journal.
>
> 'The Speaker stated that under the rules the gentleman was entitled to have his explanation included in the Journal, and that the answers to his questions could be included with the consent of the members giving the answers.
>
> 'The gentlemen answering the questions joined in the request.

'The explanation, questions and answers were as follows:

'Mr. Nuzum. Mr. Speaker, I would like to explain my vote on Eng.Com. Sub. for S.B. No. 125.

'I call your attention to Section 22, Article VI of the Constitution, dealing with length of legislative sessions.

'The gentleman from Hampshire has made the point, but I call attention to the provision of this section providing that 'All regular sessions may be extended by the concurrence of two thirds of the members elected to each House.'

'Now, Mr. Speaker, would the gentleman from Marion yield for a question?

'The Speaker. The gentleman from Marion indicates he will yield.

'Mr. Nuzum. Mr. Watson, do you have a watch?

'Mr. Watson. Yes, sir.

'Mr. Nuzum. What time does your watch show?

'Mr. Watson. I've got nine after one.

'Mr. Nuzum. Would the gentleman from Wood yield?

'Mr. Nuzum. Mr. Simonton, do you have a watch?

'Mr. Simonton. Yes, sir.

'Mr. Nuzum. What time does your watch show?

'Mr. Simonton. My watch shows six after one.

'Mr. Nuzum. Will the gentleman from Gilmer yield?

'Mr. Kidd. Yes, sir.

'Mr. Nuzum. What time does your watch show?

'Mr. Kidd. Eleven minutes after.

'Mr. Nuzum. Will the gentleman from Mingo yield?

'Mr. Nuzum. What time does your watch show?

'Mr. Gentile. Eleven after one.

'Mr. Nuzum. Will the gentleman from Fayette (Mr. Myles) yield?

'Mr. Nuzum. Mr. Myles, do you have a watch?

'Mr. Myles. Yes, sir.

'Mr. Nuzum. What time does your watch say?

'Mr. Myles. I can't see it but the clock on the wall says four minutes till twelve on March 9, 1963.

'Mr. Nuzum. You can't see your watch?

'Mr. Myles. No, sir. It's covered up with my shirt sleeve.'

From the journal of the House of Delegates for March 9, 1963, it appears affirmatively and without contradiction that the official clock was stopped at approximately 11:28 p. m., and that it remained stopped for a considerable period of time. It likewise appears affirmatively and without substantial contradiction that the bill in question was voted upon after the hour of midnight and at approximately 12:15 or 12:18 a. m., on Sunday, March 10, 1963. Perhaps the only portion of the House journal for March 9, 1963, which tends to disclose that the bill was voted upon before midnight is the following which appears at page 173: 'Mr. Myles. Mr. Speaker, I wish to explain my vote on Eng.Com. Sub. for S.B. No. 125, which was passed Saturday night, March 9, 1963, at approximately 11:29 P. M.' In that connection we bear in mind that it appears from the journal that the official clock was stopped at approximately 11:29 p. m., and that Mr. Myles is the same member of the House who stated that he could not see his watch because it was covered by his shirt sleeve. . . .

Considering the journal of the House of Delegates for March 9, 1963, in its entirety, the undenied allegations of the prohibition petition and the three affidavits filed as exhibits with and made a part of the petition, the Court holds that it clearly appears that the bill in question was not voted upon on the question of its passage or enactment until the early morning of Sunday, March 10, 1963, when

the 1963 regular session had ceased and terminated by passage of time and by operation of law; and that, therefore, Chapter 37, Acts of the Legislature, Regular Session, 1963, is unconstitutional, void and a nullity. . . .

For reasons stated, a writ is awarded to prohibit the respondents from the further prosecution or trial of the pending indictments against the relators under the provisions of the challenged statute or any other statute relating to the subject matter of such indictments. . . .

2. Enactment of Legislation

Read Article VI, §§ 24, 26, 28-32.

STATE EX REL. WALTON v. CASEY,
179 W. Va. 485, 370 S.E.2d 141 (1988).

MILLER, Justice

On March 1, 1988, the Circuit Court of Kanawha County entered an order to compel the issuance of a permanent medical license to Enrique C. Mata, M.D., pursuant to W. Va. Code, 30-14-8a. Ronald D. Walton, Executive Director of the West Virginia Board of Medicine (Board), petitions this Court for a writ to prohibit enforcement of the circuit court order. He contends that the legislative act which contained W. Va. Code, 30-14-8a (1987), was defectively titled and, therefore, in violation of W. Va. Const. art. VI, § 30. We agree, and award the writ of prohibition.

The crux of the petitioner's argument is that the Legislature in 1987 placed in the osteopathic article of the West Virginia Code, a section, W. Va. Code, 30-14-8a, which enabled medical physicians, who once held only a temporary permit under W. Va. Code, 30-3-10, to obtain a permanent license without the necessity of passing the Board's examination.

W. Va. Code ch. 30, art. 3 confers upon the Board the sole and exclusive authority to license persons, other than osteopathic physicians, to practice medicine in the State of West Virginia. Former W. Va. Code, 30-3-10, also authorized the Board to issue temporary permits to unlicensed medical physicians when it determined the public health so warranted. These permits were limited to specified geographic areas of the State and were valid for up to one year. A permit holder was subject to the supervision of a duly licensed medical physician.

Though a permit holder was not required to show satisfactory completion of the Board's medical examination, he was required to take such examination annually as a condition of renewal. In 1984, the Legislature amended W. Va. Code, 30-3-10, to provide that physicians holding a temporary permit would be ineligible to obtain any additional permits after July 1, 1985, unless they had passed the medical examination prior to that date.

The respondent, Enrique C. Mata, received an M.D. degree in 1972 from the Universidad de Madrid in Madrid, Spain. He has resided in West Virginia since 1974. In that year, he applied for and obtained a temporary permit to practice medicine. The permit was renewed annually until 1985. While practicing under the permit, he was stationed at hospitals in Hopemont and Fairmont.

As required by former W. Va. Code, 30-3-10, Dr. Mata took the Federation of Licensing Boards Examination at least once each year he held a temporary permit. He was unable to obtain a passing score in fourteen attempts. On September 9, 1985, his temporary permit was revoked. Since 1985, he has worked as the clinical director of an alcohol and substance abuse facility in Kingwood.

In 1987 the Legislature undertook to revise the licensure requirements for medicine and osteopathy. Senate Bill 166 amended W. Va. Code, 30-3-10, to abolish temporary permits for medical physicians. Subsequently, House Bill 2778 amended numerous sections of W. Va. Code ch. 30, art. 14, which provides for the regulation of osteopathic physicians. It also added a new section, W. Va. Code, 30-14-8a (1987), titled "Resident Physicians," which allowed former permit holders

to apply for and receive permanent medical licenses:

> "Any resident physician who has held a temporary certificate in the state of West Virginia prior to the first day of January, one thousand nine hundred eighty-seven, is entitled to apply for and obtain a permanent license. In lieu of any other requirement of law, *including the provisions of article three of this chapter* [W. Va. Code ch. 30, art. 3], the physician is entitled to apply for and obtain a permanent license by virtue of the fact that he or she has held a temporary certificate and has practiced in the state of West Virginia during the period of temporary certification." (Emphasis added).

In February, 1988, Dr. Mata applied for a permanent medical license citing W. Va. Code, 30-14-8a. By letter dated February 26, 1988, his attorney demanded that the Board immediately issue a license. In a reply of even date, Mr. Walton advised Dr. Mata that the Board's licensure committee would consider his application at its regularly scheduled meeting on March 13, 1988. On February 29, 1988, Dr. Mata petitioned the Circuit Court of Kanawha County for a writ of mandamus to compel the issuance of a license pursuant to W. Va. Code, 30-14-8a (1987). A mandamus was issued by order dated March 1, 1988.

The petitioner, Ronald D. Walton, contends on behalf of the Board that the circuit court acted beyond its jurisdiction in issuing a mandamus to require the Board to issue a permanent medical license to the respondent. The primary argument made is that the title to House Bill 2778 related solely to osteopathic objects contained in W. Va. Code, 30-14-1 et seq., and gave no indication it was intended to grant permanent medical licenses to physicians who had previously held temporary permits.[5]

W. Va. Const. art. VI, § 30, reads, in part: "No act hereafter passed, shall embrace more than one object, and that shall be expressed in the title. But if any object shall be embraced in an act which is not so expressed, the act shall be void only as to so much thereof, as shall not be so expressed[.]"

Our constitutional provision is similar to that embodied in many state constitutions. Our earliest case discussing this provision, Cutlip v. Sheriff of Calhoun County, 3 W. Va. 588, 590 (1869), set out its purpose at some length:

> "The object of this provision was to guard against the enactment of laws by a sort of fraud upon the legislature by including in an act for one purpose, which was stated in its title, other and different objects, not so stated, and of which nothing was often known save by a few interested in the bill. And the evil of which enhanced when bills were merely read by their titles and put upon their passage and often rushed through on the last day of the session of the legislature.
>
> "Another important object was to secure a fair and impartial consideration of each subject by making it to stand or fall on its merits, instead of having it carried against the wishes of the majority, often by having it tacked to some important measure it must be difficult or disastrous to defeat.
>
> "The history of legislation is rife with evils of this character sought to be remedied [sic] by this provision of the constitution."[8]

In Elliott v. Hudson, 117 W. Va. 345, 349, 185 S.E. 465, 466 (1936), which was decided under

---

[5]The full text of the title to House Bill 2778 reads:

"AN ACT to amend and reenact sections three, four, five, six, eight, nine-a and ten, article fourteen, chapter thirty of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to further amend said article by adding thereto a new section, designated section eight-a; and to amend and reenact sections two and three, article fourteen-a of said chapter, all relating to the state board of osteopathy, its members, applicants for examination, training of interns, license fees, temporary permits, resident physicians, fees for osteopathic medical corporations, biennial renewal of osteopathic assistant certification, and fees."

[8]Cutlip was decided under art. IV, § 36 of the 1863 Constitution of West Virginia, which was less stringent than our current provision and provided: "No law shall embrace more than one object, which shall be expressed in its title."

our present constitutional provision, we reiterated much the same reasons:

> "To submerge an important proposition in the body of an act with wholly inadequate reference thereto, if any, in the title, not only is subversive of the principle just discussed that all interested persons should be fairly informed of the import of pending legislation, but is destructive of the American concept of the necessity of open consideration of legislative matters. Such concealment tends to deception . . . . For these reasons, a title which does not furnish at least a 'pointer' to a challenged provision of the act is insufficient."

These concerns have led us to conclude that W. Va. Const. art. VI, § 30, which requires that the object of an act of the Legislature "shall be expressed in the title," serves two salutary purposes. First, it is designed to give notice by way of the title of the contents of the act so that legislators and other interested parties may be informed of its purpose. Second, it is designed to prevent any attempt to surreptitiously insert in the body of the act matters foreign to its purpose which, if known, might fail to gain the consent of the majority. . . .[9]

In the present case, we are concerned with that portion of art. VI, § 30, which requires the object of an act to be "expressed" in the title. Our cases hold that the requirement of expressiveness contemplated by our Constitution necessarily implies explicitness. A title must, at a minimum, furnish a "pointer" to the challenged provision in the act. The test to be applied is whether the title imparts enough information to one interested in the subject matter to provoke a reading of the act.

. . . The amendments to W. Va. Code ch. 30, art. 14, contained in House Bill 2778 dealt exclusively with the subject of osteopathic physicians. Its title contained no reference to the fact that any portion of chapter 30 was to be altered other than article 14. The medical licensure requirements for other physicians, such as Dr. Mata, which are set out in [§] 30-3-10, were not referenced in the title.

Indeed, the earlier amendment to W. Va. Code, 30-3-1 et seq., occasioned by Senate Bill 166, enacted four days prior to the osteopathic bill, would have led a legislator or interested citizen to conclude that temporary permits under W. Va. Code, 30-3-10, had been abolished and that there were no provisions made to obtain a further temporary or permanent permit.[10]

Consequently, it was only a result of the insertion of § 8a into the osteopathic section of the Code that Dr. Mata was enabled to assert a claim to a permanent medical license. Such a surreptitious provision, undisclosed in the title, which extended substantial benefits to physicians who could not otherwise qualify for a permanent license, is assuredly the very practice that our constitutional provision was designed to prevent.

We, therefore, conclude that insofar as the object of [§] 30-14-8a, was not expressed in the title of H.B. 2778, the section violates [Art.] VI, § 30 and is null and void. Because this [provision] directs that only the "object . . . . not so expressed . . . . shall be void," the remaining portions of the act remain valid. ...

---

[9]Another obvious purpose for this constitutional provision is to prevent the Legislature from enacting a bill which contains several different objects. This one-object standard has not been as frequently litigated as the requirement that an object of the bill be "expressed" in the title. In City of Huntington v. Chesapeake & Potomac Tel. Co., 154 W. Va. 634, 177 S.E.2d 591 (1970), we recognized that the object of a bill could contain many different parts. In Simms v. Sawyers, 85 W. Va. 245, 101 S.E. 467 (1919), we held that the one-object requirement was violated where an act of the legislature had embraced "two separate and distinct subjects of legislation, both of which [were] expressed in the title[.]" . . .

[10]This conclusion would reasonably follow from the 1984 version of W. Va. Code, 30-3-10, which terminated temporary permits as of July 1, 1985, for those who had failed to pass the medical examination prescribed by the Board before this date. The amendments in Senate Bill 166 made no provisions for temporary permit holders to obtain additional temporary permits.

KINCAID v. MANGUM,
189 W.Va. 404, 432 S.E.2d 74 (1993).

McHUGH, Justice:

. . .

I.

The plaintiffs filed a civil rights action in the United States District Court for the Southern District of West Virginia alleging that the conditions of their confinement violated the United States Constitution and certain state regulations. The district court certified the case as a class action.

Eventually, the parties agreed to settle seventeen out of nineteen areas of concern raised by the plaintiffs. However, two issues remained: the overcrowding of the jail and the adequacy of the jail's outdoor exercise facilities. The plaintiffs moved for a preliminary injunction seeking relief on those two matters. The district court granted the injunction by relying on regulations issued by the West Virginia Jail and Prison Standards Commission set forth in 95 West Virginia Code of State Rules § 1-1.1, et seq.

The defendants moved for reconsideration, arguing that the regulations upon which the district court relied were promulgated in a manner which violated the West Virginia Constitution. . . . [The District Court] certified the following question to this Court . . .:

> Does the West Virginia Legislature's authorization of the 'West Virginia Minimum Standards for Construction, Operation and Maintenance of Jails' through the use of an omnibus bill, which authorized numerous legislative rules unrelated to one another, contravene ... Article VI, Section 30 of the West Vir-ginia Constitution [providing that no act may embrace more than one object] . . .?

II.

. . . W.Va. Const. art. VI, § 30 . . . provides, in pertinent part: "No act hereafter passed, shall embrace more than one object, and that shall be expressed in the title." We are concerned with the portion of art. VI, § 30 which is known as the one-object or subject rule.[3] For reasons set forth below, we find that the use of the omnibus bill to authorize legislative rules violates the one-object rule expressed in W.Va. Const. art. VI, § 30.

We note that although the certified question specifically pertains to the legislature's authorization of the "West Virginia Minimum Standards for Construction, Operation and Maintenance of Jails" (hereinafter Minimum Jail Standards rule), we find that the legislature's authorization of all of the state agencies' regulations through the use of an omnibus bill to be at issue.

A.

[A] brief examination of the legislative history of the Minimum Jail Standards rule is necessary as an example of how the legislature is authorizing our state agencies' rules and regulations. Before the Minimum Jail Standards rule was introduced in the legislature, the procedures outlined in the State Administrative Procedures Act, W.Va.Code, 29A-1-1, et seq., were followed.[5] Although the

---

[3]Most states use the term "subject" rather than "object" in their constitutional provision prohibiting a bill from containing unrelated provisions. Millard H. Ruud, No Law Shall Embrace More Than One Subject, 42 Minn.L.Rev. 389, 390 (1958). Although courts have differed over the effect of the use of the two terms, some courts have defined the two terms so that in substance the two terms are identical. 1A Norman Singer, Sutherland Statutory Construction § 17.01, at 2-3 (4th ed. 1985). In fact, Millard H. Ruud stated in his article that "[b]ecause no real difference was discovered in the courts' handling of the question depending upon whether the unity requirement was stated in terms of 'subject' or 'object,' the cases are not separately treated in the ... discussion." . . . Therefore, we find that the terms are synonymous since the constitutional provisions containing the terms were enacted for the same basic purpose, and we will use the terms interchangeably in this opinion.

[5]The elaborate rule-making procedures for the agencies in the Administrative Procedures Act are set forth in

Minimum Jail Standards rule was originally introduced in 1988 as S.B. 426 [and] H.B. 4345, neither of those bills made it to the floor of the Senate or of the House of Delegates. Instead, the Minimum Jail Standards rule became part of S.B. 397 when the House of Delegates amended the bill. S.B. 397 was originally introduced to authorize the Racing Commission to promulgate a rule relating to thoroughbred racing. However, after the bill was amended it was an omnibus bill which encompassed authorization for all agency rules considered that year. . . .

S.B. 397 was eventually passed on March 12, 1988. . . . The omnibus bill authorized 44 rules of many different agencies including the Minimum Jail Standards rule.[7] The . . . members of the legislature did not have the actual rule before them when voting on the omnibus bill. Instead, the omnibus bill referred the members of the legislature to the state register for the contents of the rule.

Furthermore, when the agency's rule was to be amended, the omnibus bill simply referred the members of the legislature to a page and section number of the state register and explained the deletions or additions without giving the entire text of the rule. . . . The text of the rules addressed in the omnibus bill are never before the entire legislature, although the legislative rule-making review committee should have the entire text before it. See [§29A-3-11.]

The defendants argue that the omnibus rules legislation, outlined above, violates the one-object rule of W.Va. Const. art. VI, § 30 since the omnibus bill contains many unrelated legislative regulations. The defendants point out that the fear is that the legislature will pass the omnibus bill regarding the state regulations because they agree with the majority of the regulations even if they seriously disagree with one regulation. The defendants argue that this is the evil which W.Va. Const. art. VI, § 30 attempts to avoid. The defendants also note that the bill does not contain the text of the many regulations which makes it more difficult for the legislators to know what may be contained in the regulations or rules.

On the other hand, the plaintiffs argue that the bill serves one necessary governmental function: the authorization of legislative rules. Therefore, the omnibus bill only embraces one object and does

---

W.Va.Code, 29A-3-5 through 29A-3-9. As the plaintiffs point out, "[t]he procedures include public notice, publication of proposed rules, opportunity for public comment and/or a public hearing, agency review of public comments and/or testimony, publication of final proposed rules and of explanations for any changes."

Once the proposed rule has gone through the above procedures, then it is referred to the legislative rule-making review committee which reports its recommendation and the proposed rule to the legislature. See [W.Va. Code, 29A-3-11 and -12.]

W.Va.Code, 29A-3-11 [1986] outlines the duties of the legislative rule-making review committee. Once the agency has submitted the full text of the legislative rule with any deletions or additions clearly marked, the committee reviews seven matters: whether the agency exceeded statutory authority when making the proposal; whether the proposed rule conforms with the legislative intent; whether the proposed rule conflicts with another statute or rule; whether the proposed rule is necessary; whether the proposed rule is reasonable; whether the proposed rule can be made more understandable to the public; and whether the proposed rule was promulgated in compliance with the Administrative Procedures Act. After the legislative rule-making committee reviews the rule, the committee makes a recommendation to the legislature with the committee's deletions or additions. The members of the legislature then by act may authorize an agency to adopt the rule with any amendments designated by the legislature. W.Va.Code, 29A-3-12 [1986].

[7]. . . [W]e have quoted portions of the omnibus bill . . . [to give] an idea of what subjects the omnibus bill encompasses: [The omnibus bill is described as an act] authorizing the commissioner of commerce to promulgate certain legislative rules relating to the public use of West Virginia state parks, forests and hunting and fishing areas, as modified with certain amendments thereto;... authorizing the state tax commissioner to promulgate certain legislative rules relating to appraisal of property for periodic state-wide reappraisals for ad valorem property tax purposes, as modified; ... authorizing the department of natural resources to promulgate certain legislative rules relating to hazardous waste management; ... authorizing the commissioner of labor to promulgate certain legislative rules relating to the West Virginia occupational safety and health act, adoption of federal standards; ... authorizing the jail and prison standards commission to promulgate legislative rules relating to West Virginia minimum standards for construction, operation and maintenance of jails; ... [and] authorizing the insurance commissioner to promulgate certain legislative rules relating to medical malpractice [reporting requirements.]

not violate W.Va. Const. art. VI, § 30. The plaintiffs also argue that the omnibus bill poses no risk for deception because the bill must have come from the administrative agencies, have been subjected to the rigorous public comment and review requirements of the State Administrative Procedures Act, W.Va.Code, 29A-1-1, et seq., though the defendants argue that if the legislative rule-making committee decides to amend the rule or regulation the amendment does not go through the review requirements of the State [APA.] See [§ 29A-3-11(d).] The plaintiffs also point out that the regulations will have been individually studied by the legislative rule-making review committee in order to ensure that the regulations meet certain standards set forth in [§ 29A-3-11]. Therefore, the plaintiffs contend that no further review is necessary. We will view each of the parties' contentions in light of the history of the one-object rule.

B.

The one-subject rule can be traced as far back as the Romans. Michael W. Catalano, The Single Subject Rule: A Check on Anti-Majoritarian Logrolling, 3 Emerging Issues St. Const. Law 77, 79 (1990). As of 1990, forty-three states in this country have adopted some form of a one-subject rule in their constitutions. [Id.] Although the purpose of the one-subject rule has been expressed in different ways, one author has succinctly stated the general purpose of the one-subject rule:

> The primary and universally recognized purpose of the one-subject rule is to prevent log-rolling in the enactment of laws--the practice of several minorities combining their several proposals as different provisions of a single bill and thus consolidating their votes so that a majority is obtained for the omnibus bill where perhaps no single proposal of each minority could have obtained majority approval separately.
>
> Another stated purpose for the provision is to prevent 'riders' from being attached to bills that are popular and so certain of adoption that the rider will secure adoption not on its own merits, but on the merits of the measure to which it is attached. This stratagem seems to be but a variation of log-rolling.
>
> Another purpose served by the one-subject rule is to facilitate orderly legislative procedure. By limiting each bill to a single subject, the issues presented by each bill can be better grasped and more intelligently discussed.

Millard H. Ruud, No Law Shall Embrace More Than One Subject, 42 Minn.L.Rev. 389, 391 (1958) (footnotes omitted). Ruud points out that it is not necessary for log-rolling to have actually occurred since the one-object rule assumes that two objects were combined in a single bill for the purpose of log-rolling. Ruud, supra at 448.

When debating whether or not to adopt W.Va. Const. art. VI, § 30 during the West Virginia constitutional convention, a member of the convention expressed the general purpose of the one-subject rule: "If you strike out this provision, you can towards the heel of a session, take any bill, whether important or not, and make it an omnibus to carry through all sorts of schemes, tacking them on as amendments." 1 Debates and Proceedings of the First Constitutional Convention of West Virginia (1861-63) 906 (Charles H. Ambler, et al. eds.). Clearly, the constitutional framers of this State thought it was important for the members of the legislature to be fully aware of the subject upon which they were voting. An informed legislature is even more important in modern times considering the complexity of many rules and regulations.

Although this Court has not often had the opportunity to address the one-subject rule, this Court did squarely face the one-subject rule issue in Simms v. Sawyers, 85 W.Va. 245, 101 S.E. 467 (1919).[8] In Simms this Court found that an act providing for a charter for the city of Hinton and also creating the independent school district of Hinton, embraced two separate subjects of legislation in

[8]This Court has more frequently addressed whether the title of an act sufficiently indicates the subject matter of an act so as to be constitutional under W.Va. Const. art. VI, § 30. State ex rel. Walton v. Casey, 179 W.Va. 485, 488 n. 9, 370 S.E.2d 141, 144 n. 9 (1988).

violation of W.Va. Const. art. VI, § 30. The fact that both portions of the act involved the same city was not sufficient to save the act. In arriving at its conclusion this Court stated:

> Where the Legislature undertakes to legislate upon a particular subject for the accomplishment of a certain object, it is competent to embrace within one act all regulations *germane* to the subject of legislation which may be appropriate to accomplish the object sought. It is only the joining in one act of two separate subjects of legislation which is inhibited, and not the joining of many separate provisions touching one subject, and having for their object the accomplishment of one purpose.

Id. at 255, 101 S.E. at 471 (emphasis added).

This Court also addressed the one-object rule in State ex rel. Brotherton in which it found that the budget bill, which provides an expenditure plan for the operation of the government, does not violate W.Va. Const. art. VI, § 30 since "all appropriation matters contained therein are germane to the budgetary process[.]" State ex rel. Brotherton v. Blankenship, 158 W.Va. 390, 403, 214 S.E.2d 467, 477 (1975).[9] This Court did point out the limits of the use of the budget bill in Dadisman v. Moore, 181 W.Va. 779, 788, 384 S.E.2d 816, 825 (1988), as modified on reh'g, in which this Court stated that the legislature cannot amend substantive statutes with the budget bill.[10]

This Court has used the term "germane" in Simms, supra, and State ex rel. Brotherton, supra, to determine whether the one-subject rule has been violated. The term "germane" is the general test used, and it has been defined as "in close relationship, appropriate, relevant, or pertinent to the general subject." Singer, supra § 17.03, at 9 (footnote omitted). The problem with relying exclusively on the term "germane" to determine whether the one-object rule has been violated was pointed out by the Supreme Court of California which stated that "the [one-object] rule obviously forbids joining disparate provisions which appear germane only to topics of excessive generality such as 'government' or 'public welfare.'" Harbor v. Deukmejian, 43 Cal.3d 1078, 240 Cal.Rptr. 569, 582, 742 P.2d 1290, 1303 (1987). . . .

Even with this background and the use of the term "germane" by this Court it is still difficult to formulate a standard which will enable us to immediately tell whether an act violates the one-subject rule.[11]

---

[9]Ruud, supra at 437, points out that "[i]t is not seriously argued now that a general appropriations act violates the general one-subject rule; an act making appropriations for the operation of the various departments and agencies of government deals with a single subject even though a large number of appropriation items concerning the entire range of governmental programs is included."

[10]This Court has also addressed the one-object issue in Elite Laundry Co. v. Dunn, 126 W.Va. 858, 30 S.E.2d 454 (1944), in which this Court stated that the one-object rule cannot be enforced with the same rigor when an act recodifies all of the state's statutory law.

[11]Even a review of other jurisdictions which have addressed the one-object rule does not give us a clear indication of how the case before us should be resolved. For example, the following cases have found that the one-subject rule has been violated: Litchfield Elem. School District No. 79 of Maricopa County v. Babbit, 125 Ariz. 215, 608 P.2d 792 (1980) (statute violated one-subject rule and could not be deemed a general appropriation bill since it provided for executive aircraft for the Department of Public Safety and a mobile dental clinic to be operated by the dental health bureau among other things); Harbor, supra (a bill regarding fiscal affairs only appears germane because of the excessive generality of the topic, thus, the one-subject rule is violated); In Re House Bill No. 1353, 738 P.2d 371 (Colo.1987)(state revenue bill covered disparate subjects such as imposition of charge against accounts of inmates for medical visits and imposition of surcharge on insurance carriers based on workers' compensation insurance premiums received thus violating the single-subject rule); and Porten Sullivan Corp. v. State, 318 Md. 387, 568 A.2d 1111 (1990) (an act imposing ethical requirements on county council members and others and extending council's authority to impose energy and transfer taxes violates one-subject rule).

The following are cases which have found that the one-subject rule has not been violated: State v. Wagstaff, 161 Ariz. 66, 775 P.2d 1130 (1988), decision approved as modified, 164 Ariz. 485, 794 P.2d 118 (1990) (an act which

As Catalano, supra at 81, stated "[i]n determining whether a particular law violates the Single Subject Rule, the courts do not appear to use a common test. The courts have used a variety of judicially formulated tests[.]" However, we approve of the following general statement found in Sutherland Statutory Construction:

> If there is any reasonable basis for grouping the various matters together, and if the public will not be deceived, the act will be sustained. No accurate mechanical rule may be formulated by which the sufficiency of an act in relation to its title may be determined. Each case must be decided on its own peculiar facts.

Singer, supra § 17.03, at 9 (footnotes omitted). Although the statement above applies to the sufficiency of the title of an act, we think it is equally applicable to the determination of whether an act contains more than one object in violation of the one-object rule.

C.

