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## RETHINKING THE WEST VIRGINIA MUNICIPAL CODE OF 1969

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### I. INTRODUCTION

A quarter century ago, West Virginia adopted a comprehensive Municipal Code. The statutory law of the state relating to municipal corporations had fallen into a sad state of disarray at that time. Major renovation was necessary and the Municipal Code of 1969 (Municipal Code)<sup>1</sup> resulted. The Municipal Code is a sound, comprehensive and well-conceived piece of legislation. In the main, it has served the State well in the years since its adoption. Nonetheless, three provisions of the Municipal Code, which could have amplified the positive impact of the entire Act, have received but scant attention. These provisions of the Municipal Code are still alive and well. They can be dusted off, held up to examination and put to good use. The point of this Article is to identify these provisions and urge that they receive the attention, understanding, and application that they duly deserve.

The provisions meriting the most attention are found in the opening Article of the Municipal Code. The first and second provisions are

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1. W. VA. CODE §§ 8-1-1 to 8-36-1 (1990 & Supp. 1994).

codified in Sections 6<sup>2</sup> and 7<sup>3</sup> of Article 1; the third provision is an unpretentious definition tucked away in the definition section: Section 2<sup>4</sup> of Article 1. Sections 6 and 7 are legislative directives regarding how all of the provisions of the Municipal Code should be interpreted. These provisions go beyond the boiler plate slogans such as the phrases "shall be liberally construed" or "to promote uniformity" that are found throughout the statutes of the State. Sections 6 and 7 make more thoughtful and profound statements about fundamental power relationships between the state government and its municipalities. Frankly, they seek to turn old thought-ways on their head. They command that the slate be wiped clean and a whole new approach be taken towards understanding the powers of West Virginia cities. These provisions are rather like a legislative edict repealing the law of gravity and substituting a law of levitation in its stead. Defending that proposition poses a heavy agenda, but the case can be made. While the modest definition in Section 2 of Article 1 is less pretentious, it too raises a weighty issue. It clearly undertakes to provide legislative reversal of an existing judicial interpretation of a critical state constitutional provision. Again, the legislature took an established doctrine and turned it on its head.

Section 6 provides a cluster of interpretive rules applicable to old special charters. Section 7 is much more focused and emphatic; it abolishes a common law interpretive rule, known as Dillon's Rule, first applied in West Virginia more than a century ago. Section 2, the definitional provision, addresses an important part of the Home Rule Amendment of 1936 and raises some fascinating separation of powers issues.

To advance the thesis proposed by this Article, the following order of presentation will be employed. First, the events leading to the creation of the Municipal Code of 1969 will be presented. Second, each of the interpretive provisions of the Municipal Code will be identified

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2. W. VA. CODE § 8-1-6 (1990). See discussion *infra* notes 40-52 and accompanying text.
  3. W. VA. CODE § 8-1-7 (1990). See discussion *infra* notes 14-31 and accompanying text.
  4. W. VA. CODE § 8-1-2 (1990). See discussion *infra* notes 53-58 and accompanying text.

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and analyzed. Third, the cases in which these provisions have been noted and the cases in which these provisions have been ignored will be discussed. Finally, the cumulative impact of the provisions will be addressed.

II. THE EMERGENCE OF THE MUNICIPAL CODE OF 1969

The Municipal Code of 1969 was born of necessity. In 1936, West Virginia adopted a constitutional Home Rule Amendment that put an end to special chartering of cities by the Legislature and substituted local adoption of charters by a vote of the citizens of the city involved.<sup>5</sup> Prior to 1936, all charters of cities with a population of more than 2,000 had been created by special legislative act.<sup>6</sup> Following the adoption of the Home Rule Amendment, the Legislature established the procedures by which local charters were to be created and adopted and outlined the powers that Home Rule Cities could exercise.<sup>7</sup> The Home Rule Amendment identified the powers that Home Rule Cities could employ only in the most general terms.<sup>8</sup> The Home Rule Amendment did include some limitations on the powers that could be exercised and these limitations preserved a wide range of powers to the Legislature.<sup>9</sup>

5. W. VA. CONST. art. VI, § 39(a). At the time the West Virginia movement towards Home Rule was growing toward a successful conclusion, Jefferson B. Fordham was a faculty member of the West Virginia University College of Law. Dean Fordham later became dean of the University of Pennsylvania Law School and dean of local government law scholars in the nation. He was a strong proponent of Home Rule but concluded that the constitutional provision presented to the voters of the State in the election of 1936 did not merit passage. In his view, the provision would put an end to granting charters by special legislation but failed to address the matter of local autonomy versus power reserved to the state legislature. See Jeff B. Fordham, *The West Virginia Home Rule Proposal 1932*, 38 W. VA. L.Q. 235 (1931); Jeff B. Fordham, *West Virginia Home Rule Proposal*, 42 W. VA. L.Q. 42 (1935).

6. For a general discussion of incorporation, see *Wiseman v. Calvert*, 59 S.E.2d 445 (W. Va. 1950).

7. Municipal Home Rule Law, ch. 56, 1937 W. Va. Acts 238.

8. According to the language of the amendment, a municipality could adopt a charter granting power to "pass all laws and ordinances relating to its municipal affairs . . ." W. VA. CONST. art. VI, § 39(a). A proviso that follows reserved to the Legislature the right to pass general laws that would override city ordinances, and of course city laws are made subject to the state constitution. *Id.*

9. The limiting language is: "Provided, that any such charter or amendment thereto, and any such law or ordinance so adopted, shall be invalid and void if inconsistent or in

Promptly following the adoption of the Home Rule Amendment, the Legislature adopted enabling acts aimed at putting the Home Rule concept in operation. These new statutory provisions were collected in a new chapter in the West Virginia Code of 1931, denominated Chapter 8A. This new chapter spelled out the procedures for cities to use to frame and adopt Home Rule Charters<sup>10</sup> and included a substantial number of provisions outlining the powers that such cities would have. This new chapter dealing with Home Rule Cities was adjacent to Chapter 8, which continued as a repository of statutory municipal law applying to other municipalities in general. Over the years that ensued, considerable confusion arose from having two sets of laws dealing with municipalities.<sup>11</sup> The advent of the Home Rule option created the situation where there could be old special charter cities which simply continued under the charters granted previously by special act of the legislature, new Home Rule Cities that reorganized under the Home Rule Amendment and the enabling legislation in Chapter 8A, and hybrid cities which exercised the option of the enabling legislation to amend a previous special charter by adopting a charter amendment in accordance with the new Chapter 8A. New legislation was not always clear as to its reach — did it affect special charter, special charter amended, or exclusively Home Rule Cities? After three decades, the confusion was enough to drive the Legislature to adopt a new, comprehensive municipal code; thus, the Municipal Code of 1969.

The opening section of the Municipal Code lists four goals. The Municipal Code was designed to (1) "recodify the basic municipal

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conflict with this Constitution or the general laws of the State then in effect, or thereafter, from time to time enacted." *Id.*

10. These provisions were carried forward as part of the Municipal Code of 1969. See W. VA. CODE §§ 8-3-1 to -10 (1988).

11. The problem began to emerge shortly after the adoption of the 1937 enabling acts. In *Frazier v. Easley*, 2 S.E.2d 769 (W. Va. 1939), the Supreme Court of Appeals of West Virginia ruled that Bluefield, a special charter city at that time, could employ the "minor boundary adjustment" annexation method that was found in Chapter 8A (Home Rule Chapter). The court noted that certain powers conferred in Chapter 8A could be adopted only by public referendum and concluded that some other powers conferred by Chapter 8A could be exercised by all cities since there were no other provisions dealing with such matters in the old Chapter 8. Thus began the turmoil resulting from attempting to determine which powers in which chapter applied to which cities.

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law;" (2) recodify the "provisions relating to . . . intergovernmental relations;" (3) "provide as much uniformity as possible" among the various types of municipalities within the state; and (4) continue giving effect to the Municipal Home Rule Amendment of 1936.<sup>12</sup>

The first goal, recodifying, was essential. The chaotic growth of the previous three decades had produced the necessity for a general re-ordering of the municipal law. This was a challenging task accomplished in excellent fashion.

The second goal, viewed in retrospect, evokes a bit of nostalgia. Regional planning, development, and the perceived advantages of a rational allocation of resources and public services were high priorities in the late 1960s when the Municipal Code was drafted. The Great Society programs of the Johnson presidency were the order of the day.<sup>13</sup> There were substantial financial incentives to generate plans and innovative programs.