In the case before us, we must determine whether the use of the omnibus bill to enact all of the state regulations violates the one-subject rule. We agree that there is an argument that there is a rational basis for grouping the rules and regulations of the state administrative agencies. The grouping performs one function: the authorization of legislative rules. We do question, though, whether the topic is excessively general. However, the more important question is whether this grouping violates the very purpose of the one-subject rule. We think it does.

In modern times the rules and regulations promulgated by administrative agencies have become increasingly complex. For example, the legislative rules governing the board of coal mine health and safety address various issues such as the moving of mining equipment, longwall mining, the use of automated temporary roof supports, and unused mines. . . . The legislative rules of the air pollution control commission also address various complex issues such as air pollution from coal refuse disposal areas, air pollution from manufacturing process operations, and emission standards for hazardous air pollutants. . . . The danger of using an omnibus bill to pass these complex regulations is that it would be very easy for the legislative rule-making committee to amend a rule or regulation under the pressure of interested groups. The amendment would not be subject to the strict requirements of the State Administrative Procedure Act nor would there necessarily be input from the agency which is charged with the expertise in that particular area. ...

Because the legislative rules govern such important and occasionally controversial issues, we believe it is extremely important that the members of the legislature be fully aware of the new rules or changes to the existing rules when voting. Especially, since our legislature does not simply review the rules recommended by the agencies, but, instead gives our rules the same effect as statutes. See [State ex rel. Barker v. Manchin.]

We understand the burden that will be placed on the legislature by our holding that the use of the omnibus bill to pass our legislative rules violates the West Virginia Constitution. However, in State v. A.L.I.V.E. Voluntary, 606 P.2d 769, 778-79 (Alaska 1980) the Supreme Court of Alaska pointed out that "the question of whether the legislature might perform a task more efficiently if it did not have to follow [the constitution] is essentially irrelevant. Since [the constitution] applies, the question of whether efficiency takes primacy over other goals must be taken to have been answered by our constitutional framers." . . . Accordingly, we hold that if there is a reasonable basis for the grouping of various matters in a legislative bill, and if the grouping will not lead to logrolling or

---

concerns crimes against children, prosecution of crimes against children, and protection of children does not violate the one-subject rule); Calfarm Ins. Co. v. Deukmejian, 48 Cal.3d 805, 258 Cal.Rptr.161, 771 P.2d 1247 (1989) (all provisions of Proposition 103 relate to the cost of insurance or the regulation of insurance; therefore, the provisions are reasonably germane to the general purpose of the proposition); Sunbehm Gas, Inc. v. Conrad, 310 N.W.2d 766 (N.D.1981) (initiative tax measure involves the imposition and administration of the oil extraction tax and does not violate the one-subject rule); and State Finance Committee v. O'Brien, 105 Wash.2d 78, 711 P.2d 993 (1986) (a bill authorizing the issuance of bonds for various capital projects does not violate the one-subject rule).

other deceiving tactics, then the one-object rule in W.Va. Const. art. VI, § 30 is not violated; however, the use of an omnibus bill to authorize legislative rules violates the one-object rule found in W.Va. Const. art. VI, § 30 because the use of the omnibus bill to authorize legislative rules can lead to logrolling or other deceiving tactics. In the future, each agency's proposed set of rules and regulations should have a separate bill number and should include the entire text of the rules and regulations.

3. Punishment of Members

Read Article VI, § 25.

Section 25 authorizes each house of the Legislature to punish its own members and to expel a member upon two-thirds concurrence of the members present. Presumably, each house is free to prescribe the rules for implementing this section and to determine what constitutes "disorderly behavior." The section's only limitation, that a legislator cannot be expelled "twice for the same offence," assumes that the people's reelection of an individual despite his or her prior behavior wipes the record clean and is a popular expression that the member should be allowed to resume his or her place in the Legislature.

E. The State Budget

Read Article VI, § 51.

STATE EX REL. BROTHERTON V. BLANKENSHIP, 158 W.Va. 390, 214 S.E.2d 467 (1975).

HADEN, Chief Justice:

On September 4, 1974, the relators, the Honorable William T. Brotherton, Jr., as a member and President of the Senate of West Virginia, and the Honorable Lewis N. McManus, as a member and Speaker of the House of Delegates of West Virginia, and both as citizens and taxpayers of the State, sought to invoke the original jurisdiction of this Court through the issuance of a writ to require the respondent, C. A. Blankenship, Clerk of the House of Delegates and, as such, the keeper of the rolls and the custodian of the Acts and Joint Resolutions of the Legislature, 'to publish the true Budget Act in such manner as to include the full and lawful purposes and as appropriated by the Legislature without the void deletions, reductions and vetoes attempted by the Governor and without giving effect to the unlawful and unconstitutional additions of figures and language and amendments and changes in the Budget Bill attempted by the Governor and to furnish Petitioners true copies of the Budget Act as so published....'

Thereafter, on September 9, 1974, this Court acting upon the allegations of the petition, issued a rule returnable September 24, 1974. The Honorable Arch A. Moore, Jr., Governor of the State of West Virginia then, on September 16, 1974, filed a motion praying that he be granted leave to intervene in this proceeding as a party respondent. That motion was granted by this Court. ...

On November 6, 1974, this Court, by order, granted the relief prayed for in certain instances, denied such relief in other instances, and molded the writ in others to give appropriate relief required by the questions presented. ... This opinion is now filed for the purpose of stating the reasons for, clarifying, and elaborating upon the holdings in the order of November 6, 1974.

As was true in two former cases decided by this Court, State ex rel. Browning v. Blankenship, 154 W.Va. 253, 175 S.E.2d 172 (1970) and State ex rel. Brotherton v. Blankenship, W.Va., 207 S.E.2d 421 (1973), resolving matters of dispute between the legislative and executive branches of

government arising from the interplay of those branches pursuant to the Modern Budget Amendment, West Virginia Constitution, Article VI, § 51, the primary issue presented is whether the several actions of the Governor in the exercise of his veto powers in relation to the Budget Act for fiscal year 1974-1975 are valid.

The Legislature, on July 3, 1974, enacted Enrolled Committee Substitute for Senate Bill No. 9, referred to herein as the Budget Bill, providing for the budget of the State of West Virginia for the fiscal year 1974-1975. The Budget Bill was then presented to the Governor for his consideration in accordance with the provisions of the West Virginia Constitution, Article VI, Section 51, Subsection D(11). On July 15, 1974, the Governor signed the Budget Bill as approved with reductions and deletions and returned it with Executive Message No. 6 to the Legislature for further consideration by that body upon its return from recess. Both houses of the Legislature then gave consideration to the veto actions of the Governor in regard to the Budget Bill, but in so doing failed to muster the two-thirds vote required of both houses of the Legislature to override the veto actions of the Governor. The relators, not being satisfied with particular Budget Bill modifications made by the Governor through his veto actions, and believing those vetoes to be unlawful and unconstitutional, instituted this action praying for a writ of mandamus to compel the Clerk to publish the Budget Act unaffected by such veto actions. . . .

Due to the manner in which the Governor altered the Budget Bill after its passage by the Legislature, and due to the challenges made by the relators, the following basic issues are presented for resolution in this proceeding:

I. Does the Governor have the constitutional authority under the Modern Budget Amendment at the veto stage to veto any part of the accounts of the Legislature of West Virginia appropriated for the operation of that branch of government as contained in the Budget Bill?

II. Does the Governor have the constitutional authority under the Modern Budget Amendment at the veto stage to delete from the Budget Bill language of purpose, finding, direction and condition, and nevertheless retain for expenditure purposes the moneys appropriated in certain accounts of the Budget Bill?

III. Does the Governor have the constitutional power under the Modern Budget Amendment at the veto stage to delete language of purpose and itemization and amounts relating thereto, contained in an account in the Budget Bill and thereafter reinsert lump sums and language of purpose or subject relating thereto in such account?

IV. Does the Governor have the constitutional authority under the Modern Budget Amendment to reduce the amount of money in accounts of the Budget Bill and thereafter modify such account by the insertion of new language, items or parts of items and new amounts therein?

The issues thus stated are in a form substantially as presented by the relators, and in this opinion we shall endeavor to treat and resolve those issues with a statement of facts giving rise to each issue and the law applicable thereto Seriatim.

I.

Accounts Nos. 101, 102, and 103 in the Budget Bill are the account appropriations providing for the operation of the West Virginia Legislature, as a separate branch of government, for fiscal year 1974--1975. Incident to the preparation of the Budget Document and the Budget Bill, these accounts, like those companion accounts for the judicial branch of government, are prepared and submitted to the Governor for inclusion in the Budget Bill in a special and particular way.

In order to preserve the integrity and independence of the separate branches of government in the context of the budget-making process, the people by ratification provided in Subsection D(9) of the Modern Budget Amendment a plan to insure that each branch of government would exercise its rightful prerogatives and no more, even though the Governor was authorized and charged with the responsibility of the overall preparation and submission of the Budget Bill and Budget Document. That section provides:

'For the purpose of making up the budget, the governor shall have the power, and it shall be

his duty, to require from the proper state officials, including herein all executive departments, all executive and administrative officers, bureaus, boards, commissions and agencies expending or supervising the expenditure of, and all institutions applying for state moneys and appropriations, such itemized estimates and other information, in such form and at such times as he shall direct. *The estimates for the legislative department, certified by the presiding officer of each house, and for the judiciary, as provided by law, certified by the auditor, shall be transmitted to the governor in such form and at such times as he shall direct, and shall be included in the budget*.' (Emphasis supplied.)

Pursuant to the above, the Legislature, through its appropriate officers, prepared its estimated expenditures for the 1974--1975 fiscal year and transmitted them to the Governor for inclusion in the Budget Document and Budget Bill. In turn, the Governor, pursuant to the directions of Subsections D(10) and B(3) of the Modern Budget Amendment, included the estimated expenditures for the legislative department of government in the Budget Bill. That latter section provides, inter alia:

'Each budget shall embrace an itemized estimate of the appropriations, in such form and detail as the governor shall determine or as may be prescribed by law: (a) For the legislature as certified to the governor in the manner hereinafter provided; . . ..'

And, with the other proposed appropriations for the executive department and the judicial department of government, the Governor transmitted the budget as directed by the following language of Subsection B(4) of the Modern Budget Amendment:

'The governor shall deliver to the presiding officer of each house the budget and a bill for all the proposed appropriations of the budget clearly itemized and classified, in such form and detail as the governor shall determine or as may be prescribed by law; and the presiding officer of each house shall promptly cause the bill to be introduced therein, and such bill shall be known as the 'Budget Bill."

After the Budget Bill had been prepared, transmitted and introduced as a proposed appropriation measure in accordance with these constitutional directives, the Legislature purported to amend its Accounts Nos. 101, 102, and 103 by expanding and adding, in several respects, new language to the Budget Bill as introduced. Two of those modifications are the subject of the first issue; and the Governor's corresponding action with regard thereto is the predicate of this issue.

In Account No. 101, the appropriation account for the operation of the Senate, in Account No. 102, the appropriation account for the operation of the House of Delegates, and in Account No. 103, the appropriation account for the funding of the joint expenses of the Senate and the House operating annually as a unified branch of government, the inserted additional language would have, upon certain corresponding conditions, required that 'the state auditor shall transfer amounts between items of the total appropriation in order to protect or increase the efficiency of service.' The effect of the quoted language was to authorize the appropriate administrative officers of the Legislature to accomplish 'line item transfers' of appropriations for expenditure purposes during the fiscal year without further amendment of the Budget Bill and without regard to designated appropriation classifications provided for within the Budget Bill such as personal services, current expenses, equipment, etc.

Beyond that, the Legislature further amended Account No. 103 by adding the following language of appropriation:

'In addition to those funds normally allocated to the Legislative Auditor's office from Line 3 above, there is hereby appropriated an additional amount of $250,000 for the purpose of making a continuous examination and analysis of the state budget, revenue and expenditures, and departmental programs during and between sessions of the Legislature.'

'Line 3 above', within the quotation, refers to a line item appropriation as follows: 'Joint Committee on Government and Finance--$1,585,513.'

Upon passage of the Budget Bill containing this and other new language, the Governor, through

the exercise of a partial veto, excised the language permitting line item transfers in Accounts Nos. 101, 102, and 103, and, as well, deleted or struck the language seemingly appropriating an additional $250,000 to fund a continuous budgetary analysis of the office of Legislative Auditor. As required by Subsection D(11), when exercising veto authority, the Governor accompanied his partial veto of these accounts with a statement of objections or reasons and transmitted the same to the Legislature with the Budget Bill as modified by his veto actions. See State ex rel. Browning v. Blankenship, Supra.

The chief executive derives such authority as that office has to veto a Budget Bill, as passed by the Legislature, from the provisions of Subsection D(11) of the Modern Budget Amendment which state, inter alia: 'The governor may veto the bill, or he may disapprove or reduce items or parts of items contained therein.' This veto authority, although broadly and expansively granted, is not without limits, however. Relevant to the issue under discussion, this Court held in State ex rel. Brotherton v. Blankenship, W.Va., 207 S.E.2d 421 (1973) that:

> 'The Governor does not possess the authority under the provisions of Article 6, Section 51 of the West Virginia Constitution to disapprove or reduce items or parts of items contained in the Budget Bill, as enacted by the Legislature, which relate to the judiciary department.' . . .

Relying upon that holding in the previous Brotherton case, the relators logically contend that the Governor also does not possess authority under the provisions of Article VI, Section 51 of the West Virginia Constitution to disapprove or reduce items or parts of items contained in the Budget Bill, as enacted by the Legislature, which relate to the legislative department.

In the 1973 Brotherton case, the judicial department prepared its budget proposal and submitted it to the Governor for introduction as integral parts of the Budget Document and the Budget Bill. There, however, the Governor reduced the estimates of expenditures certified to his office by the judiciary before transmitting the same to the Legislature for the purpose of introduction as a part of the Budget Bill. His action in so doing was improper and the Legislature of its own motion restored the estimates submitted by the judiciary. See W.Va.Const. art. VI, § 51, D(10). The Governor's later veto, which in the same manner again reduced the judiciary estimates of its financial need, was then struck down by this Court. On the other hand, in the present case, the Legislature purported to amend its budget by adding additional language thereto after introduction of the Budget Bill in the original form in which the Legislature itself had prepared and certified its estimates to the Governor. As will appear, this is a difference in facts calling for legal distinction.

The system of 'checks and balances' provided for in American state and federal constitutions and secured to each branch of government by 'Separation of Powers' clauses theoretically and practically compels courts, when called upon, to thwart any unlawful actions of one branch of government which impair the constitutional responsibilities and functions of a coequal branch. This rationale persuaded this Court that it was constitutionally necessary to delimit the Governor's expansive arrogation of veto power colorably exercised by him in relation to the judiciary's own budget. Unquestionably, this principle would also cause this Court to invalidate an attempt by the Governor to veto the Legislature's estimated budgetary requirements for its internal operations as prepared and submitted by that body for inclusion in the Budget Bill. In either instance, Article V, Section 1, and the several provisions of Article VI, Section 51 of the Constitution, relating to the preparation and submission of the Budget Document and Budget Bill, compel the Governor to preserve, introduce and leave intact the submitted budgetary proposals of other coequal units of government.

Consequently, we reject the intervenor's contentions that the Separation of Powers doctrine only acts to restrict the Governor's budgetary veto power as it applies to the judicial branch of government, and that the Legislature is well-armed to otherwise protect its own budget proposals. This latter contention is irrelevant in a constitutional context.

The intervenor, however, supports the legality of his veto actions on Accounts Nos. 101, 102, and 103 on several other bases, assumptively not controlled by the application of the Separation of Powers doctrine. For example, the Governor contends that he had a sound legal basis to support his

veto of the legislative accounts because he was merely striking invalid amendatory actions by the Legislature which would have resulted in the inclusion of matters within a budget bill not germane to the budgetary process and not specifically set forth in the title of the budget bill. As such, the Governor contends that these additions to the Budget Bill were invalid and unconstitutional under Article VI, Section 30 of the Constitution. This position is untenable in that this Court has previously held that appropriation measures are not limited by this section of the Constitution. The decision of State ex rel. Key v. Bond, 94 W.Va. 255, 118 S.E. 276 (1923) implicitly recognizes that as the budget provides an expenditure plan for the entire operations of government within a fiscal period, all appropriation matters contained therein are germane to the budgetary process, and holds that language or objects germane to the Budget Bill and purpose need not be set forth with particularity in the title of the Budget Bill.

The Governor also assails the amendments to the legislative accounts as being unconstitutional special or 'class' legislation otherwise provided for in general law in Chapter 5A of the Code. This statute merely prohibits line item transfers without additional legislative action within budgets of agencies in the executive department of government. See Board of Education v. Board of Public Works, 144 W.Va. 593, 109 S.E.2d 552 (1959). We also note that [Code 5A-2-33], as amended, generally excepts the legislative and judicial branches of government from the regulatory provisions of Chapter 5A of the Code. That statute is consistent with the intent and language of Article VI, Section 51, the Modern Budget Amendment, that the budget officer for the executive department should assume no right to control or impede the general plan of expenditures for the necessary internal operation of the legislative and judicial departments of government during a spending year.

Parenthetically, in regard to the Legislature's authority to effect 'line item transfers' within a spending year, we are unaware of any constitutional or statutory inhibition which would prevent the Legislature from transferring its line item appropriations on its own motion. Such authority is pure legislative prerogative, whether formally exercised by legislation or authorized by rule adoption of the joint or individual legislative bodies.

Although the foregoing contentions are without merit, the intervenor, nevertheless, successfully asserts a further reason for his partial veto of the legislative accounts. To resolve the issue it is necessary to discuss somewhat extensively the provisions of Article VI, Section 51 of the Constitution.

The Legislature derives its authority to enact an appropriation measure solely through the grant of power given in the Modern Budget Amendment. That the power to appropriate has limitations is apparent from the language of the Amendment. The opening sentence of the Amendment provides: 'The legislature shall not appropriate any money out of the treasury except in accordance with provisions of this section.' This language, identical to that found in the predecessor provision to the Modern Budget Amendment, has been construed by this Court in State ex rel. Trent v. Sims, 138 W.Va. 244, 77 S.E.2d 122 (1953). In Syllabus point 9 of that decision, this Court held that this provision meant precisely what it said:

> 'The words 'shall not', as used in the first paragraph of Section 51, Article VI, West Virginia Constitution, should be given their general and ordinary meaning, and read as prohibiting the Legislature from appropriating any money out of the treasury, except in accordance with the provisions of Section 51.' Id.

As respects the Budget Bill, Subsection B[5] of the Amendment permits the Legislature to amend the Bill as prepared and introduced by the Governor. But, that authority is restricted: 'The Legislature shall not amend the budget bill so as to create a deficit but may amend the bill by increasing or decreasing any item therein: . . ..' W.Va.Const. art. VI, § 51, B(5). In the first Brotherton case, Justice Caplan, speaking for a majority of the Court, construed this provision thusly:

> 'Article 6, Section 51(5) of our Constitution permits the Legislature to 'amend the bill by increasing or decreasing any item therein', so if it had increased or decreased the *amount* of an item such as 'Other Personal Services' its action would be in line with that allowed. However,

when the Legislature undertook to expand on the Governor's budget by specifying positions under the item 'Other Personal Services' and designated salaries therefor, it began to usurp the executive power reserved by the Constitution for that branch of government. The Constitution clearly contemplates an executive budget.'

'. . . (T)he Legislature can then exercise its judgment as to whether the executive *figures* should be increased, decreased or approved as submitted. Thus the Legislature is afforded the prerogative contemplated by the Constitution.' (Emphasis supplied) . . .

In our view, this court, in order to preserve for the executive department its authority to prepare and submit a budget and thereby insure initial consideration of its fiscal proposals and priorities, relatively intact or without substantial modification by the Legislature, thereby clearly held that the Legislature's authority to increase or decrease items was limited to increase or decrease of the monetary amounts originally submitted by the Governor.

On the other hand, the Legislature is not prohibited from originating an appropriation measure creating an item or part of an item. It is clearly authorized to frame and enact its own fiscal priorities, pursuant to Subsection C(7) of the Amendment, through the vehicle of supplementary appropriation bills. . . . Nevertheless, in preservation of the concept of an executive budget, and applying Subsections C(7), and B(5) and other parts of the Amendment together, we hold that, excepting amendments to increase or decrease an amount of an item, the Legislature is otherwise required to first consider and take some form of action upon the Budget Bill before commencing the exercise of its own appropriation prerogatives. . . .

While we freely acknowledge the potential for the creation of a 'legislative' budget, as opposed to an 'executive' budget, through the enactment of a series of supplementary appropriation bills, the fact remains that part of the question amendments to Accounts Nos. 101, 102, and 103, adding language of subject, purpose or condition, were unauthorized additions to the Budget Bill.

Accordingly, we hold that the Governor has the power, pursuant to the plain provisions of Subsection D(11), Supra, to disapprove and strike unauthorized insertions added to the Budget Bill after its preparation and introduction as an appropriation proposal. . . .

As noted, the Legislature purported to amend Account No. 103 by appropriating an 'additional amount of $250,000 for the purpose of making a continuous examination and analysis of the state budget, etc. . . .' The Legislature has the authority to increase amounts of items so long as no deficit is created and thus the additional appropriation stands, although the language of subject or purpose falls by veto. W.Va.Const. art. V, § 1, art. VI, § 51, B(5). . . .

As previously noted with reference to 'line item transfer' authority, we likewise believe the Governor's veto of language 'purposing' the $250,000 additional appropriation to have been unavailing if it was done to prevent exercise of inherent legislative prerogative.

II

The issue concerning the Governor's constitutional authority under the Modern Budget Amendment to delete at the veto stage language of purpose, finding, direction and condition and nevertheless retain for expenditure purposes the moneys appropriated in certain accounts of the Budget Bill is highly reminiscent of last year's budget case. So reminiscent, in fact, we pause to wonder why it was posited a second time. State ex rel. Brotherton v. Blankenship, Supra. In that case, the relators, occupying the same position of alignment in the case as they do now, conceded that the explicit language of Subsection D(11) of the Amendment provided that the Governor could disapprove or reduce an item or part of an item. The bone of contention then was the definition of the word 'item'. In disposing of that issue, the Court quickly approached and handled the problem thusly:

'Let us now consider the acknowledged prerogative of the Governor to 'disapprove or reduce items or parts of items' contained in the Budget Act and determine whether the Governor exceeded his powers as contended by the relator. The term 'item' wherein it relates to the budget embraces a subject or purpose and an amount. . . .

With the foregoing simple and direct statement, this Court sought to settle once and forever any question concerning the Governor's right either to veto an item or part of an item, or to reduce an item or part of an item. . . .

In confirmation of last year's decision, the majority reaffirms the definition of item as therein adopted. Additionally we hold that an item may occur as a separate particular in an enumeration, account, or total, and may be any separate subject and amount within an account or total. The express inclusion of the words 'parts of items' in our Modern Budget Amendment's enhancement of veto powers renders such conclusion even more compelling. The questions re-put in this litigation apparently also require this specificity.

In the 1973 Brotherton decision, [this] Court held that the veto power granted by the people to the Governor in the Modern Budget Amendment in Subsection D(11) although broadly and expansively stated, was, nevertheless, limited by other relevant provisions of the West Virginia Constitution which were to be read in conjunction with the Modern Budget Amendment. We extensively discussed aspects of that limitation in regards to 'Separation of Powers' concepts exposited in Part I. Further elaboration is unnecessary. The first Brotherton decision also recognized a further limitation on the Governor's veto power by holding that the Governor may not reduce the funds allocated in the Budget Bill to a constitutional officer within the executive department to zero, thereby effectively eliminating the function of that office. Moreover, the Governor may not, by the exercise of his veto prerogative, perform any act which would result in the elimination of free schools in the State of West Virginia, since a free system of public schools is constitutionally mandated and unambiguously protected by Article XII, Section 1 of the West Virginia Constitution.

Except for the foregoing limitations, this Court and, as noted, the parties, forthrightly acknowledged the Governor's right to disapprove or reduce items or parts of items otherwise contained in the Budget Bill. In the case presented for decision now, there are several accounts appertaining solely to the executive department of government upon which the Governor exercised the veto power given him in Subsection D(11) of the Modern Budget Amendment. As to those accounts, the exercise of the Governor's veto power has not been qualified or restricted by the limitations previously noted. . . .

[In Account No. 350], the Governor lined through and struck items containing both subject and amount which would have made specific appropriations to Putnam County Library in the amount of $50,000 and similar appropriations to other specified beneficiary libraries. These appropriations were to be obtained from the total Library Matching Fund item in the amount of $1,500,000. By striking the specified amounts dedicated to the particular projects, the Governor thereby, in effect, retained the right to expend the amount of $1,500,000 for the more general subject of Library Matching Fund rather than giving over to the more specific legislative priorities. This veto action is clearly authorized by Subsection D(11) of the Modern Budget Amendment and on that basis we approve it. . . .

[I]n Account No. 485, the Governor vetoed the specific items of 'Airport Matching' appropriations for 'Logan', 'Beckley' and 'Keyser' in the amounts of $514,000, $362,034, and $180,000, respectively, and thereby retained the right to expend, unrestricted, except within the confines of lawful purposes, an appropriation of $1,500,000 for the subject of 'Airport Matching' within the State of West Virginia. This veto action, indistinguishable in principle from the veto action exercised as respects Account No. 350, is likewise authorized by Subsection D(11) of the Modern Budget Amendment and, on this basis, approved by this Court. . . .

Two other veto actions of the Governor are also controlled by the principle allowing the Governor to disapprove or reduce an item or a part of an item. Because of the method of veto in respect to Item No. 641, and because of the placement of the vetoed language in the Budget Bill as respects the item found in 'Sec. 3. Classification of Appropriations, etc.', an explanation of these veto actions requires a somewhat more particular treatment than those previously approved.

In Account No. 641, created by the Legislature and added to the Budget Bill, . . . the Governor

purported to strike all language of condition and purpose which would have made the appropriation in the amount of $4,500,000 operable only if the Governor, through his highway commissioner, were to apply these funds to give each employee of the Department of Highways employed as of a certain date a seven and one-half percent per annum increase in compensation for fiscal year 1974-1975. If this veto action had been permitted to stand as partially disapproved by the Governor it would have read as follows: '125--State Department of Highways--Acct. No. 641 The sum of $4,500,000.' Comparatively, Account No. 670, treated Infra in this opinion under Part IV, also provides appropriations for the operations of the State Department of Highways in the amount of $386,100,000. Inasmuch as the Governor's actions make it impossible for this Court or for the Legislature to determine what subject classification or purpose classification is intended by this modified appropriation, when comparing it to the much larger appropriation for the State Department of Highways found in Account No. 670, a majority of this Court holds that while the Governor has the authority to delete language of purpose or condition from an item and thereby accomplish a disapproval of part of an item, he may not do so in a manner which will permit him to retain an appropriated amount without an ascertainable classification of subject or purpose. As noted by Justice Caplan in the first Brotherton decision:

> 'Reason dictates that the budget must be in sufficient form and detail to inform the Legislature whether the proposed expenditures are adequate for their purpose or in excess of that needed.' . . .

Likewise, reason would dictate that items altered by veto should retain sufficient identity of subject or purpose and amount to permit intelligent review by the Legislature when it reconsiders veto actions of the Governor. Accordingly, we hold that the attempted partial disapproval of the item fails as a veto of part of an item, but that, when the amount is sought to be retained, and subject or purpose does not appear, the veto must be construed as a disapproval of the whole item, as authorized under Subsection D(11) of the Modern Budget Amendment.

The holding in Part I, Supra, of this opinion also applies to support and to validate this item veto. 'The Governor has the power, pursuant to the plain provisions of Subsection D(11), Supra, to disapprove and strike unauthorized insertions added to the Budget Bill after its preparation and introduction as an appropriation proposal.'...

In Section 3 of Title I of the Budget Bill--General Provisions, appropriations are classified in seven general categories and defined for distinguished one from the other. That section defines 'Personal Services', 'Current Expenses', 'Repairs and Alterations', 'Equipment', 'Buildings', 'Lands', and 'Appropriations Otherwise Classified'. Although one normally would not regard said Section 3 as a 'place' where specific appropriations are to be found, such was the occurrence in this case and resulted in a contested veto action by the Governor. . . . As with Account No. 641, which related to a seven and one-half percent salary increase for department of highway employees, the Legislature inserted language into the section providing for an appropriation sufficient to include a seven and one-half percent salary increase in fiscal year 1974--75 for all other State employees. The Governor deleted this language of purpose and appropriation. The subissue in regard to this particular veto action is whether the Legislature has, by inserting appropriation language into a classification or definition section of the Budget, thereby protected it from a veto authorized by Subsection D(11) of the Modern Budget Amendment. Our previous holding, authorizing the Governor to strike unauthorized insertions into the Budget Bill by veto action, would in itself answer this question in the negative. In addition, however, it seems clear that the stricken language may be excised from the Budget under the general authority of Subsection D(11) of the Amendment. While rather artfully disguised as general language within a definition in the classification section of the Budget, the effect of the language stricken by the Governor clearly places it within the ambit of an 'item' within the meaning of the Budget Amendment.

. . . [N]early in point is the definition of the word 'item' adopted in [Fairfield v. Foster, 25 Ariz. 146, 214 P. 319 (1923)]:

'* * * (W)henever the legislature goes to the extent of saying in any bill appropriating money that a specified sum of money raised by taxation shall be spent for a specified purpose, and that alone, while other sums mentioned in the bill are to be used otherwise, no matter what language it may be disguised under, it is, nevertheless, within both the spirit and letter of the Constitution, an 'item' within the bill, and may be disapproved by the Governor without affecting any other items of appropriation contained therein.'

. . . [There is] compelling logic requiring consideration of such a provision as an item or part of an item in the Budget Bill, as contemplated by Article VI, Section 51 of our State Constitution. Having thus perceived the excised language to be an item or part of an item in the Budget Bill, the Governor's veto action was authorized and approved.

III

The issue concerning the Governor's veto authority to strike enumerated appropriation items or parts of items therein and in lieu thereof to reinsert sums equal to the sum of the parts of items and items stricken is directly and unequivocally controlled by the decision in the first Brotherton case, Supra.

In Account No. 670, State Department of Highways, the Governor prepared and submitted his proposal as follows:

"TO BE PAID FROM STATE ROAD FUND
1.Unclassified-Total ---------- $386,100,000"

Consistent with Section 3 of the General Provisions of the Budget Bill, permitting the submission of accounts 'Otherwise Classified, etc.', the Governor did not specify in any detail whatsoever a further 'breakout' of highway department budget requirements. He did, however, follow this request with an extensive statement of condition, purpose and authority as to the disposition of these funds. Apparently not being satisfied with the Governor's unclassified aggregate request of $386,100,000, the Legislature inserted extensive itemization within this account. ...

By his veto, the Governor struck all legislative itemization from Account No. 670 but retained two item subjects approved by the Legislature: 'Federal Aid Programs' and 'General Operations'. To these respective subjects, the Governor reinserted the amounts of $227,000,000 and $159,100,000, which totaled $386,100,000, the original amount of the unclassified total request. This type of veto action was specifically approved in [State ex rel. Brotherton v. Blankenship]:

'Under Article 6, Section 51 of the West Virginia Constitution, the Governor does have the authority to strike items or parts of items pertaining to the budget of the executive department and in lieu thereof to insert a lump sum figure equal to the sum of the parts of items stricken after the Budget Bill has been enacted by the Legislature and presented to him for approval.' . . .

The Governor's veto actions on Account No. 670 are accordingly approved as constitutionally exercised. . . .

IV

Unlike the issues contained in Parts II and III of this opinion, the legal contentions raised in respect to the Governor's veto actions on Account No. 295 present new matters.

In the preparation of and submission of Account No. 295, the Governor . . . contemplated, among other things, a seven and one-half percent salary increase for professional and supporting school personnel as separate appropriation items outside the amounts allocable to professional services and other personnel salaries as computed pursuant to the 'School Foundation Formula' made and provided for under the general laws of this State in Chapter 18 of the Code. Although agreeing with the Governor that professional and other personnel of the Department of Education should be granted a seven and one-half percent salary increase, the Legislature disagreed with the method of achieving that increase. The Legislature's approach was to provide for such increase within the School Foundation Formula. Accordingly, the Legislature enacted general law, Enrolled Committee Substitute For Senate Bill No. 19, effective July 1, 1974, and also amended the Governor's budget proposal for Account No. 295 by striking his specification of items within that account and inserting,

by amendment, its own specification of itemization to accomplish a seven and one-half percent salary increase within the 'School Foundation Formula' by insertion of the salary increase within the School Foundation Formula. The Legislature also found it necessary to increase the total appropriation for Account No. 295 from $193,946,319 to approximately $198 million. The . . . Governor's subsequent veto action upon that amended account . . . reduced the amount appropriated by the Legislature to the original figure of $193,946,319 which he had previously submitted to the Legislature, but in making that reduction, the Governor, as well, added the words 'and expanded upon in accompanying letter and attachment. A.A.M.Jr.' In Executive Message No. 6 (the 'accompanying letter'), as a part of his objections to the legislative action in reference to Account No. 295 and in stating his reasons therefor, the Governor re-specified in a different but substantially similar form, his initial submission to the Legislature for this account[.] . . .

At least two questions arise involving first, the validity of the Governor's veto action in reducing the total appropriation for Account No. 295 from approximately $198,000,000 to his originally submitted figure of $193,946.319, and secondly, the validity, if any, of the Governor's attempted insertion of new language and new item amounts into the Budget Bill by incorporation through reference to his Executive Message containing objections to and reasons for disapproval of the legislative amendments to Account No. 295.

In the first Brotherton decision, supra, this Court held invalid the Governor's veto of Account No. 295 which, if permitted, would have wholly deleted the funds provided for the operation of the public school system in the State. There, the majority of the Court held:

> 'Inasmuch as our Constitution provides in Article 12, Section 1 thereof that the Legislature shall provide for a thorough and efficient system of free schools, the action of the Governor, in eliminating in their entirety the funds provided for that purpose, constitutes an abuse of discretion and will not be permitted.' Syllabus point 9., State ex rel. Brotherton v. Blankenship, Supra.

The relators rely upon that decision and a previous decision of this Court construing the predecessor to the Modern Budget Amendment, in effect prior to 1968. In State ex rel. Trent v. Sims, 138 W.Va. 244, 77 S.E.2d 122 (1953), this Court held that the Board of Public Works and the Legislature were bound by the provisions of the previous Budget Amendment to provide and appropriate for the public schools all estimates of need submitted by school authorities without reduction if such estimates were equal to or less than the amount appropriated for such purpose by the Legislature at its previous session. The common interpretation of that decision was that the Board of Public Works and Legislature could not reduce the estimates of requirements submitted to them by the Department of Education....

[T]he drafters of the Modern Budget Amendment in 1968 specifically omitted from that amendment proposal any language which would prevent the Governor, as successor to the Board of Public Works, from reducing estimates submitted to him by the Department of Education incident to the Governor's duty to prepare and submit a Budget Bill to the Legislature. We presume such omission to have been intentional. 16 Am.Jur.2d, Constitutional Law § 80 (1964). In this regard, the Trent decision does not inhibit either the Governor or the Legislature from the exercise of veto or amendatory action upon the budget proposals submitted by the Department of Education. Reference must now be made to the Modern Budget Amendment.

Although this Court held in the first Brotherton decision that the Governor abused his discretion in reducing the proposal for the Department of Education in Account No. 295 to zero and his veto was an unauthorized and void act, that case does not furnish authority to prevent or inhibit the Governor from exercising a veto by way of reasonable reduction of an item or part of an item. Viewing, as we do, the Governor's veto power to be broad, and expansively granted through Subsection, D(11) of the Modern Budget Amendment, we confirm his right to reduce the total appropriation in Account No. 295 from approximately $198,000,000 to approximately $194,000,000. . . .

As to the secondary issue relating to the Governor's affirmative action in suggesting to the

Department of Education that its moneys appropriated by the Legislature should be expended in accordance with language and line items insertion into his Executive Message we are confronted with a novel approach in the exercise of a veto power. As was indicated in the early case of State v. Mounts, 36 W.Va. 179, 14 S.E. 407 (1892), the executive's power to veto laws passed by the Legislature is generally thought to be negative in nature rather than affirmative. While that principle has been somewhat abrogated by the broad grant of powers given the Governor in relation to appropriation measures and specifically granted to the Office of Governor in Article VI, the Legislative Article of the West Virginia Constitution, the principle of State v. Mounts, supra, retains some life. The Governor has not been given the power to affirmatively legislate in the Modern Budget Amendment. As the Legislature is limited in its ability to amend the Budget Bill submitted to it by the Governor in Section B(5) of the Modern Budget Amendment, the Governor is likewise limited in his ability to amend the Budget Bill after its introduction for consideration by the legislative bodies. Subsection B(4) explicitly provides, in limitation of the Governor's powers, that:

> 'The governor may, with the consent of the legislature, before final action thereon by the legislature, amend or supplement the budget to correct an oversight, or to provide funds contingent on passage of pending legislation, and in case of an emergency, he may deliver such an amendment or supplement to the presiding officers of both houses; and the amendment or supplement shall thereby become a part of the budget bill as an addition to the items of the bill or as a modification of or a substitute for any item of the bill the amendment or supplement may affect.'

Consistent with the general law of State v. Mounts, Supra, the Governor was not given authority by the Modern Budget Amendment to legislate on a subject or amount not previously made law by approval of both houses of the Legislature. If such power had been intended, it would have been granted by the people to the Governor explicitly. Such power was not extended to the Governor by the people.

We note for comparison that the principle applied in Part III of this opinion, supra, in reaffirmance of the holding of Syllabus point 8 of the 1973 budget decision, is not in any manner violative of the inhibition against affirmative action by the Governor in the appropriation process. As noted, Syllabus point 8 authorizes the Governor to reinsert amounts up to and equal to sums appropriated by the Legislature in the Budget Bill and contemplates, as well, the reinsertion of language of parts thereof provided for in the Budget Bill as submitted. The 'reinsertion' principle, however, does not contemplate, or permit of the Governor, affirmative language amendment to the Budget Bill after its submission without prior approval by the Legislature, nor does it contemplate 'appropriation', by the Governor through veto exercise in monetary amounts in excess of that previously approved by the Legislature in the enactment of the Budget Bill.

Accordingly, if the Governor intended by specification of Account No. 295 in his veto message to thereby amend the Budget Bill affirmatively, he fails in that regard. We view such language as directory only to the State Department of Education and as mere surplusage to the Budget Bill. As enacted and later vetoed by the Governor, Account No. 295 appropriates an unclassified total of $193,946,319 to the State Department of Education--State Aid to Schools.

For the reasons stated in this opinion, the true Budget Act shall be published as follows:

(1) Wherein the Governor has not altered, disapproved, or reduced the Budget Act, it shall be published as enacted by the Legislature.

(2) Wherein the Governor has altered, disapproved, or reduced the Budget Act and the Governor's veto actions have not been overridden by the Legislature or objected to herein by the relators, the Budget Act shall be published as altered, disapproved or reduced by the Governor.

(3) The following accounts shall be published as altered and approved by the Governor: Numbers 101, 102, 295, 350, 485, 670, 'Sec. 3--Classification of Appropriations--an appropriation for: 'Personal Services', etc.', and 'Sec. 5-- Appropriations from Revenue Sharing Trust Fund, Item IV--Department of Natural Resources. . . .'

(4) The following account shall be published or deleted as modified by this opinion: Account No. 103 shall be restored to reflect the increase by the Legislature's addition of an unclassified appropriation of $250,000 to that account for expenditure by that body according to its inherent power to conduct its internal operations; language stricken by the Governor's veto shall be omitted from the account.

(5) Account No. 641 shall be deleted as an appropriation item from the Budget Act.

The writ of mandamus praying that the respondent be compelled to publish the true Budget Act, as molded and as directed in this opinion, is awarded. . . .

NEELY, Justice (dissenting):

I respectfully dissent from the holding of the majority of the Court . . . for the same reasons that I dissented in State ex rel. Brotherton v. Blankenship, W.Va., 207 S.E.2d 421 at p. 436 (1973). As my dissent is based upon broad theoretical considerations with regard to the appropriate division of constitutional powers based upon history and reason, there is no need to reiterate here in detail what I have articulated elsewhere.

STATE EX REL. THE LEAGUE OF
WOMEN VOTERS OF WEST VIRGINIA
v. TOMBLIN,
209 W. Va. 565, 550 S.E.2d 355 (2001).

Albright, Justice.

This matter comes to us upon a petition for a writ of mandamus filed on behalf of several prominent public interest groups and a former member of the Legislature against the presiding officers of the House of Delegates and state Senate and "the office of the Governor" (hereinafter collectively referred to as "Petitioners"). Petitioners argue that the practices currently employed by the Legislature in preparing the "budget digest" mandated by West Virginia Code § 4-1-18 are in violation of the Modern Budget Amendment, the constitutional provision regarding separation of powers, and this Court's directives in *Common Cause v. Tomblin*, 186 W. Va. 537, 413 S.E.2d 358 (1991). Petitioners assert additionally that the Legislature is unlawfully accomplishing the transfer to the governor's civil contingent fund of appropriations initially made to the House of Delegates. As relief from these asserted violations, Petitioners seek a writ of mandamus finding these practices unconstitutional; directing the Legislature to forthwith cease and desist from designating funds in violation of both constitutional and statutory mandates; and directing the Legislature to restore all deletions of lawfully appropriated funds. Upon our careful review of the arguments raised against the record submitted, we grant a writ of mandamus as moulded. . . .

II. Discussion

A. The Budget Process

By law, the state's annual budget must be accomplished pursuant to the provisions found in section 51, article VI of the constitution, known as "The Modern Budget Amendment." Since its ratification on November 5, 1968, the Modern Budget Amendment has required adherence to a budget process that begins with the governor's delivery, to the presiding officer of each house, of (1) the budget and (2) a bill enumerating the proposed appropriations of the budget [the "budget bill"], clearly itemized and classified, in such form and detail as the governor shall determine or as may be prescribed by law. Section 51 further prescribes that the "budget" shall contain a complete plan of proposed expenditures and estimated revenues, an itemized estimate of the appropriations, in such form and detail as the governor shall determine, or as is prescribed by law, and requires that the budget be accompanied with certain other information relative to the financial condition of the state.

Under section 51, no money may be appropriated from the state treasury except by means of a "budget bill" or by a "supplementary appropriation bill." W. Va. const. art. VI, § 51. The Modern Budget Amendment expressly provides that no money shall be expended from the treasury "except in accordance with [the] provisions of this section." *Id.*

As a part of initial legislation implementing the Modern Budget Amendment, the Legislature amended and reenacted West Virginia Code § 4-1-18, which provides as follows:

> The Legislature, acting by its appropriate committees, shall consider the budget bill, the budget document and matters relating thereto, *and following such consideration and upon the passage of the budget bill by the Legislature, the Legislature shall prepare a digest or summary of the budget bill containing detailed information similar to that included in the budget document submitted to the Legislature by the governor but including amendments of legislative committees, and as finally enacted by the Legislature. Such digest or summary shall be prepared at the direction of and approved by members of the conferees committee on the budget* and shall be included in the journals of the Legislature or printed as a separate document, and copies shall be furnished to the governor, commissioner of finance and administration [abolished], and the various state spending units for such use as may be deemed proper.

W. Va. Code § 4-1-18 (emphasis supplied).

While we outlined in *Common Cause* the process by which the governor's initial submission of the budget bill and budget document to the Legislature progresses to the passage of the budget bill, we find it necessary to expand on that previous discussion. . . . Typically, the governor proposes, and the Legislature agrees, to appropriate money in the budget bill to a particular office, officer, or agency under relatively broad categories or "line items," such as "personal services," "unclassified," "administration," and other somewhat more specific, but still generalized, descriptions. As referenced in the statute requiring preparation of a budget digest, West Virginia Code § 4-1-18, as well as the rules of each of the two houses of the Legislature, the budget bill is referred to the appropriate committee in each house, typically the finance committee.

As with any proposed legislation, the detailed examination of such proposal is ordinarily done in committee with the aid of a committee's staff. In the case of the "budget bill," this detailed examination proceeds from the information included in the "budget document" and the legislative hearings held in connection with each respective account set forth in the budget. With laborious and careful detail, the legislative finance committees examine the requests for the next year's appropriations. Each office, officer, and agency justifies to the legislature its respective requests. Similarly, the governor justifies his recommendations as to each of the hundreds of appropriation line items set forth in the "budget bill." The excruciating detail with which the state's annual spending plan is presented in the "budget document" and examined by the relevant legislative committees and their staffs[13] and the hours upon hours devoted to this task by legislators and interested citizens is not at all apparent from simply reading through the "budget bill."

As a result of this finance committee review, each respective house may make amendments to the budget bill and may develop recommendations or provisions that will later be found in the budget digest.[14] At the end of the committee consideration of the budget bill and the budget document, it is the "budget bill," not the "budget document," that comes back to the entire Senate or the entire House of Delegates for consideration, with whatever changes the respective house's finance

---

[13]Those individuals whose specific task it is to oversee the review of the budget include the respective finance chairs of the two houses, their respective sub-committee chairs, and the professional staffs of the committees.

[14]In *Common Cause*, we discussed the need to memorialize these negotiations that transpire during the respective consideration of the budget bill by each house of the Legislature. . . . We also emphasized that these negotiations do not become finalized until the conferrees committee meets as a whole to vote on the budget digest. . . .

committee has made. The "budget bill," is the document upon which the Legislature, as a whole, votes.[15] After each house of the Legislature has passed its version of the "budget bill," the bill goes to conference, to the "*conferees committee on the budget*" to resolve differences between the two versions prepared by each legislative house and also to make such other changes in the "budget bill," as may be necessary in light of other actions taken by the Executive or Legislature subsequent to the passage of the "budget bill" by one house. Only when the *conferees committee on the budget* has finally settled on a single bill that has been voted upon in identical form by both houses of the Legislature is the budget bill ready for presentation to the governor.

From the above discussion, it is clear that three budgetary documents are central to the case before us: (1) the budget bill, (2) the budget, which is sometimes called "the budget document;" and (3) the budget digest. From the record submitted in this case, we note the following.

(1) The budget bill in its original form as submitted by the governor in January 1999, for fiscal year 1999-2000, consisted of about 122 double-spaced pages, 8 1/2 by 11 inches.

(2) The budget for fiscal year 1999-2000, as submitted by the governor, with its supplemental information, collectively called the "budget document," consisted of three volumes; two of which were approximately 8 1/2 by 11 inches, and one of which was 11 by 17 inches. Whereas the first and second volumes were 340 and 678 pages long, respectively, the third volume contained over 490 pages, mostly in small type, and delineated information setting forth prior years' expenditures, the current year's appropriations, and the next fiscal year's requests.

(3) The "budget digest" subsequently issued by the legislative budget conferees for fiscal year 1999-2000 consisted of approximately 285 pages, 8 1/2 by 11 inches, generally, but not always, double-spaced. The digest sets forth exact copies of certain line item appropriations--as contained in the budget bill--organized in the order those appropriations appeared in the budget bill. Beneath the excerpt from the budget bill for a particular office, officer, agency, or program, statements are set forth under the heading "Legislative Intent" regarding one or more specific uses for which the conferences committee asserts that all, or a part of a line item, contained in the budget bill was intended.

B. Constitutional Concerns

As explained in section A, the preparation of a budget digest is governed by the provisions of West Virginia Code § 4-1-18. While Petitioners agree that the issue of this statute's constitutionality was fully resolved in *Common Cause,* they maintain that the Legislature is applying the statute in an unconstitutional manner. . . . Petitioners' argument is premised, to a large degree, on their assertion that an item set forth in the Budget Digest *that is not also set out with identical specificity in the budget bill* necessarily constitutes an "appropriation."

Petitioners reason that, because an "appropriation" may only be made by a budget bill or supplementary appropriation bill adopted by the whole Legislature and presented to the governor for consideration, items that are set forth in the budget digest which are not correspondingly detailed in the budget bill constitute an unlawful attempt to draw money from the state's treasury. Under Petitioners' reasoning, the powers of the Legislature, as a whole, and the powers of the executive branch are being usurped through the use of the budget digest. We do not agree.

Underlying Petitioners' argument is the implication that the budget process requires a budget bill which sets forth with precise detail each expenditure included in the state's budget. In *Common Cause,* we addressed why the intrinsic need for flexibility renders completely unworkable a detailed

[15]Whatever effort individual legislators may have made to master the "budget document," the bill adopted by the Legislature and considered by the governor contains only a small fraction of the information contained in the budget document. In a sense, the "budget bill" simply paints with broader brushes the complete picture conveyed by the "budget document."

line item budget bill.[19] . . . Due to the "nearly impossible task of allocating severely limited money among competing ends" the amounts requested by the various departments and agencies through the budget document are often not the same amounts as those finally allocated through the enacted budget bill. . . . Moreover, as we discussed in *Common Cause*, the expenditures requested by individual departments or agencies at the time the budget document is first prepared can become moot or may be reprioritized due to unanticipated needs that only surface after the budget requests for the next year are first prepared. . . . This is where the budget digest serves an important purpose in the whole budgetary process.

Petitioners take issue with certain entries in the budget digest that appear under headings entitled "LEGISLATIVE INTENT."[20] Those entries usually set forth a particular use for part of a line item included in the budget bill, under a more generalized description of funding such as "personal services," or, on occasion, "unclassified." Through the use of these statements of "Legislative Intent," the conferees committee expresses its judgment of why--and for what more specific uses--some or all of the funds appropriated in certain line items in the "budget bill" were included in that line item. *See Hechler v. McCuskey*, 179 W. Va. 129, 133, 365 S.E.2d 793, 797 (1987) (stating that "the Legislature uses this [Budget] Digest as its detailed explanation concerning the manner in which appropriations are to be expended"). In addition to providing necessary detail as to generalized funding appropriations, the budget digest serves an important function when an agency receives less funds than it originally requested. In this instance, the budget digest serves as an aid to determine how the limited funding can be divided to meet the agency's needs. In either situation, the budget digest enables the various governmental units to ascertain what uses the Legislature, through its conferees committee, intended for moneys earmarked for a particular department or agency.[21] From our review of the budget digest submitted in this case, it is clear that these statements of "Legislative Intent" only recommend proper, more particular, uses of monies duly appropriated within and under more broadly-stated categories set forth as line-items in the "budget bill."

Another violation of the Modern Budget Amendment arises, according to Petitioners, based on the fact that the expenditure recommendations or specifications in the budget digest appear to be outside the constitutional requirement that all appropriations from the state treasury must be made in the form of either a budget bill or a supplementary appropriation bill. W. Va. Const. art. VI, § 51(1). In Petitioners' view, any expenditures consistent with the statements of legislative intent in

---

[19]As we explained in *Common Cause*, inevitable changes in needs for funding between the time when the budget document is first presented and when the budget bill is ultimately passed renders completely impossible the use of a "carved in stone" line item type of budget bill. We opined in *Common Cause* that the use of such an approach "would perpetrate an evil even greater than the evil petitioners seek to redress." . . .

[20]We note that the use of the term "Legislative Intent" in the budget digest to describe the composite intentions of the committees considering the budget bill may contribute to the concern of those who dislike the idea of a "budget digest." We compare the inclusion by the conferees committee of "Legislative Intent" language in the budget digest to the actions of congressional committees, who often print lengthy reports on the "intent" of legislation. These congressional reports are often relied upon by courts to ascertain "congressional intent," despite the fact that neither house of Congress has voted on the content of the committee reports. We strongly suggest that future budget digests omit the term "Legislative Intent" and substitute a term which reflects that the recommendations are those of the budget conferees.

[21]As an example, the "Legislative Intent" set forth for the University of West Virginia Health Sciences Account, Fund 0323, organization 0478, is as follows:

> It is the intent of the Legislature that from the Capital Outlay and Equipment line-item above, one million dollars be allocated to the Marshall University School of Medicine and one million be allocated to the West Virginia University School of Health Sciences-Charleston Division.
>
> It is the intent of the Legislature that from the line item for the School of Osteopathic Medicine, an amount up to $ 260,000 shall be expended to provide assistance to those primary health training sites in West Virginia which provide doctor of osteopathy student training to the West Virginia School of Osteopathic Medicine. . . .

the budget digest amount to an appropriation. This argument suggests a misapprehension regarding the nature of the funds that are the subject of the budget digest. Those funds have been lawfully appropriated through the means established by the Modern Budget Amendment. The inclusion of an item in the budget digest in reference to a more generalized line item found in the budget bill simply does not operate to appropriate money from the state treasury within the meaning of article VI, section 51 of the Constitution of West Virginia. All funds that are described in the budget digest reference a specific line item in the budget bill, and it is the passage of that budget bill which constitutes and effects an appropriation under the mechanisms set forth in the Modern Budget Amendment. W. Va. Const. art. VI, § 51(1).

Petitioners further suggest that the budget digest process usurps the powers of the Legislature as a whole and the power of the Governor. In considering this contention, we note that, subject only to the broad prescriptions contained in the Modern Budget Amendment and any specific requirements enacted into law, the governor may submit the budget document and the budget bill with as much simplicity or complexity as he deems appropriate. Likewise, the Legislature may, through its amendments to the budget bill, insert as much detail as it deems appropriate, subject only to the power of the Executive to remove some of the detail by veto and the prohibition against including subjects of general legislation in the budget.[23]

As to possible intrusion upon the power of the Legislature, as a whole, it should be noted that a simple majority of each house of the Legislature possesses inherent and plenary power to prescribe by rule any procedure it deems appropriate for the consideration of the budget or budget bill in its respective house,[24] and, by agreement with the other house, prescribe such rules for the resolution of differences in legislation between the houses as it deems appropriate. The Legislature may, by duly enacted law,[25] further require such detail in the budget bill or budget document as it deems appropriate. In addition, during the consideration of the budget in conference each house may, by majority vote, instruct the budget conferees appointed by it to take, or refuse to take, such action as a majority of such house shall direct. Finally, each house may, by a vote of half its members, refuse to adopt any proposed budget bill without further and fuller explanation and debate such as fully satisfies at least a majority of those elected to each house.[26]

Careful reflection on the realities of the budget-making process and its acceptance by both houses and by the Executive for nearly a third of a century, lead us to believe that the instruments of government most directly involved in the process have found what they deem to be a suitable balance between the detail needed to support and justify appropriations and the desired flexibility to allow the government to function within more broadly-stated line item appropriations. Assuming that the respective branches follow these procedures faithfully as they have been developed in law and in practice, we can find no basis to treat their considered judgments as outside the constitutional pale.

With reference to this Court's decision in *Common Cause,* Petitioners argue that the budget digest

---

[23]*See* Syl. Pt. 13, *Dadisman v. Moore*, 181 W. Va. 779, 384 S.E.2d 816 (1988) (holding that "the Legislature cannot amend general substantive statutes with budgetary language").

[24]W. Va. Const. art. VI, § 24.

[25]W. Va. Const. art. VI, § 51.

[26]*See* W. Va. Const. art. VI, § 51(11) (requiring passage by majority of members elected to each legislative house for budget bills or supplemental appropriation bills).

has, in reality, acquired the force of law. . . . Petitioners suggest that the budget digest process should be viewed as unlawful based on the fact that agencies are required to spend their allotted funds consistent with the recommendations contained in the budget digest. In *Common Cause*, we addressed this same argument in acknowledging that "executive branch employees [may] feel peculiarly bound to follow its [budget digest] dictates." . . . Rather than determining that this perceived obligation to follow the suggestions set forth in the budget digest elevated the digest to "having the force and effect of law," however, we emphasized the need to follow the dictates of the budget digest statute and its specific requirement that the digest "must be approved by majority vote of a quorum of all the budget conferees pursuant to a meeting regularly called after the passage of the budget bill." . . .

The budget digest, of its own accord, cannot require the expenditure of funds in the manner suggested therein. The agencies are free to disregard the digest statements of legislative intent regarding their earmarked funds, with the understandable caveat that they will have to later explain to the Legislature and the public why they chose to disregard the purpose(s) for which the conferees committee stated such funds were to be utilized. As we exhorted in *Common Cause*, "*the agency heads are not bound in law to follow the dictates of the Budget Digest*." . . . In response to Petitioners' suggestion that the officers, offices, and agencies may feel constrained to adhere to the funding suggestions contained in the budget digest, we conclude that this is a matter with which the executive branch, not this Court, must deal. Questions involving perceived conflict between the legislative and executive branches are, by and large, political questions, which do not present issues with which this Court can, or should, concern itself. If the persons in charge of the executive branch, its officers, offices, and agencies, choose to adopt the funding recommendations stated in the budget digest, we must assume, in the absence of evidence to the contrary, that the responsible executives, in their settled judgment and discretion, have determined that such spending is in the best interests of the state. If, however, these same entities choose to spend the money for alternate uses within the broad scope of the overall purpose for which the funds were appropriated, there is no legal impediment to that decision. Those agencies must be prepared, however, to defend their expenditures, both to the legislative committees and to the public, in whose best interests we must assume they intended to act.