The third goal of uniformity among the various types of cities in West Virginia was really a reinforcement of the first — aiming at clarity and certainty as to which substantive provisions applied to what cities.

The final goal of the recodification — the continued implementation of the Home Rule City provision — merited special attention and emphasis. The new Municipal Code did eliminate a separate chapter dedicated to Home Rule Cities. There were no changes in the basic municipal law of the State that compromised the continued opportunities for municipalities to shape their own government structures and policies through adoption of a Home Rule Charter.

It is unfortunate that a fifth goal was not expressly stated, since it is evident in the Municipal Code as a whole. That goal would have been phrased in terms of a reaffirmation of the legislative goal of

12. W. VA. CODE § 8-1-1 (1990).

13. The use of federal funds to shift authority to "planners" and regionalization gave way to President Nixon's greater emphasis on traditional local controls through "revenue sharing." The presidency of Ronald Reagan was marked by a "new federalism" which sought to shift both authority and fiscal responsibility for many programs back to state and local governments entities. See generally TIMOTHY CONLAN, NEW FEDERALISM (1988).

providing maximum flexibility to municipalities to choose their own goals and select the means to achieve them. While busy lawyers seeking specific solutions to particular problems don't pause to pour over such platitudes, such a statement may have been useful in defeating the stealth principle, the gratuitous negative inferences that grew in the shadow of the strict construction of Dillon's Rule, and lingered after its legislative abolition.<sup>14</sup>

### III. A REQUIEM FOR DILLON'S RULE

The first of the provisions to be considered here is Section 7. If fully grasped, understood, and employed, Section 7 could be the most important provision of the trio. This section provides as follows:

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

Any charter provision framed and adopted or adopted by revision of a charter as a whole or adopted by charter amendment under the provisions of former chapter eight-a of this code or under the provisions of this chapter which is beyond the power and authority of a city and any ordinance provision which is beyond the power and authority of a municipality shall be of no force and effect.<sup>15</sup>

Although usually not fully understood or appreciated, Section 7 abolishes Dillon's Rule in West Virginia. Dillon's Rule is more than just a rule; it is a thought-way, an attitude, and a mind-set that is pervasive and difficult to unseat. Dillon's Rule is named for Judge John F. Dillon, who was Chief Justice of the Iowa Supreme Court, a Judge on the Eighth Circuit Court of Appeals, and President of the American Bar Association. His 1872 treatise on municipal corporations was the first major treatise in the field. It subsequently commanded the

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14. For a discussion of two such cases, *see infra* note 73.

15. W. VA. CODE § 8-1-7 (1990).

field and achieved wide-spread attention and respect. In it, Judge Dillon asserted that:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and not others: First those granted in *express words*; second those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation, — not simply convenient, but indispensable.<sup>16</sup>

West Virginia embraced the "Dillon Rule of Strict Construction" in 1884<sup>17</sup> and followed that initial embrace with several confirming applications within a short span of years.<sup>18</sup> The rule became established and was followed with general consistency for more than seven decades<sup>19</sup> until the Legislature abolished it in 1969. Without any explanation, the doctrine was applied to county commissions and school boards, as well as municipalities, though such governmental units were not within the reach of Dillon's Rule. The doctrine had the blessing of simplicity and the lure of reserving to the judiciary the power to substitute its policy choices for those of locally elected officials.

Criticism of Dillon's Rule has been widespread, but the rule continues.<sup>20</sup> It has an amazing staying power. Dillon's Rule continued in West Virginia in spite of the legislative abolition until *McAllister v. Nelson*,<sup>21</sup> decided in late 1991. This case was only the second time

16. 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911) (emphasis in original).

17. *Christie v. Malden*, 23 W. Va. 667 (1884).

18. *Parkersburg Gas Co. v. City of Parkersburg*, 4 S.E. 650 (W. Va. 1887); *City of Charleston v. Reed*, 27 W. Va. 681 (1886).

19. See, e.g., *State ex rel. Sheldon v. City of Wheeling*, 122 S.E.2d 427 (W. Va. 1961); *Hyre v. Brown*, 135 S.E. 656 (W. Va. 1926); *State ex rel. Hatfield v. Porter*, 99 S.E. 508 (W. Va. 1919); *Bluefield Waterworks and Improvement Co. v. City of Bluefield*, 70 S.E. 772 (W. Va. 1911); *State ex rel. Morely v. Godfrey*, 46 S.E. 185 (W. Va. 1903); *Judy v. Lashley*, 41 S.E. 197 (W. Va. 1902).

20. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980); ADVISORY COMM'N OF INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONAL AND STATUTORY RESTRICTIONS UPON THE STRUCTURAL, FUNCTIONAL AND PERSONNEL POWERS OF LOCAL GOVERNMENT (1962); A.E.S., Note, *Dillon's Rule, the Case for Reform*, 68 U. VA. L. REV. 693 (1982); Kenneth D. Dean, Note, *Dillon's Rule — A Limit on Local Government Powers*, 41 MO L. REV. 546 (1976).

21. 411 S.E.2d 456 (W. Va. 1991).

that the Supreme Court of Appeals of West Virginia had acknowledged the existence of Section 7. *McAllister* holds that a Home Rule Charter in West Virginia adopting a strong-mayor form of government may include a provision giving the mayor veto power.<sup>22</sup> This particular result is interesting but hardly earth shattering. What was important was the actual reliance upon Section 7 to explain the result. A belated recognition, but a recognition none-the-less.

But there is nothing about the opinion to mark it as anything more than routine. There is no elevated rhetoric, no announcement of a new beginning, no trumpeting of something extraordinary;<sup>23</sup> it is one of those decisions that settles another recurring domestic squabble within the turbulent municipal family known as Huntington. Such disputes are commonplace and widely ignored beyond the city line. Not only is the opinion self-effacing, the syllabus attached to the decision is equivocal (and contradictory) as can be. There are three syllabus points attached by the court: the first states the old rule of strict construction of power delegations; the second states the statute which abolishes the old strict construction rule; and the third summarizes the narrow holding that the veto power is valid.<sup>24</sup> The operational result of the decision and the

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22. W. VA. CODE § 8-3-2 (1990) outlines five plans for city government that may be adopted by municipalities: Mayor-Council; Strong-Mayor; Commission Government; Manager Plan; and Manager-Mayor Plan. The general outlines of these various forms of government are set out in only very general terms. Under W. VA. CODE § 8-4-7 (1990), a city may revise an existing charter to incorporate any of the plans outlined in Article 3.

23. Justice Brotherton can elevate his rhetoric on occasion and can even get testy about the syllabus points attached to an opinion. See, e.g., *First National Bank in Fairmont v. Phillips*, 344 S.E.2d 201 (W. Va. 1985) (Brotherton, J., dissenting).

24. Syllabus points are required by Constitutional mandate for Supreme Court of Appeals' decisions. W. VA. CONST. art. 8, § 4. The authoritative reach of such syllabus points was seriously examined a few decades ago. See Thomas P. Hardman, "The Law" in *West Virginia*, 47 W. VA. L.Q. 23 (1940); Thomas P. Hardman, "The Syllabus is the Law," 47 W. VA. L.Q. 141 (1941); Thomas P. Hardman, "The Syllabus is the Law" — *Another Word*, 47 W. VA. L.Q. 209 (1941); Thomas P. Hardman, "The Syllabus is the Law" — *Another Word by Fox J.*, 48 W. VA. L.Q. 55 (1941).

The last law review writing addressing the issue is the student note published in 1956, John McClarity, Note, *Courts — the Syllabus in West Virginia — Law or Official Headnote?*, 58 W. VA. L. REV. 274 (1956), which concludes that syllabus points are "official headnotes" and not binding statements of law. Ironically, the student note was written by John McClarity, the principal draftsman of the Municipal Code of 1969 (and numerous other important legislative matters).

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text of the opinion clearly support the position that the old strict construction rule has been abolished by statute. Why the old strict construction rule is quoted in a syllabus point as though it were still valid law supported by the case is simply baffling. Finally, some unfortunate language in the opinion, dug up from a 1935 opinion in Oklahoma<sup>25</sup> suggests that just perhaps the result would have been the same had Section 7 never been enacted. Humbug! Such reliance on old case law simply muddies the waters and compromises the central role of Section 7. The blandness of the opinion, the puzzling contradiction in syllabus points, and the incorporation of dubious case authority<sup>26</sup> gives *McAllister* the attributes of a lost bench mark rather than a turning point.