In short, we cannot agree with Petitioners that the current use of the budget digest has the "force and effect of law" in violation of this Court's holding in *Common Cause.* . . . Critically, a listing in the budget digest does not confer on the Legislature, on any legislator, or on any other citizen, the ability to require, as a matter of law, the expenditure of state funds for the narrower purpose set forth in the budget digest. Not only is the executive office, officer, or agency free to choose *not* to expend the money for the purpose stated in the budget digest, such entities are similarly free to expend the appropriation for another purpose within the scope of the appropriation, but distinct from the purpose set forth in the budget digest. This freedom negates Petitioners' contention that the budget digest has the "force and effect of law." . . .

Although this Court previously considered and rejected in *Common Cause* the argument that the budget digest process runs afoul of the separation of powers provision found in article V, section one of our constitution, Petitioners raise this issue again. . . . Petitioners rely on *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 279 S.E.2d 622 (1981), in which we struck as unconstitutional provisions of our Administrative Procedures Act that empowered a legislative rule-making review committee to veto rules and regulations validly promulgated by administrative agencies pursuant to delegation of the legislature's rule-making authority. . . . Based on the fact that only the Legislature is granted the authority to legislate, we held in *Barker* that the Legislature could not delegate to a committee the power to void or to amend administrative rules and regulations. Only through the legislature, as a whole, could such rules and regulations be acted upon. . . . While the budget digest process, at a quick glance, might cause some individuals to conclude that a constitutionally-prohibited delegation of duties is occurring with the preparation of the digest by a small group of legislators, this

contention is easily disproved. Whereas constitutional infirmity resulted in *Barker* from the unlawful delegation to a legislative committee of the Legislature's power as a body to legislate, in the case before us, there is no comparable wrongful delegation of legislative power. This is because the budget digest process does not alter the lawful enactment, which is the budget bill. [*Common Cause*.] As discussed above, the budget digest is only the legislative expression of how funds should be spent and not a mandate to spend state funds in any way contrary to the enacted budget bill. Unlike the legislative committee in *Barker,* the conferees committee involved in the budget digest process has no power to render ineffective provisions of the budget bill enacted into law by the whole Legislature. Consequently, there is no proscribed delegation of legislative authority. Because the budget digest simply and expressly sets forth the judgment of the conferees committee on what the Legislature intended and because that judgment expressly lacks the force and effect of law, there is no violation of the principles of *Barker* as a result of adhering to the legislatively-created budget digest process.

Having rejected Petitioners' constitutional claims rooted in the violation of the Modern Budget Amendment and finding it unnecessary to discuss at length the related concerns rooted in the separation of powers provision,[28] we proceed to consider whether the budget digest is being prepared consistent with the dictates of West Virginia Code § 4-1-18 and this Court's holdings in *Common Cause*.

C. Statutory Concerns

Our upholding of the budget digest process in *Common Cause*[29] was expressly rooted in our determination that the "*Budget Digest* prepared by the Conferees Committee on the Budget does not have the force and effect of law." . . . Notwithstanding our upholding of the budget digest process, we expressed concern that the potential for abuses of power which underlie the process could result in a ruling by this Court finding the process unconstitutional.[30] Based on these concerns, we imposed the following limitations on the budget digest process in *Common Cause*, which we again emphasize:

> The *Budget Digest* must be approved by the entire Conferees Committee on the Budget at a regular meeting scheduled in the normal course of business and open to the public.
>
> In order that officers in the executive branch not be confused concerning the nature of the *Budget Digest*, the *Budget Digest* must be clearly marked with a notice that the document has been prepared by the Conferees Committee on the Budget and that the *Budget Digest* does not have the force and effect of law.
>
> In order for the *Budget Digest* to conform to the requirement of W. Va. Code, 4-1-18 [1969], which directs the Conferees Committee on the Budget to prepare a "digest or summary" of the budget, the finance committees, their chairmen, or the subcommittee chairmen must have memoranda of the negotiations, compromises and agreements or audio recordings of committee or subcommittee meetings where votes were taken or discussions had that substantiate the material which is organized and memorialized in the *Budget Digest*.

---

[28]Because the funds which are the subject of the budget digest have already been appropriated through the enactment of the budget bill, no separate ratification by either the Legislature or the governor is required.

[29]Petitioners' theory in *Common Cause* was that the process underlying the budget digest's preparation amounted to an improper delegation of the Legislature's budget-making authority to a few select and powerful legislators. Acknowledging that the case would be open and shut if the budget digest "had the force and effect of law," we refuted this contention stating "that the *Budget Digest* does not serve to alter or amend the enacted budget bill." 186 W. Va. at 540, 413 S.E.2d at 361 (citing *Hechler v. McCuskey*, 179 W. Va. 129, 365 S.E.2d 793 (1987)).

[30]While we upheld the use of the budget digest in *Common Cause* as "preferable to available alternatives," we emphasized the need for utilizing "appropriate procedural protections" to permit the continued use of the digest. . . .

. . . West Virginia Code § 4-1-18 . . . requires the preparation of:

> a digest or summary of the budget bill *containing detailed information similar to that included in the budget document submitted to the Legislature by the governor but including amendments of legislative committees, and as finally enacted by the Legislature.*

W. Va. Code § 4-1-18 (emphasis supplied). Petitioners [assert] that the requirements this Court imposed upon the Legislature through our decision in *Common Cause* are not being met. . . . [W]e have no basis from which to conclude that the Legislature is failing to comply with the directives of this Court[.] . . .

Petitioners claim that matters extraneous to the deliberations of the finance committees or sub-committees and the conferees committee have been included in the digest under the rubric of "Legislative Intent." From the record in this case, we take notice of a practice that appears to go beyond the intent underlying West Virginia Code § 4-1-18. The practice to which we refer is the inclusion in the budget digest of items under the heading of "Legislative Intent" that were not the subject of consideration by the respective legislative committees or the conferees committee *during the legislative session and at least contemporaneous with* the final legislative enactment of the budget bill. Specifically, the record documents that *subsequent to the legislative enactment of the budget bill* legislators have been permitted to specify pet projects in their respective districts, ranked by preferences of one to ten, which might be included in the budget digest *despite the fact that the legislative committees or conferees committee* did not consider these specific requests *prior to the final legislative enactment of the budget bill.* West Virginia Code § 4-1-18 envisions the inclusion in the budget digest of "detailed information similar to that included in the budget *document* submitted to the Legislature by the governor but including amendments of legislative committees, *and as finally enacted by the Legislature."* . . . Based on this statutory language, we hold that a fair reading of West Virginia Code § 4-1-18, contemplates and requires that the material contained in the budget digest under the heading "Legislative Intent" must have been the subject of discussion, debate, and decision prior to final legislative enactment of the budget bill, either within the legislative committees or sub-committees of the respective houses to which the budget bill, or parts of it, have been committed, formally or informally, or within the conferees committee.

We understand that the actual budget digest will be prepared, with the help of staff, after the extreme pressures of the legislative session shall have passed. . . The continued approval of the budget digest process will be better assured if care is taken to record in one acceptable fashion or another, the discussion, debate, and decision which substantiates the inclusion of an item in the budget digest and that such discussion, debate, and decision occurred prior to the final enactment of the budget bill. . . . Only through careful and deliberate record making can the use of the budget digest process continue to be viewed as both legitimate and lawful.

In this Court's considered opinion, it would be prudent for the conferees committee to take care to both record and maintain documentation that demonstrates that the requirements set forth herein are being met. We are not unmindful of Petitioners' suggestion that the temptation for abuse of the digest process appears borne out by the fact that those in positions of particular responsibility and power in either house may be steering significant funding towards projects or interests that benefit their constituents through the budget digest. Notwithstanding the counter arguments that Respondents raise concerning the inherent nature of power within the legislative process, these indications of favoritism expressly validate the inquiries necessitated by the petition brought herein. Our holding today, requiring that the contents of the budget digest must have been the subject of discussion, debate, and decision prior to final legislative enactment of the budget bill, should be especially and faithfully observed with respect to budget digest expressions of legislative intent recommending expenditures in specific localities or for obviously local projects. . . .

D. Transfer of Legislative Appropriations –
"098 Account"

Petitioners challenge the practice, under recent budget bills, of authorizing a legislative officer

to cause the transfer of legislative appropriations to the executive, particularly, the governor's civil contingent fund. *See* W. Va. Code § 5-1-18. Under article VI, section 51 of the state constitution, the governor is required to include in his budget such sums of money as each house of the Legislature requires for its expenses, and may not reduce that sum. *See State ex rel. Brotherton v. Blankenship*, 158 W. Va. 390, 214 S.E.2d 467 (1975) (holding that under article V, section 1 of state constitution, governor may not reduce the amounts appropriated by Legislature for its internal operations). Upon appropriation through the final legislative enactment of the budget bill, the appropriations for the Legislature are exempt from the veto power of the Governor. . . .

Included in the classification of appropriations section of the general provisions title of the budget bills enacted in 1998, 1999, and 2000 is the following proviso:

> *And provided further*, That upon written request of the speaker of the house of delegates, the auditor shall transfer within the general revenue fund amounts from the total appropriations of the house of delegates to other agencies, boards or departments. ...

Pursuant to that purported authority, the speaker of the house requested, and the auditor did effect a transfer of $ 1,250,000 in 1998, and $ 600,000 in 1999, from the House of Delegates' appropriation to the governor's civil contingent fund. The funds which were the subject of these transfers were appropriated to the House of Delegates exclusively for the expenses of that body, under the special protections afforded legislative appropriations by the Constitution. We note that the transfers at issue here have been accomplished and the monies expended by the governor.

This Court takes notice of the passage and approval by the governor of Enrolled House Bill 2385, which took effect upon its passage on February 23, 2001, expressly disavowing the authority of the auditor to make such transfers in the future at the request of officers of either house of the Legislature, either by the action of an officer of such house or by any means other than a budget bill or supplementary appropriation. In light of the exercise by the Legislature and governor of their power to make and approve law in this regard, prohibiting such transfers, we consider the issue moot *until and unless such authority is again asserted.* Based on the passage of House Bill 2385, we determine that the practice of transferring funds from a legislative expense account to an executive department account by means other than a budget bill or supplementary appropriation requires no further action by this Court.

Based on the foregoing, we grant a moulded writ of mandamus which requires the Legislature to only include as part of the budget digest information that has been the subject of discussion, debate, and decision prior to final legislative enactment of the budget bill. . . .

Davis, J., dissenting:

The Honorable Chief Justice Thomas B. Miller, in his dissent to *Common Cause of W. Va. v. Tomblin*, 186 W. Va. 537, 413 S.E.2d 358 (1991), eloquently predicted that the Court's decision therein to permit the Budget Digest to include additional expenditures not approved of by the entire Legislature during its Regular Session was, in fact, "a great deal of unreality and a future potential for much mischief." . . . Much to the chagrin of the citizens of this State, Chief Justice Miller's prophesy has become self-fulfilling. And, like the proverbial ostrich who sticks his head in the sand to avoid seeing the obvious, the majority of this Court has refused to recognize the blatantly unlawful nature of the present Budget Digest preparation practice by actually allowing one of the biggest legal fictions in West Virginia history to continue unchecked *ad infinitum*. Although I agree that a writ of mandamus should be issued in this case, I do not concur with my colleagues as to the nature of the relief that should be awarded. Rather than the toothless writ they have deemed to be appropriate, I believe that the proper remedy is to require the Legislature, in its future preparation of the Budget Digest, to strictly abide by the clear directives contained in Article VI, section 51 of the West Virginia Constitution and W. Va. Code § 4-1-18[.] At present, however, the Legislature's actions could not be further from those prescribed by the above-referenced authorities.

In its announcement of today's decision, the majority has obfuscated the law which governs this proceeding by crafting new holdings which do not acknowledge the actual state of affairs underlying the instant controversy and by reaching an ultimate result that is completely at odds with its analysis. As an alternative to the convoluted reasoning relied upon by the majority of my brethren, I submit that the more straightforward and legally sound approach rests upon longstanding principles of established law.

A. West Virginia Constitutional Law

Pursuant to the Constitution of this State, the government of West Virginia is divided into three co-equal branches of government: "The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time ...." W. Va. Const. art. V, § 1.[1] Integral to the separation of powers is the notion that each of the branches of government has its own constituent components and its own defined functions. ...

Of particular importance to the instant proceeding is the composition of the legislative branch. In this regard, the Constitution provides that "the legislative power *shall* be vested in a senate *and* house of delegates." W. Va. Const. art. VI, § 1 (emphasis added). Thus, it is apparent that West Virginia's Legislature is bicameral in nature, meaning that an action of the Legislature contemplates action by both houses thereof. *See Lusher v. Scites*, 4 W. Va. 11, 13 (1870) ("The legislative power is an attribute of sovereignty, and the exercise of that attribute is vested by the people of the State in the Senate *and* House of Delegates." (emphasis added)[.] . . .[2]

In addition to establishing our tripartite system of government and defining the components of the legislative branch thereof, the Constitution also delineates specific duties for each of the government's separate branches. At issue in the petitioners' request for relief are the particular duties ascribed to the Legislature vis-a-vis the budgetary process. In section 51 of Article VI of the West Virginia Constitution, the procedure for proposing the budget bill, as well as any appropriations extraneous thereto, is set forth in great detail. Insofar as supplemental appropriations are concerned, this section directs that "the legislature shall not appropriate any money out of the treasury except in accordance with provisions of this section," W. Va. Const. art. VI, § 51, and that "every appropriation bill shall be either a budget bill, or a supplementary appropriation bill ...." [*Id.*]. *Accord* Syl. pt. 10, *Dadisman v. Moore*, 181 W. Va. 779, 384 S.E.2d 816 (1989) ("'Section 51, Article VI, West Virginia Constitution, commonly known as the "Budget Amendment", is couched in mandatory terms, and clearly embraces a mandate of the electorate of this State governing the Legislature in the appropriation of [public] funds.' . . .").

Once it has been determined that supplementary appropriations are necessary, the Constitution provides further guidance for their consideration.

> Neither house shall consider other appropriations until the budget bill has been finally acted upon by both houses, and no such other appropriations shall be valid except in accordance with the provisions following: (a) Every such appropriation shall be embodied in a separate bill limited to some single work, object or purpose therein stated and called therein a supplementary

---

[1] *See also* Robert M. Bastress, *The West Virginia State Constitution: A Reference Guide* 124 (1995) ("This section ... sets forth a fundamental principle of American government: that governmental powers must be allocated among the separate branches to ensure each has independent strength.").

[2]This is so because the legislative powers of the state are ordinarily vested, under constitutional provisions, in a legislature composed of a senate and house of representatives or bodies equivalent thereto, although otherwise designated, elected by the people, the bodies being integral parts which, combined, are the legislative branch or agency of the state, and *it has been said that neither is an entity of government without the other. The legislature must act as a body, and, under the bicameral system, it is only where both bodies are lawfully assembled that they constitute the legislature.* 81A C.J.S. *States* § 40, at 372-73 . . ..

> appropriation bill; (b) each supplementary appropriation bill shall provide the revenue necessary to pay the appropriation thereby made by a tax, direct or indirect, to be laid and collected as shall be directed in the bill unless it appears from such budget that there is sufficient revenue available.

W. Va. Const. art. VI, § 51, subsec. C . . ..

> An appropriations bill may be enacted into law only after it has been duly considered and approved by both legislative chambers and, thereafter, presented to the Governor for approval or disapproval. . . . *Id.* at subsec. D, para. 11 (emphasis added).

Given that the grant of authority to the Legislature generally encompasses all that is not specifically prohibited by the Constitution, it is apparent that the Legislature is empowered to appropriate money from this State's treasury as long as it complies with the procedures set forth in W. Va. Const. art. VI, § 51. *See* Robert M. Bastress, *The West Virginia State Constitution: A Reference Guide* 180 (1995) ("The first sentence of section 51 ... makes clear that the legislature must use the procedures in this section to appropriate any money from the treasury."). In fact, this Court has previously observed that "the power to appropriate money is vested exclusively in the legislature." . . .

When particular responsibilities have been ascribed to the Legislature, the focus then shifts to a determination of whether that particular function is a purely legislative duty. Such a distinction between pure legislative duties and discretionary tasks, which have been assigned to the Legislature, is important as the former are not delegable while the latter may be delegated for performance by another governmental entity. "Purely legislative power, which can never be delegated, has been described as the authority to make a complete law---complete as to the time when it shall take effect and as to whom it shall be applicable---and to determine the expediency of its enactment." *State ex rel. West Virginia Hous. Dev. Fund v. Waterhouse*, 158 W. Va. 196, 211, 212 S.E.2d 724, 733 (1974)[.][6] "Under the separation of powers provision of the Constitution of this State, the power of enacting legislation is vested solely in the legislature," *State ex rel. Carson v. Wood*, 154 W. Va. 397, 401, 175 S.E.2d 482, 485 (1970), and, "as a general rule in this jurisdiction, the legislature cannot delegate its power to make law," *Waterhouse*, 158 W. Va. at 211, 212 S.E.2d at 733. *Accord State v. Grinstead*, 157 W. Va. 1001, 1013, 206 S.E.2d 912, 920 (1974) ("The authority to enact laws, being exclusively a legislative function, cannot be transferred or abdicated to others." (citation omitted)). Because the process of appropriating funds necessarily entails the enactment of such directives into law, the Legislature's appropriations authority is a purely legislative duty which is not delegable. *See generally* W. Va. Const. art. VI, § 51 (providing procedure whereby legislatively proposed appropriations are ultimately enacted into law).

B. West Virginia Code § 4-1-18

Having laid the foundation of constitutional law upon which the proper determination of this cause should rest, it is equally important to consider the statute which is at the heart of the parties' controversy. W. Va. Code § 4-1-18 supplements the Legislature's constitutionally-ascribed appropriations authority by requiring it to prepare an annual Budget Digest after its passage of the Budget Bill.

> The Legislature, acting by its appropriate committees, shall consider the budget bill, the budget document and matters relating thereto, and following such consideration and upon the passage

---

[6]That is not to say, however, that the Legislature may not delegate nonlegislative duties to an administrative agency, which authority is outside the scope of this opinion. *See, e.g.*, *State ex rel. West Virginia Hous. Dev. Fund v. Copenhaver*, 153 W. Va. 636, 649, 171 S.E.2d 545, 553 (1969) ("The legislature may delegate its nonlegislative functions and confer discretion in the administration of the law, but it may not delegate purely legislative powers in the absence of constitutional authorization." (internal quotations and citation omitted)). *See also* Syl. pt. 5, *Woodring v. Whyte*, 161 W. Va. 262, 242 S.E.2d 238 (1978) ("Before a delegation of legislative power to an administrative agency will be held to be unconstitutional as a violation of Article VI, Section I of the West Virginia Constitution, such delegation must be of purely legislative power.").

> of the budget bill by the Legislature, the Legislature shall prepare *a digest or summary of the budget bill containing detailed information similar to that included in the budget document submitted to the Legislature by the governor but including amendments of legislative committees, and as finally enacted by the Legislature*. Such digest or summary shall be prepared at the direction of and approved by members of the conferees committee on the budget and shall be included in the journals of the Legislature or printed as a separate document, and copies shall be furnished to the governor, commissioner of finance and administration, and the various state spending units for such use as may be deemed proper.

W. Va. Code § 4-1-18 (emphasis added). Stated otherwise, this statute requires the Legislature, through its conferees committee on the budget, to prepare a synopsis of the Budget Bill as it was "finally enacted by the Legislature," § 4-1-18, which signifies passage thereof by "a majority of the members elected to each house," W. Va. Const. art. VI, § 51, subsec. D, para. 11.

The focus of the majority's inquiry, then, should have been to answer two simple questions arising from this statutory language. First, whether W. Va. Code § 4-1-18, which directs the preparation of a Budget Digest document, is constitutional. And second, whether the Legislature's present method of preparing the Budget Digest, wherein additional allocations are made which have not been *approved* by the entire Legislature or by the Governor, complies with the mandates of this statute.

C. Constitutionality of
West Virginia Code § 4-1-18

To resolve the first query, I submit that W. Va. Code § 4-1-18 is constitutional on its face. . . . Upon reading the plain language of W. Va. Code § 4-1-18, no constitutional infirmities are apparent on the face of this statute. The plain language of § 4-1-18 directs the Legislature, through its conferees committee on the budget, to prepare a "digest or summary of the budget bill containing detailed information" regarding the Legislature's amendments to the Budget Bill originally submitted to it by the Governor and reflecting the final version of the Budget Bill enacted by the Legislature. . . . Absent statutory definitions for the terms "digest" and "summary", the commonly-accepted usage of these words must be employed. . . . In common parlance, the term "digest" signifies "a summation or condensation of a body of information." [Webster's Dictionary. *Accord* Random House Webster's Unabridged Dictionary.] Similarly, "summary" is commonly defined as "an abstract, abridgment, or compendium." [*Id*.] Therefore, W. Va. Code § 4-1-18 commands the Legislature to prepare a synopsis of the Budget Bill submitted to the Governor for approval or disapproval, with notations as to the Legislature's changes to the Governor's original Budget Bill.

It has further been determined that the purpose of such a document is to provide insight as to the legislative intent inherent in the Budget Bill but which may not be readily apparent therefrom. [*Common Cause*]; *Hechler v. McCuskey*, 179 W. Va. 129, 133, 365 S.E.2d 793, 797 (1987) (recognizing that "the Legislature uses this Digest as its detailed explanation concerning the manner in which appropriations are to be expended"); *Jones v. Rockefeller*, 172 W. Va. 30, 34 n.4, 303 S.E.2d 668, 672 n.4 (1983) (observing that legislative intent as to contemplated expenditure of budgetary appropriations may be gleaned from the Budget Digest). In fact, the Digest, itself, announces that it "is prepared to provide detail regarding the intent of the Legislature in enacting certain appropriations." Legislature of West Virginia, *Digest of the Enrolled Budget Bill* 1 (Fiscal Year 1999-2000). "Thus, the plain language of this statute reflects that the Digest is designed to do two things: first, summarize the budget bill as passed; and, second, reflect the legislative changes made to the budget as submitted by the governor." *Common Cause*, 186 W. Va. at 582-83, 413 S.E.2d at 403-04 (Miller, C.J., dissenting). Both of these purposes clearly fall within the scope of authority granted to the Legislature to enact laws to carry out its constitutionally-prescribed budgetary functions. W. Va. Const. art. VI, § 51, subsec. D, para. 12 ("The legislature may, from time to time, enact such laws, not inconsistent with this section [concerning the budget and supplementary appropriation bills], as may be necessary and proper to carry out its provisions."). Therefore, it would appear that W. Va. Code § 4-1-18 is constitutional *on its face*.

D. Propriety of Present Application of West Virginia Code § 4-1-18

In answering the second question raised by the petitioners, *i.e.*, whether the Legislature's present method of preparing the Budget Digest, wherein additional allocations are made which have not been *approved* by the entire Legislature or by the Governor, complies with the mandates of this statute, I disagree with the decision reached by my colleagues. Instead of blindly looking the other way while this State's precious financial resources are being diverted in contravention of the clear constitutional and statutory guidelines for appropriations, I recognize that the present state of affairs neither complies with the mandates of W. Va. Code § 4-1-18 nor comports with the overriding constitutional tenets governing such a budgetary procedure. Simply stated,

> it is no objection to the remedy in such case, that the statute, the application of which in the particular case is sought to be prevented, is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right.

Syl. pt. 8, *Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 67 S.E. 613 (1910). From the memoranda of law submitted for this Court's consideration and the appended information, it appears to me that the conferees committee, in the course of declaring the Legislature's intent in the Budget Digest, is actually making additional allocations of state monies that have not been submitted for approval as required by the Constitution rather than preparing a mere "digest or summary" of the Budget Bill. *See* W. Va. Code § 4-1-18 (defining contents of Budget Digest). As such, the Budget Digest does not provide an accurate and succinct version of the Budget Bill "finally enacted by the Legislature." *Id.* The difficulties attending the Legislature's current Budget Digest compilation practice are numerous and violative of multiple fundamental principles.

First, despite the respondents' protestations to the contrary, it seems that the unauthorized allocations contained in the Budget Digest, although not formally denominated as "appropriations," nevertheless have the force and effect thereof without the benefit of the constitutional protections normally attending such disbursements. *See generally* W. Va. Const. art. VI, § 51. When viewing legislative actions, the substance of the act complained of, instead of its simple form, directs the ensuing analysis. *See, e.g.*, *Common Cause*, 186 W. Va. at 540, 413 S.E.2d at 361 (commenting that, "in deciding this case, it must be reality, not theory, that is the interpretive principle"); *Chapman*, 121 W. Va. at 350, 3 S.E.2d at 517 (Hatcher, J., dissenting) ("The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty---indeed, are under a solemn duty---to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority." (internal quotations and citations omitted)). Appropriations generally are considered to be directives to spending units as to how certain monies have been allocated for use during the ensuing fiscal year. *See McGraw v. Hansbarger*, 171 W. Va. 758, 768, 301 S.E.2d 848, 858 (1983) ("The budgetary appropriation process provides the means by which ... dedicated revenue ... may be withdrawn from ... the treasury and applied to the purpose for which it was intended."). Under the circumstances presented in this proceeding, I am firmly convinced that the expenditures at issue herein have the full force and effect of appropriations. The unauthorized allocations contained in the Budget Digest effectively direct various entities as to how the Legislature contemplates their spending of allotted monies and actually serve as the authorizations needed to withdraw these funds from the State's treasury.

Additionally, the appropriations presently contained in the Budget Digest have not satisfied the constitutional safeguards for the proposal, passage, and presentment of such disbursements. *See generally State ex rel. Brotherton v. Blankenship*, 157 W. Va. 100, 112, 207 S.E.2d 421, 429 (1973) ("The journey taken by a Budget Bill, from its formulation to its enactment into law, well demonstrates the great detail in which it is considered. It is thoroughly studied and considered four times---twice by the Governor and twice by the Legislature (if it acts upon the Governor's veto)."). Section 51 of Article VI of the West Virginia Constitution provides specific guidelines for the proper exercise of the Legislature's appropriations authority. First, the proposed appropriation must be

approved by "a majority of the members elected to each house of the legislature." W. Va. Const. art. VI, § 51, subsec. D, para. 11. If the appropriations contained in the Budget Digest are both proposed and approved by the conferees committee before their inclusion in the final Digest, the majority of legislators have not been afforded their opportunity to approve the proposed appropriations as required by the West Virginia Constitution. Moreover, following passage by the Legislature, the appropriations must then be presented to the Governor for approval or disapproval. *Id. See also* W. Va. Const. art. VII, § 15 (reinforcing requirement that "[a] bill passed by the legislature making appropriations of money must be submitted to the governor for his approval or disapproval"). Again, though, if the present procedure is followed, the Governor is deprived of the right to review the proffered appropriations. In short, the incorporation of unapproved appropriations into the Budget Digest completely ignores these procedural safeguards; disregards the constitutional procedures for the enactment of an appropriations bill; and abrogates the plainly stated requirement that the Digest serve as a synopsis of the Budget Bill finally enacted by the Legislature. . . .

Finally, as I noted above, the Legislature has the sole authority to appropriate funds. . . . Because such a function has been denominated a purely legislative function, the Legislature is required to exercise this authority itself, and it may not delegate its appropriations authority to any other entity. In other words, our bicameral system requires the *entire* Legislature to participate in the approval of proposed appropriations. Just as the Legislature could not delegate its appropriations authority for performance by any other entity, it similarly cannot delegate this power to a subcommittee of itself, or to one of its individual members, because such a committee is not comprised of the entirety of both of the legislative chambers. "Unilateral action by any single participant in the law-making process is precisely what the Bicameralism and Presentment Clauses were designed to prevent." . . . Thus, the Legislature's authority to make appropriations is a purely legislative duty which is not delegable. Furthermore, because the Legislature cannot delegate its appropriations authority, the Legislature's conferees committee on the budget should not be permitted to make appropriations through the Budget Digest, prepared pursuant to W. Va. Code § 4-1-18.

In spite of the Legislature's blatant variance from the governing constitutional and statutory law, it has nonetheless managed to pull the wool over the eyes of the majority and successfully left my colleagues with the impression that nothing is amiss in the wonderful world of the Budget Digest. Not only does the Court's adoption of Syllabus point 2[*] completely ignore the present Budget Digest preparation process, including the addition of unapproved allocations of State funds, but its further acquiescence to Syllabus point 6[**] perpetuates this myth, and indeed compounds this abomination.