Prior to *McAllister*, the death-to-Dillon legislative choice of Section 7 had received but one brief notice from the Supreme Court of Appeals of West Virginia in the case of *Rogers v. City of South Charleston*.<sup>27</sup> On that occasion, the legislative position was simply brushed aside. In *Rogers*, the court held that a general grant of authority to the city park board to sell and convey real property did not include the power to grant an option to buy property, though the special procedures applicable to the sale of property were followed. The opinion by Justice McGraw paraphrased a mild version of Dillon's Rule supported by citations to previous cases involving school boards, county commissions, and municipal corporations, and then dismissed the impact of the legislative attempt to abolish the rule in the following

25. *Hackney v. City of Guthrie*, 41 P.2d 705 (Okla. 1935).

26. The *Hackney* case doesn't really bowl you over. The case does make an impressive bow to the legislative independence of a city council, but under circumstances widely (perhaps even wildly) removed to the issue before the court in the *McCallister* setting. In *Hackney*, protesting citizens sought to enjoin the city from granting a franchise to provide natural gas service within the city on the grounds that a referendum on such issue, then required by Oklahoma law, had been corrupted by fraudulent election activities (bogus registration of persons who were not citizens of the city on the city voter registration and the payment of cash bribes to citizens to vote in favor of the franchise). The court voiced strong support for the principle that courts could not enjoin legislative actions of a city council and that other remedies at law provided an adequate remedy against corrupt election practices. *Hackney* was cited twice in an annotation, M. L. Cross, Annotation, *Injunction Against Legislative Body of State or Municipality*, 140 A.L.R. 439, 441, 449 (1942), but seems otherwise to have escaped serious attention prior to the *McCallister* notice.

27. 256 S.E.2d 557 (W. Va. 1979).

terms: "W. Va. Code § 8-1-7 relaxes the common law rule of strict construction somewhat but it does not lift all restrictions on the exercise of power by the Board."<sup>28</sup>

The language of the statute directs courts to disregard the common law rule of strict construction, not just to "relax" it "somewhat." And clearly, Section 7 did not "lift all restrictions on the exercise of power." It simply provided that grants of power should be liberally construed.<sup>29</sup> The power granted the park board by statute required unanimous approval by the board for the sale of any park property.<sup>30</sup> That unanimous agreement was present in granting the purchase option to the potential buyer. The question of law regarding the authority of the park board was whether the board had the authority to grant an option to sell to a potential buyer as incidental to its power to sell immediately if it complied with the statutory requirements for a direct sale. Section 7 would ask whether that power was incidental or reasonably implied. That question was not addressed in these terms and the authority to enter into an option contract was denied. Justice Neely dissented but gave no attention to the role of Section 7 at all.<sup>31</sup>

Strangely, from time to time, the entire issue of interpretive rules, which commonly dominate as a starting point of analysis, is utterly ignored. Two such West Virginia cases decided after the adoption of the Municipal Code illustrate. The first is *Local 598, Council 58, AFSCME v. City of Huntington*,<sup>32</sup> in which Justice Neely held that Huntington had the contractual capacity to enter into and bind itself in a collective bargaining contract with its employees. Public-employee bargaining has long been a matter of contention in West Virginia.<sup>33</sup> And the Legislature has repeatedly refused to adopt any kind of gener-

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28. 256 S.E.2d at 561.

29. W. VA. CODE § 8-1-7 (1990).

30. W. VA. CODE § 8-21-9 (1990).

31. 256 S.E.2d at 566 (Neely, J., dissenting).

32. 317 S.E.2d 167 (W. Va. 1984).

33. See WEST VIRGINIA BLUE RIBBON PERSONNEL COMM'N, REPORT TO THE GOVERNOR (1992). The Commission deadlocked nine-nine on whether to recommend adoption of a public employee collective-bargaining policy for West Virginia. The report presents an extended discussion of both sides of the issue and outlines matters that should be addressed in such a collective bargaining law. *Id.* at 23-43.

al collective-bargaining law for public employees. In spite of this, the court, through Justice Neely, accepted the capacity of Huntington to enter into such a contract on the grounds that the general terms of the Municipal Code grant "plenary" power to contract to municipalities.<sup>34</sup> Dillon's Rule would have inquired whether collective-bargaining contracts were indispensable to accomplish garbage collection — and obviously could have concluded no.<sup>35</sup> Had the Section 7 interpretive rule been noted, the issue would have been close. An approach using a Section 7 analysis would focus on whether such contracting power could be implied in light of a pattern of steadfast refusal by the Legislature to establish collective bargaining for public employees. But there was no mention of Dillon's Rule, nor of the statute abolishing it.

The second occasion of ignoring rules of interpretation arose when the municipality of Burnsville sought to collect unpaid business and occupation taxes from a convenience store in that community.<sup>36</sup> West Virginia relied for many years on a gross receipts tax as the dominant business tax of the State. And since 1947, municipalities were authorized to "piggy-back" on this tax for businesses operating within municipalities.<sup>37</sup> In 1985, the State began to recede from the gross receipts tax but appeared to have continued it as a major revenue source for cities. The issue in *Burnsville* was whether the Legislature had adequately expressed its intent to sustain the municipal right to impose a gross receipts tax on businesses while abolishing that tax at the state level. Writing for a unanimous court, Justice Miller held that the tax authority had continued at the municipal level, though the Legislature had expressed this intent "awkwardly," in Justice Miller's term.<sup>38</sup>

In neither *Huntington* nor *Burnsville* did the court bind itself up with the edict of Dillon's Rule that would have put a policy-making straight jacket on the municipality involved. Both decisions involved

34. 317 S.E.2d 167, 168 (W. Va. 1984) (citing W. VA. CODE § 8-12-1 (1990)).

35. See *State ex rel. Sheldon v. City of Wheeling*, 122 S.E.2d 427 (W. Va. 1961) (holding that, although Wheeling had the power to regulate plumbing to assure public health and safety, the city could not use licensing as the means of achieving that goal without express legislative authorization).

36. *Town of Burnsville v. Kwik-Pik, Inc.*, 408 S.E.2d 646 (W. Va. 1991).

37. Act of June 23, 1947, ch. 3, 1947 Ex. Sess., W. Va. Acts 741.

38. 408 S.E.2d at 650.

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eight long, un-numbered paragraphs, covering a variety of topics.<sup>41</sup> Reading this section demands patience and commitment. Nonetheless, Section 6 contains important directives that merit serious attention. Moreover, the form and content of the first two paragraphs sends an important message: respect local choices. Paragraph one identifies and distinguishes five possible relationships between provisions of the new Municipal Code and continuing provisions of old special legislative charters. Paragraph two provides legislative direction as to what consequences should flow from each of the five identified relationships. The combination of the two paragraphs demonstrate an appreciation for the complexity of the problem and an abundant respect for local autonomy.

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in addition to the usual and ordinary rules of statutory construction, and to set forth a substantive provision as to application in connection with possibility (2).

As to possibility (1), the pertinent provisions of this chapter shall supersede such conflicting or inconsistent charter provisions and shall be deemed amendments to such charters. As to possibility (2), one year from and after the effective date of this section [July 1, 1969] or the effective date of any pertinent amendment to this chapter hereafter adopted, such provisions of this chapter shall supersede such charter provisions and shall be deemed amendments to such charter, unless within such one-year period an ordinance is adopted providing that such charter provisions shall be applicable, in which event such charter provisions shall be applicable so long as said ordinance remains in full force and effect. As to possibility (3), all such charter provisions shall be construed so as to conform to and be consistent with the pertinent provisions of this chapter. As to possibility (4), the charter provisions shall remain in operation and effect until amended or repealed by general law hereafter enacted or until hereafter supplanted by a new charter or revised as a whole or amended in accordance with the provisions of this chapter. As to possibility (5), the applicable provisions of this chapter shall be deemed amendments to such charter. In determining the relationship between such charter provisions and the provisions of this chapter in any situation not included in the possibilities outlined above, the relationship shall be determined in keeping with the general concepts and principles embodied in the rules of construction set forth in this paragraph. The provisions set forth above in this paragraph shall also be applicable to the relationship between the pertinent provisions of various local or special acts of the legislature (other than special legislative charters) pertaining to municipal matters and the provisions of this chapter.

W. VA. CODE § 8-1-6 (1990).

41. The remaining paragraphs of Section 6 address situations where substantive provisions contain conflict rules specifically related to that substantive provision, restate the supremacy of state law over conflicting ordinances, provide for continuation in office of all persons holding municipal office at the time the Municipal Code took effect, and save the effect of prior laws on transactions and causes of actions occurring before the effective date of the Municipal Code. W. VA. CODE § 8-2-6 (1990).