If Syllabus point 2 existed in a vacuum, far removed from any potential for mischief, it would paint an accurate picture of the ideal application of W. Va. Code § 4-1-18. However, the reality is that "the inclusion of an item in the budget digest in reference to a more generalized line item found in the budget bill *does* ... operate to appropriate money from the state treasury[.]" (Emphasis added). Simply stated, just because the Budget Digest allocations walk like appropriations and talk like

---

[*]Syllabus Point 2 stated:

2. The inclusion of an item in the budget digest in reference to a more generalized line item found in the budget bill does not operate to appropriate money from the state treasury within the meaning of [Article VI, § 51]. All funds that are described in the budget digest reference a specific line item in the budget bill, and it is the passage of that budget bill which constitutes and effects an appropriation under the mechanisms set forth in the Modern Budget Amendment. [Footnote by the editor.]

[**]Syllabus Point 6 stated:

6. A fair reading of [W. Va. Code 4-1-18] contemplates and requires that the material contained in the budget digest under the heading "Legislative Intent" must have been the subject of discussion, debate, and decision prior to final legislative enactment of the budget bill, either within the legislative committees or sub-committees of the respective houses to which the budget bill, or parts of it, have been committed, formally or informally, or within the conferees committee. [Footnote by the editor.]

appropriations does not mean that they are not, in fact, appropriations regardless of the nomenclature used to describe them. Additionally, despite the majority's holding to the contrary, I firmly believe that "all funds that are described in the budget digest [*do not*] reference a specific line item in the budget bill." (Emphasis added). If there were such a neat matching of these various monetary figures and budgetary documents, the present controversy would not exist and certainly would not have been presented to us not once, but twice, for final resolution. . . .

Moreover, Syllabus point 6 further confuses the applicable law by holding that

> [a] fair reading of [§ 4-1-18] contemplates and requires that the material contained in the budget digest under the heading "Legislative Intent" must have been the subject of discussion, debate, and *decision* prior to final legislative enactment of the budget bill, either within the legislative committees or subcommittees of the respective houses to which the budget bill, or parts of it, have been committed, formally or informally, or within the conferees committee.

(Emphasis added). Rather than requiring the informative "legislative intent" to have been generated by way of *approval* by the Legislature during its deliberation of budgetary matters, the majority states simply that the matter need only have been *decided* by some committee thereof. This procedure is entirely inconsistent with the second Syllabus point of the Court's decision. In short, Syllabus point 6 allows the Legislature to continue its illegal delegation of its *nondelegable* budgetary powers to a subpart of itself. Additionally, Syllabus point 6 directly contradicts the staunch holding of Syllabus point 2 by requiring not the *approval* of a budgetary line item, as contemplated by Syllabus point 2, but merely the *decision* thereof, which, in the absence of more specific language, could amount to a total rejection of the proposed expenditure. I cannot countenance the further conflagration of the law of this State in this regard. . . .

G. Conclusion

In his conclusory remarks to his *Common Cause* dissent, Chief Justice Miller said,

> What the majority has done is distort the constitutional and legislative framework surrounding the budget and ignore our cases that preclude amending legislation without the full vote of the legislature.

. . . I echo these sage words and would add only that in this case, the majority has gone a precipitous step further by also ignoring the constitutional protections adopted to safeguard the citizens of this State. Accordingly, I respectfully dissent.

F. Legislative Compensation and Terms of Office

Read Article VI, §§ 3, 33, 37, and 38.

STATE EX REL. HOLMES V. GAINER,
191 W.Va. 686, 447 S.E.2d 887 (1994).

MILLER, Justice:

The relators, Darrell E. Holmes, Clerk of the Senate of West Virginia, and Donald L. Kopp, Clerk of the House of Delegates of West Virginia, on April 5, 1994, filed this original petition for a writ of mandamus against the respondent, Glen B. Gainer III, Auditor of the State of West Virginia, and for a writ of prohibition against the respondent, the Honorable Herman Canady, Judge of the Circuit Court of Kanawha County. Subsequently, we permitted Donna J. Boley and Robert P. Pulliam, M.D., to appear as intervenors and gave them the right to take depositions and to file interrogatories. This matter was set for a full hearing on June 7, 1994.

The relators seek a writ of mandamus to compel the State Auditor to perform his statutory duty to issue warrants for the payment of salaries and expenses for the members of the Legislature and others pursuant to House Bill 4031 (Bill). This Bill was passed by the West Virginia Legislature

during the 1994 session. The State Auditor is authorized to issue warrants for the payment of legislative compensation and expense allowances W.Va.Code, 12-3-1 (1990), and W.Va.Code, 12-3-5 (1923). At issue is the validity of the legislative pay raise contained in the Bill. The Auditor contends that the procedures used in adopting the Bill did not conform to the requirements of Section 33 of Article VI of the West Virginia Constitution relating to pay raises for members of the West Virginia Legislature. . . .

Section 33 of Article VI of the West Virginia Constitution established a Citizens Legislative Compensation Commission (Commission) and vested the Commission with the authority to submit to the West Virginia Legislature its resolution determining compensation and expense allowances for members of the Legislature. On March 3, 1994, the Commission endorsed a "Resolution Submitting Recommendations with Respect to Compensation and Expense Allowances." The resolution was submitted to the West Virginia Legislature at its regular session on March 3, 1994, the same date it was adopted by the Commission.

After submission of the resolution to the Legislature, it was enacted into the Bill, which amended W.Va.Code, 4-2A-1, et seq., to increase the compensation and expense allowances of the legislators. . . . On March 19, 1994, the Honorable Gaston Caperton, Governor of the State of West Virginia, signed the Bill into law.

The issues before this Court are simply (1) whether the requirements for setting legislative compensation and expense allowances under Section 33 of Article VI of our Constitution were followed properly, and (2) whether contact by members of the Legislature with members of the Commission violated due process such that the increased compensation and expense allowances for the Legislature should be held invalid.

I.

We first address the question of the constitutionality of the Commission's resolution that resulted from its meeting on March 3, 1994. A review of the history of Section 33 of Article VI of the West Virginia Constitution is of some value to gain insight into the adoption of this 1970 amendment. Prior to the adoption of Section 33 of Article VI in its current form, which was ratified by the voters on November 3, 1970, passage of a separate constitutional amendment was required to increase the compensation and expense allowances of members of the Legislature.[4] This constitutional requirement made it extremely difficult to get a legislative compensation constitutional amendment to increase legislative salaries passed with any frequency by the voters. This difficulty, undoubtedly, was the chief impetus behind the 1970 amendment which was designed to liberalize the ability to increase legislative compensation and expense allowances. Many states have more liberal procedures that allow the members of their legislatures to increase their pay without voter approval at any time. In some states, the raise does not take effect in the session in which it was voted, while in other states, the raise does not take effect during the term of the legislators voting on it.

The relators argue that the resolution on compensation and expense allowances submitted by the Commission and reduced to the Bill complies with the mandate of Section 33 of Article VI. They point to the ten words at the beginning of the third paragraph of Section 33: "The commission shall

---

[4]For example, Section 33 of Article VI, contained in the Code, set these salaries:

"The members of the Legislature shall each receive for their services the sum of five hundred dollars per annum and ten cents for each mile traveled in going to and returning from the seat of government by the most direct route. The Speaker of the House of Delegates and the President of the Senate, shall each receive an additional compensation of two dollars per day for each day they shall act as presiding officers."

The editor's notes to the current provision trace the history of the various amendments to Section 33 of Article VI. These notes indicate that prior to 1970 the members of the Legislature only had two raises. The first raise came from an amendment ratified by the voters in November, 1920, which increased their salaries from four dollars a day to five hundred dollars per annum. The second amendment ratified in [1954], increased their salaries to fifteen hundred dollars per annum.

meet as often as may be necessary[.]" They claim that this language provides that the Commission can meet as many times as desired and also can offer a resolution on compensation and expense allowances each time. Consequently, the relators contend that the Legislature can reduce the resolution to a Bill any time after the resolution is submitted.

On the other hand, the intervenors argue that the relators' interpretation of Section 33 of Article VI of the West Virginia Constitution completely ignores the remaining language of the third paragraph relating to submission of a resolution on compensation and expense allowances by the Commission to the Legislature every four years. They contend that under this language, the Commission can submit a resolution on compensation and expense allowances only once every four years based on a quadrennial cycle starting with the 1971 regular legislative session. They also state that such submission must be made within fifteen days after the beginning of the regular session, done in this case.

We have not had occasion to interpret this provision. There are two Attorney General opinions that have touched on this question. The first opinion was issued on March 1, 1977, by the Honorable Chauncey H. Browning, Jr., Attorney General, to William C. Campbell, the Chairman of the Commission. Mr. Campbell had inquired whether the Commission could send its resolution on compensation and expense allowances to the Legislature at intervals of less than four years. Attorney General Browning, after quoting the third paragraph of Section 33 of Article VI, concluded that a resolution must be submitted at least every four years, but one could be submitted more often. See 57 Atty.Gen.Op. 115 (March 1, 1977). Much the same reasoning was used by the Honorable Darrell V. McGraw, Jr., Attorney General, in his opinion dated March 9, 1994, addressed to the Honorable Keith Burdette, President of the Senate.

We recognized in Walter v. Ritchie, 156 W.Va. 98, 109, 191 S.E.2d 275, 282 (1972), that: "Although an opinion of the attorney general is not binding upon this Court it is persuasive when it is issued rather contemporaneous with the adoption of the statute in question. See State ex rel. Battle v. Baltimore and Ohio Railroad Company, 149 W.Va. 810, 837, 838, 143 S.E.2d 331[, 347, 348] (1965)." However, in this case, we believe the Attorney General opinions failed to take into account the historical background surrounding the adoption of Section 33 of Article VI.

We also find there is an ambiguity in the third paragraph of Section 33. This ambiguity in the third paragraph arises because there is no mandatory language clearly stating that the Commission's resolution on compensation and expense allowances can be submitted only once every four years. Moreover, it is difficult to imply such a meaning as it would tend to negate the language that allows the Commission to meet as often as possible. When an ambiguity occurs, we apply the rule set out in Syllabus Point 1 of Winkler v. State School Building Authority, 189 W.Va. 748, 434 S.E.2d 420 (1993):

> "Questions of constitutional construction are in the main governed by the same general rules applied in statutory construction."

It was this ambiguity which caused the two Attorney General opinions to hold that the Commission could submit a resolution more often than every four years. However, such an interpretation allowing the Commission to meet more frequently than every four years does not necessarily imply that it can submit a resolution at any time after it meets. This type of construction would emasculate the language in the latter portion of the third paragraph which sets out the four-year cycle beginning after the 1971 regular session of the Legislature, which would be contrary to our normal rule requiring us to consider all parts of a constitutional or statutory provision. . . .

It is our view that this ambiguity can best be resolved by holding that what was intended was to allow the Commission to have considerable latitude in the frequency of its meetings. However, its resolution on compensation and expense allowances must be submitted to the Legislature at sessions occurring at four year cycles calculated from the 1971 regular session of the Legislature. Such an interpretation gives meaning to both parts of the third paragraph of Section 33. Moreover, it comports with the historical analysis of the reasoning behind [Section 33], which was designed to

loosen the extremely restrictive constitutional limitation that precluded any increase in legislative compensation and expense allowances unless it was voted on by the citizens.

From an historical standpoint, we do not believe that the Legislature in 1970, when it adopted the amendment of Section 33 of Article VI creating the Commission, which was ratified by the voters, contemplated that it would receive a resolution for compensation and expense allowances from the Commission more often than every four years. Nor do we believe that, in view of past history, the voters who approved the amendment thought otherwise.

We also conclude that Section 33 of Article VI, which allows the Commission to meet as often as necessary, is designed to give the Commission ample opportunity to examine legislation from other states and determine what would be a reasonable increase in legislative compensation and expense allowances. Moreover, because the Commission's resolution must be submitted within fifteen days after the beginning of the legislative session, the Commission needs the opportunity to meet as often as necessary in to permit input from interested citizens.

Consequently, we hold that Section 33 of Article VI allows the Commission to meet as often as necessary. However, Section 33 restricts the Commission from submitting to the Legislature its resolution on compensation and expense allowances except on a quadrennial basis calculated from the 1971 legislative session. There is nothing in this section that requires the Legislature to act on the resolution at the legislative session when it is first submitted. Once the Commission's resolution is properly submitted, the Legislature may act on it at any time during the four-year cycle before the next resolution is required to be submitted.

Although we conclude that the Commission and the Legislature failed to follow the provisions of Section 33 of Article VI, as we now construe them, we decline to strike the increase in legislative compensation and expense allowances. As we have indicated, there has been no authoritative interpretation of Section 33 of Article VI before this case. Indeed, as we earlier observed, the two Attorney General opinions would point to an interpretation that would justify the actions taken by the Commission and the Legislature. . . . Thus, . . . we give only prospective operation to this opinion. However, in the future, both the Commission and the Legislature will be bound by the dictates of this opinion.

II.

A subsidiary attack is made on the Bill because the Commission failed to file its resolution within fifteen days from the opening of the legislative session, as required by Section 33 of Article VI. This late filing was occasioned by the fact that there were four vacancies on the seven-member Commission before the beginning of the 1994 legislative session. These vacancies were not filled by the Governor until February 7 and 11, 1994, session. These appointments were made after the fifteen-day deadline for filing the Commission's resolution.

We are not cited nor have we found a case that discusses what effect a governor's failure to appoint members of an administrative agency will have on the agency's ability to meet a statutory or constitutional deadline. However, in the past, we have attempted to solve situations that arise because of the lack of executive appointments to an administrative agency by fashioning some reasonable relief. It is apparent that an executive official could through a statutory appointment authority virtually paralyze the operation of an administrative agency by failing to exercise this power of appointment. Thus, in State ex rel. Brotherton v. Moore, 159 W.Va. 934, 230 S.E.2d 638 (1976), we held that a writ of mandamus would lie to compel the Governor to exercise his power of appointment.

In Serian v. State By and Through West Virginia Board of Optometry, 171 W.Va. 114, 297 S.E.2d 889 (1982), we held that the Governor's failure to appoint a lay member to the Board of Optometry, as required by statute, would not deprive the Board of its jurisdiction to hear a license revocation case. More recently in Francis O. Day Co. v. West Virginia Reclamation Board of Review, 188 W.Va. 418, 424 S.E.2d 763 (1992), the Board of Review lacked the four votes required by statute from a seven-member board because of the absence of a member. The Board split three

to three, and it then took no action on the administrative appeal because there were not the statutory four votes. We held that the Board must enter an order allowing an appeal to the next higher tribunal rather than delay the entire administrative decision.

These cases demonstrate this Court's concern that an administrative agency or a commission should not be crippled by actions that are entirely beyond its control, which would destroy the reasonable expectations of the parties who are the beneficiaries of its jurisdiction. Consequently, we conclude that the late filing by the Commission of its resolution beyond the fifteen-day period set in Section 33 of Article VI of the Constitution will not defeat the resolution where it was occasioned by the lack of a quorum by reason of executive delay in making the appointments.

III.

Finally, we address the intervenors' due process claims which are predicated on the fact that some members of the Legislature contacted members of the Commission regarding their views as to the amount of legislative compensation and expense allowances that the Commission should recommend. This issue was not raised by the respondent Auditor Gainer. The intervenors cited no law to support this issue in their brief filed on June 3, 1994, four days before the scheduled final arguments. During the course of oral arguments, the intervenors cited two cases--Home Box Office, Inc. v. Federal Communications Commission, 567 F.2d 9 (D.C.Cir.1977), and Portland Audubon Society v. The Endangered Species Committee, 984 F.2d 1534 (9th Cir. 1993). Portland Audubon involves provisions of the Federal Administrative Procedure Act, which specifically ban ex parte communications under 5 U.S.C. § 557(d)(1) and (2) (1976). We, of course, are not controlled by the Federal Administrative Procedures Act nor does our Administrative Procedures Act, W.Va.Code, 29A-1-1, et seq., contain similar language. The issue in Home Box Office involved federal rulemaking by the Federal Communications Commission where there appears to be some restriction on ex parte communications[.] . . .

Whatever due process force Home Box Office, supra, may be said to have outside the restrictions contained in the Federal Administrative Procedures Act was not recognized by the same court in its later opinion in Sierra Club v. Costle, 657 F.2d 298 (D.C.Cir.1981). In Sierra Club, the court, after footnoting a variety of commentators' views regarding ex parte communications involving informal rulemaking of a policymaking sort, came to this conclusion:

> "Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall. As judges we are insulated from these pressures because of the nature of the judicial process in which we participate; but we must refrain from the easy temptation to look askance at all face-to-face lobbying efforts, regardless of the forum in which they occur, merely because we see them as inappropriate in the judicial context. Furthermore, the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated. Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs." 657 F.2d at 400-01. (Footnotes omitted).

In this case, we view the Commission, at best, as a limited administrative agency empowered to act on the very narrow issue of legislative compensation and expense allowances. Its resolution may be considered as policymaking of a sort, but we agree with the foregoing statement from Sierra Club and its conclusion that it would not impose a judicial prohibition fashioned under a due process rubric on ex parte communications to informal administrative proceedings. Based on the above, we find no merit in the intervenors' due process argument.

IV.

In conclusion and for the reasons stated in this opinion, we issue a writ of mandamus directing Auditor Gainer to process the legislative compensation and expense allowances in accordance with

the terms contained in the Bill.

NEELY, Justice, dissenting in part:

I dissent to the court's holding that W.Va. Const. Art. VI, § 33 prohibits the commission from submitting a proposal for a pay increase other than once every four years. The majority uses phrases such as "[i]t is our view" and "we do not believe"; however, our "view" and our "belief" have nothing to do with the matter. The plain wording of W.Va. Const. Art. VI, § 33 permits the commission "to meet as often as may be necessary and shall within fifteen days after the beginning of the regular session of the legislature in the year one thousand nine hundred seventy-one and within fifteen days after the beginning of the regular session in each fourth year thereafter submit by resolution to the legislature its determination of compensation and expense allowances, which resolution must be concurred in by at least four members of the commission."

The plain words of § 33 allows the commission to meet as often as it wishes, but it must submit a resolution every four years. There is nothing contradictory or ambiguous in these provisions, since as the facts of this case demonstrate, governors may be surpassingly reluctant to appoint commissions disposed to adjust legislative pay in an equitable way. . . .

This is only the third pay raise the legislature has afforded itself since 1971! In years when money is tight for teachers, public employees, judges, and the state police, the Legislature can hardly give itself a raise even if such a year falls upon the majority's magic fourth year. Occasionally it is politically possible to include the Legislature in a general raise, as occurred in 1994, and when that happens the Legislature should--like every other public employee, teacher, judge, and cop--have the benefit of having their salaries based on the fair value of their services in the year the raise is passed.

[A dissenting opinion by Chief Justice Brotherton is omitted.]

G. Prohibited Acts

Read Article VI, §§ 36-40, 43, 47, & 52.

NOTES ON ARTICLE VI, § 39

1. From Robert M. Bastress, Jr., *Constitutional Considerations for Local Government Reform in West Virginia*, 108 W. Va. L. Rev. 125, 139-44 (2005):

Article VI, § 39 . . . limits the Legislature's ability to enact "local" or "special" laws. The latter "include laws that focus on individual cases or that classify a narrow class of individuals, groups, or entities for special treatment. 'Local laws' limit their application to a specific locale within the State, rather than apply statewide. Thus, special laws classify by persons, places, or things, and local laws classify by places." The notion is that general laws are preferred because they reduce the potential for favoritism and discrimination and promote "uniformity and consistency in statutory enactments." In addition, the provision promotes efficiency, localism, and separation of power goals through its enumeration of eighteen subjects that the Legislature is completely prohibited from using special or local laws to regulate because the subject is too trivial to merit legislative time, or concerns only local matters, or relates to a matter that should be controlled by another branch. As to all other subjects, the Legislature must use general laws whenever it "would be proper." The Court has loosely applied that latter requirement and has deferred to the Legislature's judgment that a general law was not feasible so long as that judgment was reasonable.[90] As such, the constraint has

[90]The standard of review has not been completely toothless, however. Consider the following:

had a minimal impact on the Legislature's regulatory capability.

Five of the enumerated subjects concern local government matters[.][91] The first of those prohibits statutes "incorporating cities, towns or villages, or amending the charter of any city, town or village, containing a population of less than two thousand[.]" The framers' reason for including this as a prohibited subject was undoubtedly based on the opinion that such matters were too trivial to warrant legislative treatment rather than for respect for localism. That conclusion follows from the fact that nowhere in the 1872 Constitution was there any limitation on the Legislature's ability to revamp municipal governments for particular towns and cities over two thousand, a power that the Legislature exercised with regularity until 1936, when the Home Rule Amendment forbade the practice.[92]

The other relevant provision in § 39 prohibits local laws "regulating or changing county or district affairs." The phrase has eluded clear definition from our court; there are few cases interpreting it - none recently decided - and those that have been rendered have produced some conflicting results. For example, in *State ex rel. Green v. Board of Education*,[93] the Legislature had enacted a law requiring the Braxton County Board of Education to compensate Green for injuries he had sustained while working for the Board. (Because of then-existing sovereign immunity, Green could not successfully sue the Board.) The Court agreed with the Legislature that the Board had a moral obligation to pay Green but nevertheless concluded that the act related to a district affair and thus was barred by § 39. The Court reasoned:

> To the extent that the statute directs the Board of Education of Braxton County to reimburse relator, the Legislature, in our opinion, is regulating the fiscal affairs of the board. If such regulation should be held valid in this case, the instant appropriation would be a stepping stone toward legislative direction of the fiscal affairs of boards of education and other governmental agencies of the State.

In addition, the Court has found that a statute dealing with business hours in county courthouses is a regulation of county affairs.[95]

A statute violates § 39 when it fails to operate uniformly on a class. Thus, the Supreme Court struck down a law that varied magistrates' pay by county of residence, grouping the counties according to population, but arbitrarily placing a handful of counties in a level with counties that were not of the same approximate size. State ex rel. Longanacre v. Crabtree[,177 W. Va. 132, 350 S.E.2d 760] (1986). Moreover, to satisfy § 39, a population classification must be 'natural, reasonable and appropriate to the purpose of the statute.' Accordingly, a legislative authorization to tax hotel occupancy that was limited to Class I cities (those with more than 50,000 people) violated § 39 because there was no reason not to extend the tax authority to smaller communities. State ex rel. City of Charleston v. Bosely[, 165 W.Va. 332, 340, 268 S.E.2d 590, 595] (1980) [(quoting Hanks, 157 W.Va. 350, Syl. Pt. 3, 201 S.E.2d 304 (1973))]. *Id*. *See also* [Taxpayers Protective Ass'n v. Hanks, 157 W. Va. 350, 358-59, 201 S.E.2d 304, 308-09 (1973)] (statutory provision that allowed an exemption for counties over 100,000 from a requirement that counties maintain Saturday hours for their courthouse offices was arbitrary and bore no reasonable relationship to the Act's purposes and therefore violated § 39).

[91]The other three subjects from W. VA. CONST. art. VI, § 39 are:
Laying out, opening, altering and working roads or highways;
Vacating roads, town plats, streets, alleys and public grounds;
Locating, or changing county seats; . . ..

[92]W. VA. CONST. art. VI, § 39a[.] . . . For examples of affirmations of the Legislature's power to restructure a city's affairs, *see generally*, Hood v. City of Wheeling, 85 W.Va. 578, 102 S.E. 259 (1920); Booten v. Pinson, 77 W. Va. 412, 89 S.E. 985 (1915).

[93]133 W.Va. 750, 58 S.E.2d 279 (1950).

[95]Hanks, 157 W. Va. at 358-59, 201 S.E.2d at 308-9.

On the other hand, the Court in *Herold v. McQueen*, 71 W.Va. 43, 75 S.E. 313 (1912), confronted a statute that directed construction of a high school in Nicholas County, established a board of directors to oversee it, and imposed a tax on county residents to pay for it. The Court upheld the act, relying on the improbable reasoning that it was not a law "regulating or changing" a district affair; rather, it "only created"something.[96] The Legislature had made the plan contingent on approval of the county's voters, but that was not a crucial fact. We know this because the Court explicitly said so:

> The legislature could have established the high school without submitting the question to a vote of the people at all, and may have submitted it to a vote only for the reason that it thought it unwise to establish the school unless a majority of the voters of the whole county were in favor of it.

In any event, a later case upheld a similar statute, directing construction of a high school in Upshur County, in which the law did not afford the taxpayers of the county the option to vote on the plan and the new taxes.[98] Another decision upheld a statute directing the Kanawha County Court and the Kanawha County Board of Education to provide $ 83,000 to help support the county library, even though the library was already in existence and the act did not therefore "create" it.[99] The Court noted *Herold*'s regulate/change - create distinction, but did not offer an explanation as to why the statute did not affect a "change" in the county's and district's fiscal affairs.

West Virginia law on the meaning of "regulating or changing county or district affairs"[100] is obviously muddled. Much of it must also be considered just plain wrong. It is untenable to conclude that a decision to build a particular school to serve a particular county or local population and to assess the citizens of that locality for the funds to construct the school does not pertain to "district affairs." Concluding otherwise defeats § 39's purpose of preserving by some measure local decision-making on matters of strictly local concern and focusing the Legislature on matters of statewide import.

Other states commonly make distinctions about "local" affairs and issues in construing provisions analogous to § 39 and home rule laws. While their decisions have produced diverse results, they have at least identified what ought to be the relevant inquiries. Needless to say, they do not include determining whether the state law has changed a local condition or created a local condition. Rather, the criteria have concerned the impact of the particular subject,[101] whether uniform treatment of the

---

[96]71 W. Va. 43, 47, 75 S.E. 313, 315 (1912). The Court stated, in full, on this point:

> The act does not attempt to regulate or change the county and district affairs of Nicholas county. Such county and district affairs as the Legislature is inhibited from regulating or changing by a local or special act, are still carried on in that county under the general laws applicable alike to all the counties and districts of the state. The act only creates a county high school, and provides for its support by a tax to be levied on the taxpayers of the whole county. It does not work a change in, or operate as a regulation of, the general county and district affairs which already existed, but it is a creation of something in addition thereto. It makes no change in the plan provided by general law for the creation of district high schools; and, under the general law, any two or more districts of Nicholas county may still combine and establish district high schools.

[98]Casto v. Upshur County High Sch. Bd., 94 W.Va. 513, 517-18, 119 S.E. 470, 472 (1923).

[99]Kanawha County Pub. Library v. County Ct., 143 W. Va. 385, 386, 391-405, 102 S.E.2d 712, 714, 716-24 (1958).

[100]The term "affairs" is used, as well, in Article VI, § 39a to identify those things, "municipal affairs," over which cities have home rule powers. Both §§ 39 and 39a concern subjects that the Constitution directs should be addressed by the Legislature only through general laws and should otherwise be decided at the local level. Thus, the interpretation of "county or district affairs" in § 39 would also affect the meaning of "municipal affairs" in § 39a.

[101]A decision whose impact would be primarily local would be more likely to be characterized as a local (or, in § 39's

subject is needed, the relative breadth of the subject, and whether it relates to administrative or procedural aspects of local government.[102] Applying those criteria, as well as common sense, allows the conclusion that the phrase, "district or county affairs," would apply to attempts by the Legislature to restructure a particular county government.

If this reasonable interpretation prevails, then one can safely conclude that § 39 would not permit the Legislature to, say, provide for the consolidation of Charleston and Kanawha County, but it would have nothing - at all - to say about a general statute authorizing cities and counties to consolidate if they choose to do so. Article IX, § § 8 and 13 reinforce that interpretation.

Section 39 deals only with special laws that interfere with county and school district governance. The next section, Article VI, § 39a, now imposes the same limitation on the Legislature regarding special laws and municipal affairs of cities with over two thousand residents.

[*See* Chapter 9.]

2. *Gallant v. County Commission of Jefferson County*. In 2001, a circuit court in Jefferson County enjoined the demolition of the county's jail until the county commission complied with the review requirements for historical structures set forth in W. Va. Code 29-1-8 for any property "permitted, funded, licensed, or otherwise assisted" by the state. The court reasoned that the maintenance of the jail and its razing were financed by the county's general revenues, which included some state-provided funds. Later that year, the Legislature amended the statute to exclude from its coverage "any county's general revenue fund regardless of whether or not state funds are commingled with the county's general revenue fund."

Relying on the amendment, the Commission moved to dissolve the injunction, which the circuit court did over the plaintiffs' objections that the amended statute was invalid as applied and on its face. On appeal, the Supreme Court in *Gallant v. County Commission of Jefferson County*, 212 W.Va. 612, 575 S.E.2d 222 (2002), agreed with the plaintiffs that the statute could not be retroactively applied to the County's decision to demolish the jail but rejected their contention that the amendment constituted "special" legislation in violation of Article VI, § 39 because it applied only to county commissions and not to other political subdivisions.

After reciting typical refrains insisting on deference to the Legislature and respect for the presumption of constitutionality, the *per curiam* opinion described the question as "whether the classification is reasonably related to the purpose of the legislation." The Court then found the distinction of counties from other subdivisions was deeply rooted in history. The Constitution itself treats counties and municipalities differently. *See* Article VI, § 39a; Article IX; Chapter IX, *infra*. Furthermore, "the Legislature has consistently addressed counties as a separate and distinct class, municipalities as another separate and distinct class, and other political subdivisions in separately defined distinct classes." The Court concluded:

> While judicial review of those judgments is clearly available where arbitrary and capricious choices are alleged, it is readily apparent that an absolute minefield would be created in both the Legislature and the courts were it to be determined that the mere fact that the Legislature applied a given statute to counties without also making it applicable to municipalities or other subdivisions violated the proscription against special legislation, per se. We decline that invitation. In the absence of a showing that the exclusion of other political subdivision from the

---

terms, county or district) affair. The decision about whether to build a school and to tax only locally to finance it would, for example, have an impact that is primarily local.

[102]MATTHEW BENDER'S ANTIEAU ON LOCAL GOVERNMENT LAW § 21.05[1] at 21-31 (2d ed. 1977); Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737 (1959); *see generally* ANTIEAU, *supra*, §§ 21.02 & 21.05[1]; OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW 105-127 (1982).

> operation of the statute at issue constitutes a "clear and palpable" disregard for the proscription against special legislation, the Legislature's choice is presumptively appropriate. In this case there simply is no showing that the Legislature's choice was arbitrary or capricious. . . . We agree with the Legislature's determination that the statute at issue is a general one, not prohibited by Article VI, § 39 of the Constitution.

The Court, however, offered no rationale for the separate treatment of counties in the challenged statute.

STATE EX REL. APPALACHIAN
POWER CO. V. GAINER,
149 W.Va. 740, 143 S.E.2d 351 (1965).

CALHOUN, Judge.

This case involves two proceedings in mandamus which were instituted in this Court pursuant to its original jurisdiction in such cases. . . . The relators in the two mandamus proceedings seek to have the Court to require the respondent, Honorable Denzil L. Gainer, in his official capacity as Auditor of the State of West Virginia, to honor requisitions of the state road commissioner and accordingly to draw state warrants for payment of expenses incurred by the relators, respectively, in moving portions of their public utility facilities in connection with the construction of certain federal-aid interstate highways. The basic question presented for decision is the constitutionality of Chapter 161, Acts of the Legislature, Regular Session, 1963, which authorizes payment by the state of items of expense such as those incurred by the two relators in this case.

The Chesapeake and Potomac Telephone Company of West Virginia, a corporation, is a public utility engaged in the transmission of messages by telephone. The state road commission directed that company to relocate portions of its facilities, which were located within an existing public highway right of way, in order to facilitate the construction of a federal-aid interstate highway known as Interstate No. 77. . . .

Statements of costs of relocation of facilities were delivered by the telephone company to the state road commission. They were audited and approved by the auditing department of the commission. The state road commissioner drew his requisition upon the respondent state auditor for issuance by him of a warrant for the payment to the telephone company of the amount of the statements, as audited and approved, in the aggregate sum of $39,301.87. The respondent state auditor refused to honor the requisition of the state road commissioner[.] . . .

The case as it relates to Appalachian Power Company, an electric public utility corporation, arose in a similar manner in all respects except that the claim in the mandamus proceeding instituted by it is for the sum of $3,111.00. . . .

Chapter 161, Acts of the Legislature, Regular Session, 1963, amended Article 4, Chapter 17 of Code, 1931, as amended, by adding thereto a new section designated as Section 17-b, the constitutionality of which is in question in this case and which may, in the interest of brevity, be referred to hereafter in this opinion merely as Section 17-b. It [provides that, "Whenever the state road commissioner shall determine that any public utility line or facility located upon, across or under any portion of a state highway shall be relocated in order to accommodate a federal-aid interstate highway project, and upon such determination and due notice thereof, the public utility owning or operating such facility shall relocate the same in accordance with the order of the commissioner," the cost of relocation shall be paid out of the state road fund. The section further authorizes relocation reimbursements from the road fund to any municipally-owned utility in any road construction, not just in federally-assisted projects.]

. . . [I]t is contended in behalf of the respondent that Section 17-b is violative of Constitution, Article VI, Section 52, which is, in part, as follows: 'Revenue from gasoline and other motor fuel

excise and license taxation, motor vehicle registration and license taxes, and all other revenue derived from motor vehicles or motor fuels shall, * * * be appropriated and used solely for construction, reconstruction, repair and maintenance of public highways, * * * and the payment of obligations incurred in the construction, reconstruction, repair and maintenance of public highways.' On the other hand, it is contended in behalf of the relators that reimbursements paid to public utilities for costs of relocating public utility facilities, pursuant to the requirements of Section 17-b, are proper parts of the cost of the construction, reconstruction, repair and maintenance of public highways and that such reimbursements constitute 'the payment of obligations incurred' in such construction, reconstruction, repair and maintenance of public highways within the meaning of Constitution, Article VI, Section 52. . . .

This Court has held that a telephone company which previously occupied a public highway right of way under a franchise from a county court could be required to remove such facilities at its own expense in order to facilitate improvement of the highway. County Court of Wyoming County v. White et al., 79 W.Va. 475, 91 S.E. 350[.] Meanwhile this Court has consistently recognized that the use by public utilities of public highways, streets or rights of way is a use thereof in the public interest and for public purposes. . . . The question here presented is whether the legislature, in a proper and legitimate exercise of the police power and in the light of the federal-aid highway construction program recently provided for by the Congress, may lawfully provide for reimbursement of public utilities for the cost of relocation of their facilities, properly located on a state highway right of way, when such relocation is necessitated by the furtherance of the interstate highway construction program. As the law is presently written, ninety percent of such reimbursement, arising in connection with federal-aid interstate highways, will be paid from federal-aid funds and ten percent from the state public road fund. . . .

This Court has had occasion to consider Constitution, Article VI, Section 52, which creates the state constitutional road fund, in a quite limited number of cases. In State ex rel. State Road Commission v. O'Brien, 140 W.Va. 114, 82 S.E.2d 903, the Court declined to give a technically restrictive construction to the constitutional provision. In that case it was held that the legislature could lawfully and constitutionally pledge monies from the constitutional road fund to payment of the principal of and interest on bonds for payment of a portion of the cost of construction of a bridge on a public highway on a federal matching fund basis. Thereafter, in Charleston Transit Company v. Condry, 140 W.Va. 651, 659, 86 S.E.2d 391, 397, the Court stated: 'We think that the purpose of the people of this state in adopting Section 52, Article VI of the Constitution, was to prevent diversion by the legislature of funds derived from the sources named in the constitutional provision to purposes other than the construction, reconstruction, repair and maintenance of public highways; and the payment of interest and principal on road bonds theretofore or thereafter issued.' It is evident, therefore, that the Court heretofore has construed the Constitution to mean that the provision creating the road fund contemplates more than actual construction, reconstruction or repair of public highways in a strict sense of such terms. . . .

It is clear that, under the common law and but for the provisions of Section 17-b, public utilities could be required, at their own expense, to move their facilities from public streets or public highway rights of way when required to do so by proper public authorities in order to facilitate the relocation, reconstruction or improvement of the public ways on which such public utility facilities were previously located. It does not necessarily follow from that proposition, however, that the legislature, in a proper exercise of its vast reservoir of police power, may not lawfully and constitutionally provide for reimbursement to be paid by the state to the utilities for relocation of such facilities when such relocation is rendered essential to the vast present day program of highway construction, reconstruction, repair and improvement.

In the light of the authorities previously cited, . . . we believe and, accordingly the Court holds, that the legislature properly and lawfully exercised the police power in providing, in Section 17-b, that the cost of relocating public utility facilities in connection with federal-aid highway projects may

be paid from the constitutional state road fund and that the statute in this respect is not in violation of Constitution, Article VI, Section 52. We are of the opinion that reimbursement of the utilities for the cost of relocation of their facilities constitutes 'the payment of obligations incurred' in the construction of public highways. . . .

H. Immunity from Suit

1. Legislative Immunity

Read Article VI, § 17.

WEST VIRGINIA CODE
CHAPTER 4, ARTICLE 1A – LEGISLATIVE IMMUNITY

§ 4-1A-1. Purpose; legislative findings and declarations.

(a) The purpose of this article is to describe the scope and limitations of legislative immunity provided by:
(1) English common law;
(2) The Speech or Debate Clause of the United States Constitution, Article I, Section 6;
(3) Decisions regarding legislative immunity as developed in federal common law by the federal judiciary in interpreting the Speech or Debate Clause of the United States Constitution, Article I, Section 6;
(5) The Speech or Debate Clause of the West Virginia Constitution, Article VI, Section 17;
(6) The Separation of Powers Doctrine and the system of checks and balances embodied in the United States Constitution; and
(7) The Division of Powers set forth in the West Virginia Constitution, Article V[.]
(b) The Legislature finds and declares as follows:
(1) That the privilege of Speech or Debate has been recognized as an important protection of the independence and integrity of the Legislature.
(2) That the ancestry of this privilege traces back to a clause in the English Bill of Rights of 1689 and the history traces even further back, almost to the beginning of the development of the English Parliament as an independent force.
(3) That in the American governmental structure, privileges arising under the Speech or Debate Clause reinforce the Separation of Powers Doctrine and the system of checks and balances that was so deliberately established by the founding fathers and was carried over into the West Virginia Constitution.
(4) That the protections provided by the Speech or Debate Clause and the Separation of Powers Doctrine were not written into the national and state Constitutions simply for the personal or private benefit of members of Congress, the state Legislatures and local governing bodies, but were intended to protect the integrity of the legislative process by insuring the independence of individual legislators.

§ 4-1A-2. Applicability of definitions.

For the purposes of this article, the words or terms defined in this article have the meanings ascribed to them. These definitions are applicable unless a different meaning clearly appears from the context.

§ 4-1A-3. Legislative act defined.

"Legislative act" means an act that is generally to be performed by the Legislature in relation to the investigative, deliberative and decision-making business before it. A "legislative act":

(1) Is an integral part of the processes by which members participate in proceedings that come before the Senate or House of Delegates or a committee thereof; and

(2) Relates to the consideration and passage or rejection of proposed legislation; or

(3) Relates to other matters that constitutional law places within the jurisdiction of either the Senate, the House of Delegates or the legislative branch of state government as a whole.

§ 4-1A-4. Legislative sphere defined.

The "legislative sphere" includes all activities that are an integral part of the deliberative and communicative processes by which members of the Legislature participate in committee and house proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either house.

§ 4-1A-5. Political act defined.

"Political act" means an act, nonetheless legitimate, that is political in nature rather than being a legislative act as defined in section three of this article.

§ 4-1A-6. Scope of legislative immunity generally.

(a) Legislative immunity, affording protection under the Separation of Powers Doctrine and the Speech or Debate privilege, extends to all of a legislator's legislative acts, as defined in section three of this article.

(b) The Speech or Debate privilege, when it applies, is absolute and has two aspects:

(1) A member of the Legislature has immunity extending both to civil suits and criminal prosecutions for all actions within the legislative sphere, even though the conduct, if performed in other than a legislative context, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes; and

(2) A member of the Legislature is provided a testimonial privilege that operates to protect those to whom it applies from being compelled to give testimony as to privileged matters and from being compelled to produce privileged documents.

§ 4-1A-7. Legislative immunity in specific instances.

The scope of legislative immunity includes, but is not limited to, the following legislative acts:

(1) Introducing and voting for legislation;

(2) Failing or refusing to vote or enact legislation;

(3) Voting to seat or unseat a member;

(4) Voting on the confirmation of an executive appointment;

(5) Making speeches;

(6) Enforcing the rules of the Senate or House of Delegates or the joint rules of the Legislature;

(7) Serving as a member of a committee or subcommittee;

(8) Conducting hearings and developing legislation;

(9) Investigating the conduct of executive agencies;

(10) Publishing and distributing reports;

(11) Composing and sending letters;

(12) Drafting memoranda and documents;

(13) Lobbying other legislators to support or oppose legislation;

(14) Abolishing personnel positions; and
(15) Hiring and firing employees.

§ 4-1A-8. Actions taken without lawful authority are not immune.

Legislative immunity does not extend to activities by legislators that are without lawful authority under constitutional law, statutory law or rules of the Legislature, including, but not limited to, the following:
(1) Using an unconstitutional procedure to enact legislation;
(2) Conducting an illegal investigation or an unlawful search or seizure;
(3) Performing another otherwise valid legislative act without proper legislative authority;
(4) Filing a false or incomplete report, disclosure or claim regarding an otherwise valid legislative act; or
(5) Using legislative office for private gain in violation of the provisions of chapter six-b of this code that define and enforce governmental ethics.

§ 4-1A-9. Political acts are not privileged.

Legislative immunity does not extend to political acts, including, but not limited to, the following:
(1) Communications to the press through letters, electronic mail, newsletters or news releases: *Provided,* That the release of pending legislation, committee reports, journals, acts and other official legislative reports and documents is a legitimate legislative activity;
(2) Privately releasing a republication of a speech made within the legislative sphere;
(3) Holding a press conference;
(4) Making speeches or giving interviews outside of the legislative sphere; or
(5) Assisting a constituent or supporter through constituent services, including, but not limited to, making appointments with government agencies, attempting to influence discretionary acts of a government officer or providing assistance in securing government contracts.

§ 4-1A-10. Administrative acts are not immune.

(a) Legislative immunity does not extend to activities by legislators that are administrative in nature rather than legislative. If the underlying facts on which a decision is based are legislative facts involving establishment of a general policy or state of affairs, then the decision is legislative. If the facts used in the decision making are more specific, such as those that relate to particular individuals or situations, then the decision is administrative.
(b) With regard to legislative personnel matters, whether a personnel decision regarding a legislative employee is shielded by legislative immunity depends upon the nature of the duties of the employee about whom the personnel decision is made. Personnel decisions regarding a legislative employee are afforded immunity if the employee's duties are directly related to the functioning of the legislative process and the duties:
(1) Involve work that significantly informs or influences the shaping of laws, such as when the employee has an opportunity for meaningful input into the legislative process; or
(2) Are peculiar to a legislator's work as a legislator or intimately cognate to the legislative process.

§ 4-1A-11. Certain offers of proof about legislative activities not prohibited.

(a) Proof of a person's status as a member of the Legislature is not prohibited.
(b) A member of the Legislature who chooses to offer evidence of legislative acts as a defense

to a criminal prosecution has not been "questioned", even though the member thereby subjects himself or herself to cross-examination.

§ 4-1A-12. Legislative acts of legislative staff, aides or assistants.

Legislative immunity extends to legislative staff, aides or assistants working on behalf of a legislator. Inquiry is prohibited into things done as a legislator's staff member, aide or assistant which would have been legislative acts if performed by the legislator personally.

§ 4-1A-13. Legislative immunity from ultimate relief.

Legislative immunity may be invoked to shield a legislator from judicially ordered relief, including, but not limited to, the following:
(1) Criminal prosecution for his or her legislative acts; (2) Liability for damages for his or her legislative acts;
(3) Declaratory judgments with respect to his or her legislative acts;
(4) Injunctive relief with respect to his or her legislative acts; and
(5) Extraordinary writs with respect to his or her legislative acts.

§ 4-1A-14. Testimonial immunity.

(a) Testimonial immunity is an aspect of legislative immunity that protects a legislator from questioning elsewhere than in the legislative forum.
(b) When a legislator has been improperly questioned before a grand jury concerning legislative acts, the counts in a criminal indictment that are based on the testimony must be dismissed.
(c) When a legislator is found to be immune from a civil complaint, the relief to be granted is to have the complaint dismissed or to have a writ of prohibition issued to stop further proceedings.
(d) In the case of a subpoena that seeks to improperly question a legislator's conduct as to legislative acts, to depose a legislator or to seek disclosure as to any matters pertaining to the memoranda, documents or actions by a legislator which are or were in connection with the legislative process, the subpoenas may be quashed or the court may grant a motion for a protective order.

§ 4-1A-15. Right to interlocutory appeal.

Denial of a claim of legislative immunity is immediately appealable under the collateral order doctrine because the Speech or Debate Clause is designed to protect legislators not only from the consequences of litigation's results but also from the burden of defending themselves.

§ 4-1A-16. Common law regarding legislative immunity not affected by the enactment of this article.

The Legislature of the State of West Virginia, in codifying certain elements and doctrines of the common law regarding legislative immunity through the enactment of this article, does not intend to narrow the common law definition of legislative immunity that is afforded the Legislature under the speech or debate privilege and the separation or division of powers, and does not, with the enactment of this article, otherwise revoke or abrogate any portion of the common law. This article shall not be construed so as to narrow, restrict, revoke or abrogate the common law.

2. Sovereign and Executive Immunity

Read Article VI, § 35.

PITTSBURGH ELEVATOR COMPANY v. WEST VIRGINIA BOARD OF REGENTS, 172 W.Va. 743, 310 S.E.2d 675 (1983).

McGRAW, Chief Justice:

This is an appeal by the Pittsburgh Elevator Company challenging two rulings of the Circuit Court of Monongalia County. The first is an order which granted the motion of the appellee, the West Virginia Board of Regents, to dismiss the appellant's complaint, previously transferred from the Circuit Court of Kanawha County and consolidated with proceedings pending in Monongalia County, for the reason that venue was improper in the Circuit Court of Monongalia County. The second is the court's refusal to transfer the consolidated proceedings to the Circuit Court of Kanawha County. The appellant contends that venue was not proper in the Circuit Court of Monongalia County, or, in the alternative, that the court abused its discretion in refusing to transfer the consolidated proceedings to the Circuit Court of Kanawha County. We find that venue is proper in the Circuit Court of Monongalia County, and, therefore, reverse the order of the lower court.

The facts are not in dispute. On October 23, 1979, Jason Martin, then four years of age, fell from the stage of the main theater in the Creative Arts Center at West Virginia University, located in Morgantown, Monongalia County, West Virginia. On January 14, 1981, the child and his parents instituted an action for damages in the Circuit Court of Monongalia County against the appellee, the West Virginia Board of Regents, as owner of the Creative Arts Center, and against various other defendants involved in the design and manufacture of the stage, including the appellant, the Pittsburgh Elevator Company. . . .

II

The crucial issues raised in this case involve the effect of [W.Va.Code 29-12-5], which authorizes the State Board of Insurance to procure liability insurance on behalf of the State, upon the exclusive venue provisions of W.Va.Code § 14-2-2, and the specious tenet of law that state agencies are immune from suit under W.Va. Const. art. VI, § 35.[6]

---

[6]The original West Virginia Constitution, adopted in 1863, contained no provision addressing the amenability of the State to suit. In 1872, however, art. VI, § 35 was added, providing that, "The State of West Virginia shall never be made defendant in any court of law or equity." The recorded debates and proceedings of the 1872 West Virginia Constitutional Convention are barren of any reference to the precise meaning of this provision. Upon examination of potential antecedents to this provision, however, it becomes clear that art. IV, § 26 of the Illinois Constitution of 1870 served as the prototype for West Virginia's art. VI, § 35. It provided, "The State of Illinois shall never be made defendant in any court of law or equity." The similarities between surrounding provisions of each constitution also support this conclusion. Article VI, §§ 34, 36, and 37 of the West Virginia Constitution of 1872 are nearly identical to article IV, §§ 25, 27, and 28 of the Illinois Constitution of 1870.

Just as in West Virginia, the original Illinois Constitution, adopted in 1818, contained no provision addressing the issue of sovereign immunity. The Illinois Constitution of 1848, however, contained a section which provided, "The general assembly shall direct by law in what manner suits may be brought against the state." Ill. Const. art. III, § 34 (1848). During the Illinois Constitutional Convention of 1869-70, a resolution was offered "[t]hat the following restriction shall be inserted in the Constitution: No law shall be passed by the General Assembly, whereby the State shall be defendant in any court of law or equity." . . . This resolution was eventually adopted and was incorporated as art. IV, § 26 of the Illinois Constitution of 1870. However, in interpreting this provision, the Illinois Supreme Court has stated,

> While this language of the constitution, if construed literally, would absolutely prevent a suit against the State, this court has previously at least intimated that the State could be joined as a defendant in a law-suit, provided it had expressed its consent thereto by affirmative action of the General Assembly.

. . . This interpretation of constitutional language identical to our own directly conflicts with our sometime holdings that the absolute immunity provided by art. VI, § 35 cannot be waived by the Legislature or the courts. See Ohio Valley Contractors v. Board of Education, W.Va., 293 S.E.2d 437 (1982); City of Morgantown v. Ducker, 153 W.Va. 121, 168

In Tompkins v. Kanawha Board, 19 W.Va. 257 (1881), this Court discussed for the first time the constitutional immunity from suit granted the State by W.Va. Const. art. VI, § 35. The plaintiff in Tompkins sued the Kanawha Board, a governmental corporation charged with keeping the channel of the Kanawha River free from obstacles, for damages occasioned by the sinking of his barge. In defense, the Kanawha Board asserted the State's immunity from suit. The Court held that the defense of constitutional immunity from suit was not available to the state governmental corporation. Justice Johnson, writing for the Court, reasoned:

> . . . The State as such does not enter into business of any such character. Her business is political, and when she wants improvements carried on, she creates corporations with the ordinary incidents thereto, to do that business. It would be against all our ideas of State government, if a corporation created by the State to carry on a work of improvement should not be liable like any other corporation for the damage it inflicted, notwithstanding the State might own the property of the corporation. Sovereignty does not reside in such a corporation. The State cannot delegate her sovereignty. There is no creature of the State above the law and irresponsible. If this were so, the corporation might deny to certain individuals all benefits to be conferred by the corporation, and yet it being sovereign or representing sovereignty it could not be sued.

. . . The concept that "[t]here is no creature of the State above the law and irresponsible" expressed in Tompkins finds its foundation in article III of the West Virginia Constitution, commonly known as our "Bill of Rights." Section one of article III begins with a statement of the inalienable rights which all persons enjoy in a civilized society[.] . . . Of particular significance in safeguarding these rights are section 9 of article III, . . . section 10 of article III, . . . and section 17 of article III[.]

. . . In the past this Court has stated that the constitutional bar to suit contained in article VI, section 35, is apparently irreconcilable with the fundamental rights of due process and access to the courts guaranteed by article III. See State ex rel. Phoenix Insurance Co. v. Ritchie, 154 W.Va. 306, 175 S.E.2d 428 (1970). However, a closer analysis of the scope of the immunity provided by article VI, section 35, indicates that such is not the case. In Coal & Coke Ry. Co. v. Conley, 67 W.Va. 129, 67 S.E. 613 (1910), the Court in determining that a suit to enjoin the Attorney General and the Prosecuting Attorney of Kanawha County from enforcing the penal provisions of a legislative

---

S.E.2d 298 (1969); State ex rel. Scott v. Taylor, 152 W.Va. 151, 160 S.E.2d 146 (1968).

Sovereign immunity of the state is now the exception rather than the rule. It is retained in only eleven jurisdictions: Alabama, Arkansas, Delaware, Georgia, Maryland, North Dakota, Oklahoma, South Dakota, Tennessee, Virginia and West Virginia. . . . The state's immunity has constitutional status in six of these jurisdictions: Alabama, Arkansas, Delaware, North Dakota, Tennessee, and West Virginia. In Delaware, North Dakota and Tennessee, suits may be brought against the state as the legislature may by law direct. . . Only in Alabama, Arkansas, and West Virginia does the constitutional provision read as an absolute prohibition against suit. . . .

The debates and proceedings of the Illinois Constitutional Convention of 1869-70 . . .indicate that an original intention of the constitutional provision granting sovereign immunity was to prevent bondholders of the state from sacking the public treasury. In view of the Legislature's profligate inclination to enact bonding schemes, the repayment of which is inevitably shunted upon the shoulders of posterity, see W.Va. State Treasurer, Annual Report at 9 (1982) (The principal bonded indebtedness of the State of West Virginia totaled $1,128,700,000 as of June 30, 1982, or $5,782.27 for every man, woman and child in West Virginia. . . ., this interpretation seems justified.

This interpretation is consistent with our constitutional provision which prohibits the expenditure of money from the treasury in the absence of an appropriation made by the Legislature. W.Va. Const. art. X, § 3. Thus, the argument proceeds that W.Va. Const. art. VI, § 35, is designed to prevent the casting of the State as a defendant in a lawsuit which could result in a judgment against "the State of West Virginia," upon which a successful plaintiff could, in execution of such judgment, invade the public treasury for funds which have not been properly appropriated by the Legislature. Conversely, and to avoid interpretation which would conflict with other constitutional provisions, W.Va. Const. art. VI, § 35 was not intended to immunize corporate bodies created by the Legislature to prosecute public policy, for whom appropriations have been or can be made, and for whom the Legislature has not only authorized, but has further appropriated money for the purchase of liability insurance, see W.Va.Code § 29-12-5, as illustrated by this case.

enactment was not barred by article VI, section 35, stated:

> The state and the government of the state are two different things, the former being an ideal person, intangible, invisible, immutable; the latter a mere agent, and, within the spirit of the agency, a perfect representative, but outside of that, a lawless usurper. . . . [I]t is plain that, in this controversy between one citizen and other citizens, involving the question whether the Legislature, in passing this statute, has violated the Constitution by depriving the complainant of its property without due process of law, or denying it the equal protection of the laws, or whether the defendants have authority to do the threatened acts, the state cannot favor either side. It is just as important that every citizen, regardless of his station in life, be protected in the rights guaranteed to him by the Constitution, as it is that the Legislature be permitted to exercise all of its functions, or that the treasury of the state be supplied with revenue, or that the government be protected in its property rights. . . . The Legislature is not the state, and if, breaking over the constitutional limits of its powers, it trample upon the rights of a citizen, the state shields and protects the latter, treating the act of the former as a form of tyranny. Pure, unsullied, and infallible in legal contemplation, the state can do no wrong. Though her officers and tribunals may, she never sustains nor upholds them in it. On the contrary, she disavows and repudiates their wrongful acts.

. . . [T]he "State" as contemplated by the constitution represents the ideal; it is the people united together for their common benefit. See W.Va. Const. art. III, § 3. One may not sue the "State" as such, but "whatever wrong is attempted in its name is imputable to its government", which may no more wrong an individual with impunity than may any private person. . . .

Once the distinction between the State as an "ideal person, intangible, invisible, immutable," and the government of the State as an agent accountable for its wrongful acts is recognized, the asserted irreconcilability of the freedoms guaranteed by article III and the bar to suit contained in article VI, section 35 loses all validity. Indeed, as the Court in *Poindexter* [*v. Greenhow*, 114 U.S. 270 (1885),] observed: "[The] immunity from suit, secured to the States, is undoubtedly a part of the Constitution, of equal authority with every other, but no greater, and to be construed and applied in harmony with all the provisions of that instrument." . . .

Nevertheless, the later decisions of this Court have not adhered to the distinction recognized in Coal & Coke Ry Co. v. Conley, supra, although, in order to avoid problems of irreconcilability, the Court has over the years carved exceptions from the prohibition against suing the "State" contained in article VI, section 35. For example, in State ex rel. Phoenix Insurance Co. v. Ritchie, supra, the Court held that mandamus would lie to compel the State Road Commissioner to institute eminent domain proceedings to ascertain the value of property damaged through the negligence of highway construction which caused flooding in the City of Montgomery. Though, in essence, a cause of action for damages caused by negligence, the court granted the writ over the objections of Justices Berry and Calhoun, who argued that the majority's holding, in effect, authorized an indirect suit against the State for damages in violation of W.Va. Const. art. VI, § 35. Justice Browning, writing for the majority, stated:

> Article III, Section 9, of the Constitution of this State provides that "[p]rivate property shall not be taken or damaged for public use, without just compensation ...." However, [Art. VI, § 35] of the Constitution provides that "[t]he State of West Virginia shall never be made defendant in any court of law or equity...." These constitutional provisions appear to be irreconcilable, but this Court has held that if the State Road Commissioner abuses his discretion in failing to institute an action of eminent domain against a property owner who alleges that his property has been taken or damaged as a result of the construction of a public highway, such commissioner will by this Court be directed in a mandamus proceeding to institute such action to determine whether property has been taken or damaged and, if so, the amount of damage the property owner has suffered. ...

In Stewart v. State Road Comm'n, 117 W.Va. 352, 185 S.E. 567 (1936), the petitioner in another

mandamus proceeding sought to compel payment of a judgment rendered against the State Road Commission for land appropriated for road purposes without purchase or condemnation. The State Road Commission contended that the judgment could not be enforced because, as a state agency, it was constitutionally immune from suit. The Court agreed, but emphasized the other remedies available to the petitioner despite the constitutional prohibition against suing the State:

> [. . .] There is no specific exception to [§ 35]. Such a provision is ordinarily construed to be "absolute and unqualified." . . . We recognize that the constitutional inhibition against taking private property for a public use without just compensation (article 3, § 9) is of equal dignity with the inhibition against suing the state. If necessary to maintain the rights of a citizen under the former, the two provisions would be construed together and the former treated as an exception to the latter. This has been done in some states. . . . Our procedure, however, affords ample protection to one in the position of petitioner without resorting to that necessity. (1) He may enjoin the state road commissioner, and his representatives, personally, from unlawfully invading his property. Coal & Coke Railway Co. v. Conley, 67 W.Va. 129, 146, 147, 67 S.E. 613. (2) He may recover damages from the commissioner and his representatives, personally, for unlawfully entering upon and taking his property. The constitutional immunity of the state is not extended to its officials and their representatives in the performance of an unlawful act. Coal & Coke Railway Co. v. Conley, supra. (3) He may mandamus the commissioner in person, to condemn his land. Draper v. Anderson, 102 W.Va. 633, 135 S.E. 837....
>
> We are aware that when the Legislature has established a corporate entity and provided it with funds to conduct an enterprise for the state, some jurisdictions with constitutional provisions similar to ours have held that the entity is separate from the state and is subject to suit....But as was remarked by the Arkansas court: "This is a question which each state must decide for itself." We have long been committed to the opposite view. . . .

In similar fashion, the Court has determined that a variety of other actions in which the State or its officers are named as defendants fall outside the bounds of the constitutional prohibition against suing the State. For example, an injunction to restrain or require a state officer to perform a ministerial duty is not prohibited, . . .; suits against officers, acting, or threatening to act, under allegedly unconstitutional statutes, have been held not to be suits against the State, ...; recognition of a "moral obligation" by the State may be discharged by the appropriation of public funds to private individuals,...; suits for declaratory judgment have been held not to be suits against the State, . . .; mandamus has been permitted to require the state road commission to institute proper condemnation proceedings upon the taking or damaging of land for public purposes, . . .; liability arising from the performance of proprietary functions is not immunized, . . .; quasi-public corporations which have no taxing power or dependency upon the State for their financial support have been held not to be afforded any immunity, . . .; and, finally, mandamus may be employed to compel state officers, who have acted arbitrarily, capriciously, or outside the law, to perform their lawful duties.[7]

Our constitution clearly contemplates that every person who is damaged in his person, property, or reputation shall have recourse to the courts to seek the redress of his injuries. See W.Va. Const. art. III, §§ 9, 10, 17. See generally Cooper v. Gwinn, 171 W.Va. 245, 298 S.E.2d 781, 786 (1981). The fact that the wrongdoer is an instrumentality of state government should not eviscerate these constitutional rights, inasmuch as the Bill of Rights contained in article III is designed to protect

---

[7]The Legislature has also sought to ameliorate the harshness of the constitutional bar to suits against the State by creation of the Court of Claims, which is authorized to consider and approve claims against the State not otherwise cognizable in the regular courts of the State, and to recommend an award to the Legislature. See [W.Va.Code §§ 14-2-1 et seq.]. However, the recommendation of the Court of Claims is not binding on the Legislature, which may accept or reject the court's findings and approve or disapprove its recommendations. See, e.g., State ex rel. Stollings v. Gainer, 153 W.Va. 484, 170 S.E.2d 817 (1969). Accordingly, this legislative creation may do little to dispel the due process objections surrounding W.Va. Const. art. VI, § 35.

people from government. Moreover, one's constitutional right to access to the courts should not depend upon whether one seeks recourse for injuries attributable to a governmental agency by way of a cause of action sounding in tort, or by way of a mandamus to compel compensation for the damaging of private property.[8] Compare Mahone v. State Road Comm'n, 99 W.Va. 397, 129 S.E. 320 (1925), with State ex rel. Phoenix Insurance Co. v. Ritchie, supra. It is anomalous, indeed, that our constitution protects property which is damaged, for example, through the negligence of the State Road Commission in the course of constructing a roadway, see State ex rel. Phoenix Insurance Co. v. Ritchie, supra, but would not protect the life and limbs of a person negligently run down by a truck driven by an employee of the State Road Commission during construction of the same roadway. See Syllabus Point 1, Mahone v. State Road Comm'n, supra. ("The state road commission of West Virginia is a direct governmental agency of the state, and as such is not subject to an action for tort.") Undeniably, problems of equal protection are present in such a situation.

Nevertheless, the Court has intermittently adhered to the position that bona fide state agencies are immune from damage suits pursuant to W.Va. Const. art. VI, § 35.[10] Thus, despite the fact that the West Virginia Board of Regents is a statutorily created corporation upon which the Legislature has specifically bestowed the ability "to sue and be sued," [W.Va.Code § 18-26-3], the Court held in City of Morgantown v. Ducker, 153 W.Va. 121, 168 S.E.2d 298 (1969), that the Board is a state agency which is constitutionally immune from suit under W.Va. Const. art. VI, § 35. . . .

The appellant accepts [City of Morgantown v. Ducker] as a proper statement of law for purposes of this appeal. Consequently, we are not required to address the apparent inconsistencies between the rights safeguarded by [Article III] and prior decisions interpreting the scope of the immunity from suit granted the State by [Art. VI, § 35], although upon close examination it appears the case for immunity may have been overstated therein. Rather, the appellant requests that we examine the effect of the legislatively authorized procurement of liability insurance by a state agency upon the otherwise applicable constitutional bar to suit.

Both the appellant and the appellee advance the contention that where recovery is sought against the State's liability insurance coverage, the constitutional bar to suit should not apply. Similar arguments have been made [and rejected] in previous West Virginia cases. [Boice v. Board of Education, 111 W.Va. 95, 160 S.E. 566 (1931); Bradfield v. Board of Education, 128 W.Va. 228, 36 S.E.2d 512 (1945).] . . .

However, both Boice and Bradfield were decided prior to enactment of W.Va.Code § 29-12-5, which authorizes the Board of Insurance to procure liability insurance on behalf of the State, and which further prohibits the insurer from whom a policy has been purchased from relying upon the constitutional immunity of the State against claims or suits. In light of this statutory prohibition, we conclude that a suit seeking recovery against the State's insurance carrier is outside the bounds of the constitutional bar to suit contained in [Art. VI, § 35].

In determining the validity of a claim of constitutional immunity this Court has in the past looked behind the formal parties in a suit in order to assess the suit's impact on the State. . . . The paramount

---

[8]Quaere whether all injuries attributable to the negligence of a governmental agency are damages to "private property" for which compensation must be provided pursuant to W.Va. Const. art. III, § 9.

[10]Factors which the Court considers in determining whether an entity is a state agency entitled to constitutional immunity include: (1) whether the entity functions statewide, Hesse v. State Soil Conservation Comm., 153 W.Va. 111, 168 S.E.2d 293 (1969); (2) whether the entity performs the work of the State, City of Morgantown v. Ducker, 153 W.Va. 121, 168 S.E.2d 298 (1969); (3) whether the entity was created by the Legislature, Woodford v. Glenville State College Housing Corp., 159 W.Va. 442, 225 S.E.2d 671 (1976); (4) whether it is subject to local control, Hess v. State Soil Conservation Committee, supra; and (5) whether it is financially dependent on State coffers, Boggs v. Board of Education of Clay County, W.Va., 244 S.E.2d 799 (1978). See Ohio Valley Contractors v. Board of Educ., 170 W.Va. 240, 293 S.E.2d 437, 438 (1982).

justification underlying the constitutional grant of immunity is to protect the financial structure of the State.[13] . . . Thus, in City of Morgantown v. Ducker, supra, the Court held the plaintiff's claim against the Board of Governors of West Virginia University, predecessor to the Board of Regents, to be barred because:

> The judgment which the plaintiff would seek in a suit against the board of governors, if satisfied, would be paid from funds in the treasury of the state. The interest of the state would be directly affected and involved in any suit to collect the claim against the board of governors with respect to funds belonging to and in the custody of the state.

. . . Accordingly, it is reasonable to conclude that suits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State's liability insurance coverage fall outside the traditional constitutional bar to suits against the State. . . . The Legislature has not, by enactment of W.Va.Code § 29-12-5, sought to waive the State's constitutional immunity from suit. Rather, we read the statute as the Legislature's recognition of the fact that where recovery is sought against the State's liability insurance coverage, the doctrine of constitutional immunity, designed to protect the public purse, is simply inapplicable. As this Court recently stated in Gooden v. County Comm'n of Webster County, 171 W.Va. 130, 298 S.E.2d 103, 105 (1982): "Where liability insurance is present, the reasons for immunity completely disappear."

In the usual policy for liability insurance, the insurer retains the right of exclusive control over litigation against the insured based on claims covered by the policy. . . . Concomitant with this right is the requirement that the insurer defend the insured against all actions in which the complaint alleges facts which come within the coverage of the liability policy. . . . Such a duty to defend on the part of the insurer is clearly contemplated by W.Va.Code § 29-12-5. . . .

Where a cause of action is, in essence, a suit against a state agency's insurance carrier, the justification for applying the exclusive venue provisions of W.Va.Code § 14-2-2 evaporates. In Davis v. West Virginia Bridge Commission, 113 W.Va. 110, 113, 166 S.E. 819, 821 (1932), the Court stated that the "manifest purpose" of exclusive venue statutes such as W.Va.Code § 14-2-2, "is to prevent the great inconvenience and possible public detriment that would attend if functionaries of the state government should be required to defend official conduct and [the] state's property interests in sections of the commonwealth [sic] remote from the capital." Thus, where the real party in interest is the insurance carrier which is obliged to defend the action brought against the Board of Regents, there is no rational justification for application of W.Va.Code § 14-2-2. . . . We therefore hold that the exclusive venue provision of W.Va.Code § 14-2-2 is not applicable to a cause of action wherein recovery is sought against the liability insurance coverage of a state agency. In such circumstances, the question of proper venue should be resolved without regard to W.Va.Code § 14-2-2. Generally, venue for a cause of action lies in the county wherein the cause of action arose or in the county where the defendant resides. . . . Accordingly, in the instant case, venue is proper in the Circuit Court of Monongalia County.

For the foregoing reasons, we reverse the order of the Circuit Court . . . and remand this case for further proceedings consistent with this opinion. . . .

NEELY, Justice, concurring in part and dissenting in part:

Although I agree with the narrow result in this case, I must disassociate myself from an opinion

---

[13]Traditionally, two criterion have been advanced for a grant of constitutional immunity--financial and functional. The functional criteria distinguishes between "governmental" and "proprietary" functions. See Note, Torts-Governmental Immunity in West Virginia-Long live the King?, 76 W.Va.L.Rev. 543 (1978). The court abandoned such distinctions as unworkable in the context of common law governmental immunity in Long v. City of Weirton, 158 W.Va. 741, 214 S.E.2d 832 (1975). See also [Ohio Valley Contractors v. Board of Educ.]

that pretends to answer questions that this Court has not been asked. Ordinarily a dissent to dicta is like the sound of one hand clapping; however, when an opinion attempts to stretch dicta into a definitive statement of law, such a frolic and detour is dangerous and requires a response. The danger of undisciplined dicta is that lawyers and nisi prius judges may take it seriously. Improvident dicta may skew settlement negotiations for years before a party with sufficient assets begs this Court to "reconsider" a ruling which in reality it never rendered. Therefore, law must be written with care. It is meant to be an exercise of the mind, not a venting of the spleen.

There is nothing "specious" about the "tenet of law that state agencies are immune to suit under W.Va. Const. art. VI, § 35." . . . Although this Court has carved exceptions to art. VI, § 35, such as permitting mandamus to compel the State to condemn when property has been taken, these exceptions are within the original intent of the constitutional framers. The purpose of art. VI, § 35 is to protect the treasury of the State from a wholesale invasion that would divert money from legislatively appropriated purposes to the payment of court awards.

In the case before us, the State has waived the immunity granted by art. VI, § 35 by purchasing an insurance policy under a statute, Code, 29-12-5 [1957] that explicitly forbids the insurance carrier from asserting the defense of sovereign immunity in suits within the coverage limits. The State, through her legislature, has chosen therefore to protect persons injured on State property through insurance. Court awards for this class of protected persons are the result of a conscious legislative decision to allocate a fixed amount of money for the protection of tort victims. That decision does not mean that the legislature could not have properly chosen to rely on sovereign immunity in such cases and to expend limited state funds for other purposes.

The exclusive venue provision of [Code 14-2-2] that requires actions against the State or her officials to be brought at the seat of government is designed to protect state officials from vexatious litigation in counties far distant from their daily duties. The suit under consideration here, however, is not against the State or its officers but rather against an insurance carrier. . . . Because the action is not against the State, it stands to reason that no policy goal of [§] 14-2-2 is served by limiting venue to Kanawha County.

. . . That is all there is to this case; but it is not all there is to the majority opinion. Apparently, the author of the majority opinion did not agree with the drafters of our State Constitution who believed sovereign immunity was necessary to protect the state coffers. Some reasonable men might even agree. Neither the existence of his opinion nor even its correctness, however, can erase the words from the page. That is the essence of constitutional government, government by law and not men. If judges are not mindful of that restraint, who will be?

Like much of the law, today's case requires us to fit a square peg into a round hole. The fit is not perfect; but our solution appears rational, and given the overall legislative intent does no violence to any constitutional or legislative policy. I vigorously dissent, however, to any implication in the majority opinion that art. VI, § 35 does not protect the State from suit, and dissent even more vigorously to the further implication that this Court, sworn as we are to uphold the Constitution of the State of West Virginia, and bounded as we are by the limits of human rationality, would hold a State constitutional provision unconstitutional under the State Constitution.

MILLER, Justice, concurring:

I concur with the ultimate result in this case that W.Va.Code, 29-12-5, is not invalid as waiving the State's constitutional immunity. However, I believe that the majority may have raised some false hopes in its lengthy discussion of "the specious tenet of law that state agencies are immune from suit under W.Va. Const. art. VI, § 35." I do not believe that we can nullify a constitutional command. I recognize that a number of state courts have abandoned their common law or court-created doctrine of sovereign immunity. This is understandable and part of the continual process of court development and modification of common law principles to meet the changing needs of society. See

Morningstar v. Black & Decker Manufacturing Company, 162 W.Va. 857, 253 S.E.2d 666 (1979).[2] I am aware, however, of no court which has judicially abolished sovereign immunity set by its constitution.

Our constitutional immunity barring suits against the State is as firmly embedded in our law as its counterpart, the Eleventh Amendment, is in the federal law. This amendment prohibits federal courts from entertaining suits brought by citizens against any state[.] . . . Our treatment of state sovereign immunity is rather similar [to Eleventh Amendment doctrine] in that while we recognize that the State or its agencies are not subject to suit, Ohio Valley Contractors v. Board of Education of Wetzel County, 170 W.Va. 240, 293 S.E.2d 437 (1982), in certain instances state officials may be sued, Ables v. Mooney, 164 W.Va. 19, 264 S.E.2d 424 (1979). We have also limited sovereign immunity to those agencies actually performing direct state functions utilizing state revenues. E.g., Woodford v. Glenville State College Housing Corp., 159 W.Va. 442, 225 S.E.2d 671 (1976).

The majority quotes extensively from Tompkins v. Kanawha Board, 19 W.Va. 257 (1881), and suggests it will support the erosion of sovereign immunity. I do not agree. It must be remembered that the defendant in Tompkins involved a public corporation created by a legislative act charged with certain responsibilities over the navigability of the Kanawha River. It was not under the direct control of the State and apparently received its funds from tolls. This Court held it was not immune from suit. We adopted the same view in regard to the West Virginia Turnpike Commission in Hope Natural Gas Co. v. West Virginia Turnpike Commission, 143 W.Va. 913, 105 S.E.2d 630 (1959).

Furthermore, I do not subscribe to the majority's inference that the following provisions from Article III of the Constitution of West Virginia, viz., Section 1 (life, liberty, and pursuit of happiness); Section 9 (eminent domain); Section 10 (the due process clause), or Section 17 (open courts), might be read individually or collectively to supersede the sovereign immunity section. . . . The majority's reference in the present case to our eminent domain and general life, liberty, and pursuit of happiness provisions of our Constitution are a bit mystifying to me. In any event, I find nothing in any of the historical antecedents of these provisions which would cause me to conclude that they warrant abolishing the concept of sovereign immunity which is embodied in Section 35 of Article VI of our Constitution.

Finally, I should note [that there] may be occasions when the amount sued for may be in excess of applicable policy limits, or there may be deductible clauses that in effect require the State to assume some portion of a final judgment. In these situations, I would have no doubt that the State's sovereign immunity would apply and to this extent the trial court would permit utilization of the immunity.

GRIBBEN v. KIRK,
195 W.Va. 488, 466 S.E.2d 147 (1995).

CLECKLEY, Justice.

. . .

I.
FACTS AND PROCEDURAL HISTORY

This case represents the third group of present and former State Police Troopers who have filed actions in an attempt to collect unpaid back wages for overtime. In the first action, Adams, et al. v. Mooney, Civil Action No. Misc.-77-342, the Honorable Patrick Casey, Judge of the Circuit Court

[2]We, along with other courts, have abolished common law immunity for a variety of local governmental units which did not have the benefit of the state's constitutional immunity. E.g., Gooden v. County Commission of Webster County, 171 W.Va. 130, 298 S.E.2d 103 (1982); Ohio Valley Contractors v. Board of Education of Wetzel County, 170 W.Va. 240, 293 S.E.2d 437 (1982); Long v. City of Weirton, 158 W.Va. 741, 214 S.E.2d 832 (1975).

of Kanawha County, by order entered January 14, 1988, awarded 123 current and former State Police Troopers $484,254.86 in retroactive overtime pay. The second action, Cordle, et al. v. Kirk, Civil Action No. 83-P.Misc.622, bears an important relationship to the present case and, therefore, it is necessary for this Court to explain the Cordle case in more detail.

Cordle was a class action mandamus proceeding filed on October 13, 1983, requesting the circuit court to order the DPS Superintendent to compensate the petitioners for overtime wages. By order dated December 31, 1988, the Honorable Margaret L. Workman, who then was serving as a Judge on the Circuit Court of Kanawha County, found the exemption in W.Va.Code, 15-2-5, of State Police Troopers from the overtime pay provision of the West Virginia Wage and Hour Law, W.Va.Code, 21-5C-1, et seq., "is unconstitutional in that it denies equal protection under the laws as required by the Fourteenth Amendment to the United States Constitution and it violates the prohibition against passage of special legislation found in Article 6, Section 39 of the West Virginia Constitution." (Citation omitted).

The order further provided that under the facts of the case, an award of back wages is not barred under West Virginia's constitutional immunity against suit. Nevertheless, although the petitioners argued the appropriate time period to calculate the award was from July 1, 1978, until June 30, 1985, the circuit court determined the petitioners could not receive retroactive overtime pay pursuant to this Court's decision in Ables v. Mooney, 164 W.Va. 19, 264 S.E.2d 424 (1979), prior to October 13, 1983, the date the lawsuit was filed. Instead, the circuit court awarded the petitioners back wages for the time frame from October 13, 1983, "to June 30, 1985, the date Federal Wage and Hour guidelines were adopted by the department." The order did not identify the individuals entitled to the overtime pay or the sum certain amount due.

By "Amended Judgment Order" filed on August 10, 1992, the Honorable Paul Zakaib, Jr., Judge of the Circuit Court of Kanawha County, identified 392 individuals who were entitled to relief under the December 31, 1988, order. The order calculated the amount of unpaid overtime due each individual, which resulted in an aggregate award of $3,501,501.35, plus costs and fees. The order also issued a writ of mandamus against the DPS "to allocate sufficient funds from its budget to compensate the Petitioners ... plus reasonable costs and fees as approved by the Court." This decision in Cordle was not appealed by the State.

The parties agree that the Cordle class has experienced a significant amount of difficulty in collecting the award. According to the respondents' brief, the collection efforts of the Cordle class were unsuccessful until the 1994 Legislature appropriated $2,000,000 for the 1994-95 fiscal year to pay "Overtime and Wage Court Awards." Of the $2,000,000 appropriated, the Adams class received full payment on the principal in the amount of $484,254.86. The Cordle class received partial payment in the amount of $1,500,000.

Meanwhile, the third action evolved. On February 10, 1994, another group of State Police Troopers filed a "Motion for Leave to Intervene" in Cordle. This group claimed they were coerced and mislead into "opting out" of the Cordle litigation. These petitioners were denied the right to intervene; so, on March 1, 1994, they filed this independent action for a writ of mandamus in the Circuit Court of Kanawha County captioned John T. Gribben, et al. v. Col. Thomas Kirk, Superintendent of the Division of Public Safety, Glen B. Gainer, Jr., [State Auditor], Larrie Bailey, [State Treasurer.] The petitioners requested that the circuit court issue a writ of mandamus declaring them to be members of the Cordle class and enforcing their right to relief pursuant to the Cordle judgment. By order dated June 22, 1994, the circuit court granted the writ of mandamus upon the finding that misrepresentations were made and the petitioners were intimidated and coerced into "opting out" of the Cordle class. The order declared the Gribben petitioners to be members of the Cordle class and stated they are entitled to the same relief as the Cordle class for unpaid wages from October 13, 1983, to June 30, 1985.

By orders dated December 29, 1994, and March 17, 1995, the circuit court awarded the Gribben

petitioners the aggregate total principal of $1,156,771.44. The circuit court also awarded interest payable thereon from December 31, 1988, the date the Cordle class was deemed entitled to unpaid wages, even though the class members and the amount due to each member was not calculated until the order dated August 10, 1992. Both orders issued writs of mandamus against the State Auditor and Treasurer to pay the petitioners' claims by warrants drawn on the State Treasury.

II.

DISCUSSION

. . .

A.

Sovereign Immunity

The respondents argue that the constitutional immunity provision of Section 35 of Article VI of the West Virginia Constitution bars the petitioners' claim for back overtime pay. . . .

Although this Court, as well as the Legislature, can modify and even abolish the common law immunities applicable to local governments and governmental agents, e.g., Long v. City of Weirton, 158 W.Va. 741, 214 S.E.2d 832 (1975), the constitutional grounding of the State's immunity is not judicially revocable. Kerns v. Bucklew, 178 W.Va. 68, 72, 357 S.E.2d 750, 754 (1987), citing Ables v. Mooney, 164 W.Va. 19, 25 n. 5, 264 S.E.2d 424, 428 n. 5 (1979); Pittsburgh Elevator Co. v. West Va. Bd. of Regents, 172 W.Va. 743, 759, 310 S.E.2d 675, 691 (1983) (Miller, J., concurring).[12]

The facial absoluteness of Section 35, however, has not prevented this Court from recognizing several contexts in which litigation may go forward even though the State government--and sometimes, even, the State treasury-- could be seriously affected by the outcome of the litigation. Most of these were catalogued in Pittsburgh Elevator. The most notable among them is that courts will entertain actions against State officials through the common law writs of mandamus, prohibition, and habeas corpus or through the courts' equitable powers to issue injunctions. In such cases, the "State" is not a defendant; rather, a State official is sued (usually in his or her official capacity) to require performance of a nondiscretionary duty of constitutional or statutory origin or to cease engaging in a course of conduct that violates some constitutional or statutory duty. These judicial powers are recognized by the jurisdictional grants in Sections 3 and 6 of Article VIII of the West Virginia Constitution and have been so exercised throughout the State's history. E.g., Oakley v. Gainer, 175 W.Va. 115, 331 S.E.2d 846 (1985),overruled on other grounds, Harshbarger v. Gainer, 184 W.Va. 656, 403 S.E.2d 399 (1991); Wagoner v. Gainer, 167 W.Va. 139, 279 S.E.2d 636 (1981); State ex rel. Blankenship v. McHugh, 158 W.Va. 986, 217 S.E.2d 49 (1975); State ex rel. Garnes v. Hanley, 150 W.Va. 468, 147 S.E.2d 284 (1966). Our cases reflect a desire to ensure the proper performance of official duties, and so long as compliance with a judicial decree does not require the expenditure of money, no potential for conflict with Section 35 is triggered.

At times, however, enforcement of other constitutional provisions results in equitable decrees or mandamus orders that can have a serious financial impact. The school and prison cases are illustrative. See, e.g., Crain v. Bordenkircher, 176 W.Va. 338, 342 S.E.2d 422 (1986); Pauley v.

---

[12]Although sovereign immunity provisions were common in nineteenth century state constitutions, today they are very much the exception rather than the rule. Our survey in Pittsburgh Elevator identified only five other states whose constitutions still contain sovereign immunity sections and only two (Alabama and Arkansas) with provisions as rigid as ours. . . . It may well be that the strict sovereign immunity imposed by Section 35 has outlived its perceived utility and that West Virginia should join the rest of the country and adopt more flexible legislative resolutions to the issues surrounding governmental liability. Certainly, modern notions of fairness and accountability tend to support doctrines that provide relief to individuals injured by another's conduct and that spread the risk of loss from such injuries through governmental and insurance programs. The West Virginia Legislature, for example, following our decisions abolishing the common law immunities for local governments, crafted a comprehensive statute designed to accommodate the competing goals of compensating individuals injured by official misconduct and of maintaining the stability of local governments. See The Governmental Tort Claims and Insurance Reform Act, W.Va.Code, 29-12A-1, et seq. These matters, of course, are for the legislative and executive branches to address and are beyond the power of this Court.

Kelly, 162 W.Va. 672, 255 S.E.2d 859 (1979). This Court enters such territory with great care, fully respectful of the fact that our Constitution places on the Legislature the primary responsibility for raising and allocating State funds. Accordingly, we generally have drawn a demarcating line between orders requiring a State official to spend money for the public good to meet a constitutional standard--such as that which requires provision of a "thorough and efficient" system of public schools or forbids the imposition of cruel and unusual punishment--and ones requiring officials to pay damages to an individual for the past violation of the same constitutional standard. Courts may grant relief in the former cases but not in the latter.[13]

Even in a suit for monetary damages against a State official in his or her official capacity, however, we recognize two very limited contexts in which awards have been upheld. One category is represented by Kerns, supra, where we granted a writ of mandamus against the respondents, the West Virginia University President and the Board of Regents, to compel payment of damages for employment discrimination on the basis of sex. The respondents argued the damages were barred by constitutional immunity, but we determined the State's immunity was superseded by the Supremacy Clause of the United States Constitution and federal legislation that protects against employment discrimination. In Syllabus Point 1 of Kerns, we explained:

> "In addition to the overriding effect of the supremacy clause of the Constitution of the United States (art. VI, cl. 2) upon contrary state law, federal legislation which is expressly authorized by section 5 of the fourteenth amendment to the Constitution of the United States and which implements such amendment will by its own force override contrary state constitutional or statutory law, such as governmental immunity (W.Va. Const. art. VI, § 35), which state law provides less protection or relief than provided by the fourteenth amendment and its implementing legislation, such as the Equal Employment Opportunity Act of 1972, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (1982)."

Thus, damages may be had against the State despite constitutional immunity if there is federal legislation that applies to the State by virtue of Section 5 of the Fourteenth Amendment.[14]

In the present case, the respondents argue that the petitioners' claim for relief is based on federal and state constitutional grounds and that, while Congress may have the power to authorize suits against the states for constitutional violations and in abrogation of sovereign immunity, it has not done so. In fact, the United States Supreme Court specifically has held that the federal cause of action for remedying violations pursuant to 42 U.S.C. § 1983 does not lie against the states regardless of whether the claim is pursued in federal or state court. The Supreme Court has said it

---

[13]Federal law interpreting states' Eleventh Amendment sovereign immunity has drawn the same distinction. Compare, e.g., Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), with Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). We also find that federal courts have drawn a distinction between money damages and specific monetary relief noting that "[d]amages are given to the plaintiff to substitute for a suffered loss ... specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' " Maryland Dep't of Human Resources v. Department of HHS, 763 F.2d 1441, 1446 (D.C.Cir.1985), quoting D. Dobbs, Handbook on the Law of Remedies 135 (1973); see also Bowen v. Massachusetts, 487 U.S. 879, 914 (1988) (Scalia, J., dissenting) ("Whereas damages compensate the plaintiff for a loss, specific relief prevents or undoes the loss--for example, by ordering return to the plaintiff of the precise property that has been wrongfully taken").

[14]The parameters of Congress's ability to abrogate a state's Eleventh Amendment right to sovereign immunity is the subject of substantial academic debate. See Jonathan R. Siegel, The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity, 73 Tex.L.Rev. 539 (1995); Note, Clear Statement Rules, Federalism, and Congressional Regulation of States, 107 Harv.L.Rev. 1959 (1994). In Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985), the United States Supreme Court limited Congress's power by holding "that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute. The fundamental nature of the interests implicated by the Eleventh Amendment dictates this conclusion." . . .

"cannot conclude that § 1983 was intended to disregard the well-established immunity of a State from being sued without its consent." Will v. Michigan Department of State Police, 491 U.S. 58, 67 (1989).[15] . . . This argument has great force, but it is not dispositive here because the petitioners do not place reliance upon Kerns. Rather, they base their claim on the second context in which we have required State agencies or officials sued in their official capacities to pay monetary awards.

The rationale of the second line of cases recently was invoked in American Federation of State, County and Municipal Employees, et al. v. CSC of W.Va., 176 W.Va. 73, 341 S.E.2d 693 (1985) (per curiam) (AFSCME II), in which two groups of Department of Human Services (DHS) employees brought mandamus actions against the West Virginia Civil Service Commission (CSC) and the DHS. The employees requested this Court, inter alia, to issue a writ of mandamus to compel the payment of back pay which we previously addressed in American Federation of State, County and Municipal Employees v. CSC of W.Va., 174 W.Va. 221, 324 S.E.2d 363 (1984) (AFSCME I). The actions by the two groups of employees were consolidated.

One argument made by the respondents in AFSCME II was that the action was barred by constitutional immunity. We disagreed and stated:

> "[T]he enactment of W.Va.Code, 29-6-15 [1977] [the relevant civil service provision] and decisions of this Court in which back pay was awarded to public employees wrongfully suspended, demoted, or dismissed, Spencer v. CSC, 173 W.Va. 153, 313 S.E.2d 430 (1984); Drennen v. Department of Health, 163 W.Va. 185, 255 S.E.2d 548 (1979); Bell v. Dadisman, 155 W.Va. 298, 184 S.E.2d 141 (1971); Harris v. CSC, 154 W.Va. 705, 178 S.E.2d 842 (1971); State ex rel. Godby v. Hager, 154 W.Va. 606, 177 S.E.2d 556 (1970); State ex rel. Karnes v. Dadisman, 153 W.Va. 771, 172 S.E.2d 561 (1970); State ex rel. Clark v. Dadisman, 154 W.Va. 340, 175 S.E.2d 422 (1970), flow from an implicit recognition that the sovereign immunity doctrine is not implicated in the context of employee relations where the State, acting through its agents, as an employer, has unlawfully withheld all or a part of an employee's salary.... The sovereign immunity doctrine is not a bar to recovery of back pay in the cases now before us." 176 W.Va. at 79, 341 S.E.2d at 699. . . .

See also Paxton v. Crabtree, 184 W.Va. 237, 400 S.E.2d 245 (1990). Although AFSCME II was a per curiam opinion and thus lacked precedential weight, the authorities cited to support the issuance of the writ of mandamus were aptly described,[16] and all but one-- Spencer v. CSC, 173 W.Va. 153, 313 S.E.2d 430 (1984)--were signed opinions of the Court. Indeed, while ruling on appeals by State employees, we said in Bell v. Dadisman, 155 W.Va. 298, 300, 184 S.E.2d 141, 143 (1971), that "one wrongfully discharged from a public office is entitled to be paid for the entire time during which he was wrongfully excluded therefrom." In addition, we stated in Syllabus Point 1, in part, of State ex rel. Clark v. Dadisman, 154 W.Va. 340, 175 S.E.2d 422 (1970), that a wrongfully dismissed civil servant "is entitled to be reinstated to his former position ... without loss of pay during the period from the date of his dismissal until the date he is reinstated." Moreover, albeit without reference to Section 35, this Court routinely over many decades has issued writs of mandamus requiring the Auditor to compensate public employees for obligations previously incurred by the State. E.g., State ex rel. Roth v. Sims, 139 W.Va. 795, 81 S.E.2d 670 (1954) (mandamus order requiring Auditor to honor requisition for employee to receive approved professional training); State ex rel. W.Va. Bd. of Educ. v. Sims, 139 W.Va. 802, 81 S.E.2d 665 (1954) (mandamus awarded requiring Auditor to honor a requisition for payment to a professor for an already completed sabbatical leave); State ex

---

[15]Compare Hafer v. Melo, 502 U.S. 21 (1991) (in their individual capacity, state officials may be sued under § 1983).

[16]All the cited cases were appeals from the Civil Service Commission except State ex rel. Godby v. Hager, 154 W.Va. 606, 177 S.E.2d 556 (1971), which was a mandamus action requiring a county commission to pay back wages to a wrongfully dismissed assessor at a time when we still recognized counties' common law sovereign immunity.

rel. Bd. of Gov. of W.Va. Univ. v. Sims, 136 W.Va. 789, 68 S.E.2d 489 (1952) (mandamus issued to compel Auditor to issue warrants on requisitions for payment of "prior service allowance" in compensation for past personal services); State ex rel. Key v. Bond, 94 W.Va. 255, 118 S.E. 276 (1923) (mandamus awarded in June, 1923, requiring Auditor to execute warrants for salary of petitioner earned in May, 1923).

In such cases as AFSCME I and II, supra, the Legislature has directed an agency to engage personnel, to employ them on particular terms, and to pay them according to certain criteria. Despite those directions, the agency, acting through the official named as a respondent in the mandamus petition, failed to properly execute its assignment. This failure resulted in an obvious legal debt, and the wronged employee's effort to collect on it does not implicate Section 35 because the Legislature, in effect, already had budgeted for the personnel services and for payment for the services in accordance with its directions. Thus, mandamus lies against the recalcitrant official to perform the nondiscretionary duty created by the statute and pay the employee as the Legislature required.

On the other hand, when a court is asked to impose retroactive liability for noncompliance with a statute where there has not been a legislatively anticipated liability, such as occurred in Ables v. Mooney, 164 W.Va. 19, 264 S.E.2d 424 (1979), we have held that Section 35 bars recovery for damages. The question presented in Ables was whether the petitioners, active and retired State Police Troopers, were entitled to two-years back overtime wages that accrued during a period in which the DPS Superintendent refused to pay such wages. The DPS Superintendent refused the payment on the basis of State ex rel. Giles v. Bonar, 155 W.Va. 421, 184 S.E.2d 639 (1971) (State Police Officers were not employees protected by the Wage and Hour Law), prior to its overruling in State ex rel. Crosier v. Callaghan, 160 W.Va. 353, 236 S.E.2d 321 (1977).[17] The DPS Superintendent in Ables argued, inter alia, that the mandamus action brought by the petitioners was a suit against the State and, consequently, was prohibited under Section 35. In addressing the interplay between that section and mandamus actions, we held "that our constitutional immunity provision does not forbid suits against State agencies or officials where the claim is made that they are acting unconstitutionally or beyond their lawful powers, or have failed to perform a nondiscretionary duty imposed on them by law." 164 W.Va. at 29, 264 S.E.2d at 430. Thus, we said in Syllabus Point 2 of Ables:

> "In certain instances a suit may be maintained against a State official in his individual capacity, notwithstanding the constitutional immunity provision found in Article VI, Section 35 of the West Virginia Constitution, where the relief sought involves a prospective declaration of the parties' rights. However, where the relief sought involves an attempt to obtain a retroactive monetary recovery against the official based on his prior acts and which recovery is payable from State funds, the constitutional immunity provision bars such relief."

---

[17]In Crosier, a group of employees who worked as conservation officers for the West Virginia Department of Natural Resources (DNR) brought a mandamus action against the Director of the DNR to compel him to pay for overtime the employees performed. In deciding Crosier, we overruled our 1971 decision in Giles, supra, where we stated that public officers, specifically State Police Officers, were not protected by the Wage and Hour Law. However, in Crosier, we found "nothing in the wage and hour law that excludes 'officers' as such[.]" 160 W.Va. at 358, 236 S.E.2d at 324. Therefore, we held conservation officers are employees covered by the Wage and Hour law and are entitled to mandamus relief.

In Ables, supra, we found the Superintendent complied with the Wage and Hour Law from the date Crosier was decided until July 1, 1978, when the Legislature amended the wage provisions of the West Virginia Department of Public Safety Reorganization Act, W.Va.Code, 15-2-1, et seq. As part of the amendment, W.Va.Code, 15-2-5, excluded State Troopers from coverage under the Wage and Hour Law but provided they were entitled to supplemental pay. Therefore, the issue presented to this Court in Ables was limited to "whether the two-year back pay requirement of W.Va. Code, 21-5C-8(d), applies retroactively from the date of Crosier." 164 W.Va. at 24, 264 S.E.2d at 427. We distinguished Ables from Crosier on the grounds that Crosier did not consider the constitutional immunity issue, and, therefore, Ables was not controlled by our decision in Crosier.

We then concluded the State Police Officers in that case were requesting a retroactive monetary award and, therefore, it was constitutionally barred.

We recognize that Ables simply may not be reconcilable with the authorities in AFSCME II.[18] Possibly, Ables is different because of the unanticipated nature of the liability sought to be imposed there. But see Clark, supra (authorizing back pay for agency employees fired after the governor unlawfully terminated agency's civil service status and ordered a mass discharge of its workers) and Harris v. CSC, 154 W.Va. 705, 178 S.E.2d 842 (1971). Another possibility is that civil service appeals at least are distinguishable because they represent judicial review of an administrative decision from a tribunal specifically authorized by the Legislature to resolve employee grievances and render awards for back pay and from which both the grieving employee and the employing agency can appeal. We need not decide here, however, whether these or other distinctions have substance and serve to resolve the tension in our cases. Rather, for reasons explained below, we only need recognize that the AFSCME II authorities permit courts to entertain mandamus actions brought by public employees against State officials to force the payment of wages for work previously performed or unlawfully denied where the respondent officials fail to comply with legislation that regulates the public employment relationship and that includes an enforcement mechanism. Furthermore, as discussed above, our cases also make clear that mandamus will lie against a State official to adjust prospectively his or her conduct to bring it into compliance with any statutory or constitutional standard.

In this case, the respondents point to the fact that the duty to pay petitioners the disputed amount arises from constitutional and not statutory law. The respondents argue there has been no legislative authorization or contemplation of overtime pay for State police. Indeed, the Legislature specifically provided for an alternative method to compensate State police. See W.Va.Code, 15-2-5, note 5, supra. The respondents also contend the circuit court's order is retroactive because it requires them to pay for damages prior to the date of judgment. The petitioners counter-argue by asserting that the source of the duty breached in failing to lawfully compensate public employees for work performed should not affect recovery in AFSCME II-type contexts. The petitioners further claim that the circuit court's award here was prospective only because the back pay period it used began to run from the date on which Cordle was filed. The petitioners insist that their rights, because the circuit court in this case concluded the petitioners were wrongfully pressured to opt out of the Cordle litigation, must be determined as if they had joined in that lawsuit. In addition, the petitioners maintain that mandamus relief should not be limited to the vagaries of how long litigation requires to run its course. Thus, the crucial date for drawing a line between prospective and retroactive relief should be the initiation of the relevant mandamus action and not the date of judgment.

These contentions present difficult issues, which, happily for us, we do not have to decide here. Cordle concluded in the December 31, 1988, order, which was incorporated in the final order dated August 10, 1992, that awarding overtime from the date of the initiation of the litigation was prospective relief only. When the appeal time for the 1992 order lapsed, that determination of the circuit court acquired preclusive effect as to any subsequent litigation between parties in privity with the Cordle litigants. See State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995); Conley v. Spillers,

---

[18]It seems that our analysis regarding sovereign immunity has lead us to both awkward and irreconcilable results. Neither the Bar nor Bench should assume that we are sub silentio overruling Ables. Despite the celebrated dictum in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), in the law of modern constitutional remedies, not every right comes equipped with a guarantee of individual remediation for every violation of that right. As this case demonstrates, the doctrine of sovereign immunity provides a formidable limitation on the availability of individual remedies. While it is "[d]ecried as irrational and immoral by some, ... criticized on historic grounds by others, ... [and] recognized by all to have little doctrinal coherence, the doctrine of sovereign immunity nonetheless retained the endorsement of the two institutions that matter -- [the West Virginia Supreme Court of Appeals and the West Virginia Legislature]." Interfirst Bank of Dallas, N.A. v. United States, 769 F.2d 299, 303 (5th Cir.1985)[.] . . .

171 W.Va. 584, 301 S.E.2d 216 (1983)[.] . . . Furthermore, we expressly find that "'in the earlier litigation the representative of the [State] had authority to represent its interests in a final adjudication of the issue in controversy.' " Miller, 194 W.Va. at 13, 459 S.E.2d at 124, quoting Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 403, 60 S.Ct. 907, 917, 84 L.Ed. 1263, 1276 (1940). The State's failure to appeal that judgment collaterally estops it from relitigating the Section 35 issue in this case. We are in this case, therefore, bound by the Cordle ruling.

Accordingly, we hold that Section 35 of Article VI does not bar the petitioners' claim for an award of overtime pay owed to them for the period ensuing from the outset of the Cordle lawsuit. For purposes of this case, we are bound to consider that as a grant of prospective relief. . . .

NOTE

Beichler v. West Virginia University, 226 W.Va. 321, 700 S.E.2d 532 (2010), held that Article VI, § 35, "concerning this State's sovereign immunity, does not bar the claim of a State employee for unpaid wages asserted under the West Virginia Wage Payment and Collection Act, W. Va. Code, 21-5-1 (1987), *et seq*."

UNIVERSITY OF WEST VIRGINIA BOARD OF TRUSTEES V. GRAF,
205 W.Va. 118, 516 S.E.2d 741 (1998).

Per Curiam.

[Graf, a University hospital physician filed a grievance with the West Virginia Education and State Employees Grievance Board challenging his employer's policy that prohibited its physicians from moonlighting and seeking compensation for lost income. The case ultimately reached the Supreme Court, which ruled that Graf had a statutory right to moonlight and that the Grievance Board had the authority to award him damages. *Graf v. West Virginia University*, 189 W.Va. 214, 429 S.E.2d 496 (1992). The case was remanded for their calculation. Subsequently, the Board determined that Dr. Graf's losses amounted to $1,001,925.43, of which – after another round of appeals – he was paid $1,000,000 on the University's insurance policy. Graf then petitioned the circuit court for attorney's fees, as authorized by the grievance statute, W. Va. Code 18-29-8, and was awarded $330,921, plus interest. The University then appealed to the Supreme Court arguing that the award violated sovereign immunity because Graf had already received the full million dollars from the school's insurance policy and that was the maximum that he could recover. After ruling that the University could raise the "jurisdictional" sovereign immunity doctrine for the first time on appeal, the Court turned to the merits of that defense.]

[A] brief overview of this State's sovereign immunity doctrine is in order. The State's immunity from suit is derived from [Article VI, Section 35 of the Constitution.] . . . "This constitutional grant of immunity is absolute and . . . cannot be waived by the legislature or any other instrumentality of the State." *Mellon-Stuart Co. v. Hall,* 178 W. Va. 291, 296, 359 S.E.2d 124, 129 (1987) (citations omitted). This Court has explained that "the policy which underlies sovereign immunity is to prevent the diversion of State monies from legislatively appropriated purposes. Thus, where monetary relief is sought against the State treasury for which a proper legislative appropriation has not been made, sovereign immunity raises a bar to suit." *Id.* (Citations and footnote omitted.)

Nevertheless, over the years this Court has carved exceptions from the prohibition against suing the State. "The facial absoluteness of Section 35 . . . has not prevented this Court from recognizing several contexts in which litigation may go forward even though the State government -- and sometimes, even, the State treasury -- could be seriously affected by the outcome of the litigation." *Gribben v. Kirk,* 195 W. Va. 488, 493, 466 S.E.2d 147, 152 (1995). These exceptions include injunctions to restrain or require State officers to perform ministerial duties, *Chesapeake & O Ry.*

Co. v. Miller, Auditor, 19 W. Va. 408 (1882), *aff'd,* 114 U.S. 176, 5 S. Ct. 813, 29 L. Ed. 121 (1885); suits against State officers acting or threatening to act, under allegedly unconstitutional statutes, *Blue Jacket Consol. Copper. v. Scherr,* 50 W. Va. 533, 40 S.E. 514 (1901); recognition of a moral obligation by the State, *State ex rel. Davis Trust Co. v Sims,* 130 W. Va. 623, 46 S.E.2d 90 (1947); counterclaims growing out of transactions wherein the State institutes actions at law against a citizen, *State v. Ruthbell Coal Co.,* 133 W. Va. 319, 56 S.E.2d 549 (1949); suits for declaratory judgment, *Douglass v. Koontz,* 137 W. Va. 345, 71 S.E.2d 319 (1952); mandamus relief to require the State Road Commission to institute proper condemnation proceedings upon the taking or damaging of land for public purposes, *Stewart v. State Road Commission of West Virginia,* 117 W. Va. 352, 185 S.E. 567 (1936); suits alleging liability arising from the State's performance of proprietary functions, *Ward v. County Court of Raleigh County,* 141 W. Va. 730, 93 S.E.2d 44 (1956); suits against quasi-public corporations which have no taxing power or dependency upon the State for financial support, *Hope Natural Gas v. West Virginia Turn. Com'n,* 143 W. Va. 913, 105 S.E.2d 630 (1958); mandamus relief to compel State officers, who have acted arbitrarily, capriciously or outside the law, to perform their lawful duties, *State ex rel. Ritchie v. Triplett,* 160 W. Va. 599, 236 S.E.2d 474 (1977); suits in which constitutional immunity is superseded by federal law, *Kerns v. Bucklew,* 178 W. Va. 68, 357 S.E.2d 750 (1987); suits that seek recovery under and up to the limits of the State's liability insurance coverage, *Pittsburgh Elevator v. W. Va. Bd. of Regents,* 172 W. Va. 743, 310 S.E.2d 675 (1983); and suits by state employees seeking an award of back wages which is prospective in nature, *Gribben v. Kirk,* 195 W. Va. 488, 466 S.E.2d 147 (1995).

We decided above that sovereign immunity is implicated under the facts of this case. Our next task is to determine whether the relief sought by Dr. Graf falls within any of the aforementioned exceptions. Dr. Graf seeks monetary relief which immediately eliminates several of the exceptions. This monetary relief is sought not from an individual State officer, the Court of Claims, nor from a quasi-public corporation but from the State itself. It did not arise from a counterclaim in an action originally instituted by the State, nor was the State sued in its proprietary function. Instead, Dr. Graf's claim arose in a grievance procedure against the State as employer. Nevertheless, neither the underlying claim nor the instant one properly can be considered a claim for back pay. The underlying claim was for wages lost from outside employment due to the wrongful conduct of the State in interfering with Dr. Graf's statutory right to engage in such employment. It therefore resembles a tort action. Dr. Graf now seeks attorney fees accumulated in litigating this tort action. Because of the nature of the underlying claim, the type of relief sought, as well as by the process of elimination, we conclude that Dr. Graf's instant claim falls under the exception which allows suits that seek recovery under and up to the limits of the State's liability insurance coverage.

In Syllabus Point 2 of *Pittsburgh Elevator v. W. Va. Bd. of Regents,* 172 W. Va. 743, 310 S.E.2d 675 (1983), this Court stated that "suits which seek no recovery from state funds, but rather allege that recovery is sought under and up to the limits of the State's liability insurance coverage, fall outside the traditional constitutional bar to suits against the State." We further noted in Syllabus Point 1 of *Eggleston v. W.Va. Dept. of Highways,* 189 W. Va. 230, 429 S.E.2d 636 (1993),

> W. Va. Code, 29-12-5(a) (1986), provides an exception for the State's constitutional immunity found in Section 35 of Article VI of the West Virginia Constitution. It requires the State Board of Risk and Insurance Management to purchase or contract for insurance and requires that such insurance policy "shall provide that the insurer shall be barred and estopped from relying upon the constitutional immunity of the State of West Virginia against claims or suits.

See also, State ex rel. W. Va. DOH v. Madden, 192 W. Va. 497, 453 S.E.2d 331 (1994); and Syllabus, *Shrader v. Holland,* 186 W. Va. 687, 414 S.E.2d 448 (1992) (holding that "the State shall not be made the defendant in any proceeding to recover damages because of the defective construction or condition of any state road or bridge," based upon an exclusion in the insurance policy purchased by the Department of Highways.)

As noted previously, in his underlying claim, Dr. Graf was awarded $ 1,001,925.43 in damages

for lost wages. As the University states in its brief, $ 1,000,000.00 of this award was paid to Dr. Graf under a policy administered by CNA Insurance Companies. This sum constituted the limits of the State's liability insurance coverage in this matter. Therefore, Dr. Graf has already recovered up to the limits of the State's liability insurance coverage. Any further recovery would be in excess of the State's liability insurance coverage and is barred by the State's constitutional immunity from suit. Accordingly, we reverse Dr. Graf's award of attorney fees and costs in the amount of $330,921.00 plus interest.

We reiterate that Dr. Graf's underlying claim for lost wages, from which the case *sub judice* arises, resembles, more than anything else, a tort claim for purposes of a sovereign immunity analysis. Even though the claim was filed as a grievance pursuant to statute, it is based upon the State's intentional and improper conduct in denying to Dr. Graf, contrary to State regulations, the opportunity to earn compensation as a practicing physician outside of the State university system. The recovery sought by Dr. Graf was damages for lost wages and not back pay. Because of the nature of Dr. Graf's underlying claim, and the type of recovery sought, Dr. Graf can only recover under and up to the limits of the State's liability insurance coverage. This is in contrast to those plaintiffs who seek back pay awards. We emphasize that the interaction of constitutional immunity and back pay awards concerns a separate line of cases and is subject to a different analysis. In back pay cases, the controlling factor is whether the relief sought is prospective and *not* whether recovery is sought under and up to the limits of the State's liability insurance coverage. *See Gribben v. Kirk,* 195 W. Va. 488, 466 S.E.2d 147 (1995); and *Skaff v. Pridemore,* 200 W. Va. 700, 490 S.E.2d 787 (1997). . . .

Starcher, Justice, dissenting:

. . . Someday, I think, a number of thorny sovereign immunity issues should and will be more thoroughly addressed by this Court. My sense is that our sovereign immunity jurisprudence has come to be – from a theoretical or academic perspective – fairly confused. I further sense that this jurisprudential confusion has unfortunately created a fertile field for opportunistic attempts by litigants to escape liability for their wrongdoing, by the last-minute assertion of sovereign immunity.

Frankly, what does rather ancient and eroded constitutional language have to do with a multi-million-dollar hospital corporation's last-ditch attempt to escape paying money to a doctor who had to spend $300,000.00 in attorney fees to get what he was legally entitled to? In my judgment, very little. Yet this scenario, of course, is the instant case in a nutshell.

As the majority opinion barely acknowledges, Dr. Graf got his fee award pursuant to a statute, *W.Va. Code*, 18-29-8 [1992]. Adhering to the principle of brevity, it is not necessary to detail how and why the Legislature puts attorney fee provisions in statutes. The fact is that they do so -- a lot.

These attorney fee statutes are an explicit direction by the Legislature that government agencies shall pay a party's attorney fees when the agency has made such a substantial mistake that a citizen, or an employee, or a business, is required to use a lawyer to correct the agency's action.

Thus, payment of these attorney fees is a legislatively-mandated cost of running the government for the benefit of its citizens. Requiring a state agency to pay these attorney fees is the same as requiring a state agency to pay the gasoline bill for a state road truck at the local convenience store. A statute requiring an agency to pay attorney fees is no more impaired by the doctrine of sovereign immunity than is a statute requiring the same agency to pay its gasoline bills.

Dr. Graf was entitled to this fee payment under the statute. I think he should receive what the Legislature directed. The circuit judge read the statute in a straightforward manner and took the same position. I would affirm the circuit court.

We are supposed to construe statutes constitutionally, if at all possible. Instead, the majority opinion stretches the other way, to rule that the duly-enacted statutory attorney fee provision, as applied to Dr. Graf, is unconstitutional.

The majority opinion is clearly an anomalous, result-oriented decision. Dr. Graf is seen as

overreaching by asking for payment of his attorney fees, in addition to his million-dollar "lost income" recovery.

However, because attorney fee provisions are crucial to promoting effective legal advocacy for all citizens, we have no right to use archaic constitutional language to undermine statutes that apply such provisions to *all* citizens -- just because, in a given case, the statute is utilized by a person who probably has plenty of money. . . .

For the foregoing reasons, I dissent.

NOTES

1. The plaintiff in *Parkulo v. West Virginia Board of Probation and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996), was assaulted, kidnapped, brutally raped, and then left nude beside the road by a convicted felon who had been released from prison by the parole board. Parkulo then sued the Parole Board and the Division of Corrections but lost on summary judgment. On appeal, the Supreme Court affirmed, holding that the Parole Board could invoke absolute quasi-judicial immunity and that the Division of Corrections could claim the benefit of the public duty doctrine.

Justice Albright's opinion for the Court first iterated the point from *Pittsburgh Elevator* that litigants suing state agencies for damages must allege in the complaint that "recovery is sought under and up to the limits of the State's liability insurance coverage." He then canvassed the various decisions doing away with sovereign immunity for local governments (*see* Chapter 9, *infra*) and noted that the Court had limited the effects of those rulings by recognizing the "public duty doctrine." Under that doctrine, "a governmental entity is not liable because of its failure to enforce regulatory or penal statutes." [*Benson v. Kutsch*, 181 W.Va. 1, 380 S.E.2d 36 (1989).] . . . Recovery [against the government] may be had for negligence only if a duty has been breached which was owed to the particular person seeking recovery. . . . The linchpin of the 'public duty doctrine' is that some governmental acts create duties owed to the public as a whole and not to the particular private person or private citizen who may be harmed by such acts. Therefore, the nature of the defendant as a governmental entity is invoked, which operates to distinguish the defendant from 'a private person' or a 'private citizen.'"

Thus, *Wolfe v. City of Wheeling*, 182 W. Va. 253, 387 S.E.2d 307 (1989), held that a city fire department could not be held liable for failing to respond promptly to calls for assistance from a home owner. "[T]he duty to fight fires and provide police protection runs to all citizens and raises no liability to a particular individual for the failure to do so," unless the plaintiff could establish that some "special relationship" existed between him and the fire department that created a "special duty."

To prove that "special relationship," the plaintiff must meet a four-part test: "(1) An assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the local governmental entity's affirmative undertaking."

Eventually, the Court determined that the Division of Corrections could avail itself of the public duty doctrine and remanded the case to the circuit court for it to determine whether a "special relationship" existed between the plaintiff and the Division. (To say the least, that would be a highly unlikely prospect.) The remand also included instructions for the trial court to discern whether the Parole Board's and the Division's insurance policies provided coverage notwithstanding the Board's immunity and the public duty doctrine. "[T]he immunities and defenses available to the State and its insurer in this action are defined first by the actual provisions of the policy or policies purchased by the State and may provide coverage notwithstanding common-law immunity or the public duty doctrine."

2. In *Clark v. Dunn*, 195 W.Va. 272, 465 S.E.2d 374 (1995), Clark and others sued the Department of Natural Resources and Terry Dunn, an officer of the DNR, for injuries allegedly inflicted by the negligent acts of Dunn while acting in his official capacity. The Court, in an opinion by Justice Albright, held:

> [I]n the absence of an insurance contract waiving the defense, we conclude that the doctrine of qualified or official immunity bars a claim of mere negligence against the Department of Natural Resources, a State agency not within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act, W.Va.Code section29-12A-1, et seq., and against Officer Dunn, an officer of that department acting within the scope of his employment, with respect to the discretionary judgments, decisions, and actions of Officer Dunn which are the subject of the complaint in this action.

Relying on *State v. Chase Securities, Inc.,* 188 W.Va. 356, 424 S.E.2d 591, 593 (1992), the Court described the qualified immunity as follows:

> A public executive official who is acting within the scope of his authority and is not covered by the provisions of W.Va.Code, 29-12A-1, et seq. [the West Virginia Governmental Tort Claims and Insurance Reform Act], is entitled to qualified immunity from personal liability for official acts if the involved conduct did not violate clearly established laws of which a reasonable official would have known. There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive. . . .

I. Miscellaneous Provisions

Read Article VI, §§ 11,16, 34, 36, 44, 46, and 53-54