This legislative appreciation for complexity and flexible response contrasts dramatically with the simplistic, single rule-of-thumb approach that has dominated the judicial analysis of similar matters.<sup>42</sup>

The five-part rule pattern of Section 6 has been given serious attention in two cases. On both occasions it was Justice Miller who sought to employ the legislative guidance in interpreting the relationship between municipal and state law. In the first case, he wrote for a unanimous court. In the second, he dissented alone.

In *Hogan v. City of South Charleston*,<sup>43</sup> the issue was who had authority to appoint the Chief Administrative Officer of the Board of the Park and Recreation Commission. Contenders for this power were the Board of the Park and Recreation Commission and the Mayor. A charter adopted by the city in 1973 gave that appointing power to the mayor. The state law authorizing the establishment of boards to manage parks and recreation clearly gave that power to the board. Section 6 makes it clear that where there is a direct conflict between a charter and the state law, the state law prevails. Justice Miller read the enabling act authorizing the establishment of parks and recreation boards as including express authority to control its personnel. This was a fair reading of the statute. The state rule granting the appointive authority to the board prevailed over the charter provision granting that appointive power to the mayor. The ironic twist here is that the city was acting under a Home Rule Charter, not a special charter surviving from the pre-1936 days. Thus, Section 6 by its own terms did not apply to the issue involved in the case.<sup>44</sup>



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42. See, e.g., *State ex rel. Plymale v. Huntington*, 131 S.E.2d 160 (W. Va. 1963), discussed *infra*.

43. 260 S.E.2d 833 (W. Va. 1979).

44. Section 6 begins with the following language:

In furtherance of the purpose of this chapter as set forth in section one [§ 8-1-1] of this article, each municipality is subject to the provisions contained in this chapter and may exercise the power and authority conferred by this chapter. In this regard, it is recognized that when the provisions of *existing special legislative charters* are compared with and are considered in the light of the provisions of this chapter, there are five basic possibilities as to the relationship between such charter provisions and the provisions of this chapter.

W. VA. CODE § 8-1-6 (1990) (emphasis added).

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The result was correct in *Hogan*, but the source of authority should have been the second paragraph of Section 7, which addresses direct conflicts of state policy and Home Rule City provisions.<sup>45</sup>

The dissenting use of Section 6 by Justice Miller occurred in *State ex rel. Hill v. Smith*.<sup>46</sup> At issue in the case was the authority of a deputy municipal clerk of Charleston to issue an arrest warrant for the offense of shoplifting. Charleston's old special charter expressly provided for such authority. Writing for the majority, Justice Harshbarger ruled that the clerk could not issue such a warrant because the general state law authorized two city officials to issue warrants — the mayor and the municipal judge.<sup>47</sup> From this, the majority opinion drew the negative implication that no other city official could be authorized to issue warrants. Miller's dissent focused upon the interpretive rules stated in Section 6.<sup>48</sup> The fourth of the five possible relationships between the Municipal Code and old special charters, he felt, directly addressed the issue. Specifically, the Municipal Code provides that: "as to any particular charter provisions, there may be no counter-part of such provisions of this chapter."<sup>49</sup> When such is the case, the Legislature directs that "the charter provision shall remain in operation and effect until amendment or repealed by general law. . . ."<sup>50</sup> Justice Miller emphasized his point:

There is no argument over the fact that our general Municipal Code does not contain any provision relative to the right of the municipal court clerk to issue warrants. The majority ignores the provisions of W. Va. Code, 8-

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45. Section 4 provides:

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

W. VA. CODE § 8-1-7 (1990) (second paragraph).

46. 305 S.E.2d 771 (W. Va. 1983).

47. W. VA. CODE §§ 8-10-1, -2 (1990).

48. 305 S.E.2d at 776 (Miller, J., dissenting).

49. W. VA. CODE § 8-1-6 (1990).

50. *Id.*

1-6 (1969), and in particular the class four language which would authorize validation of Charleston's special charter provision.<sup>51</sup>

It is arguable, of course, that the Legislature really did intend closely to limit the authority to issue warrants by naming only the two officials specified and no others. That policy could easily have been made clear by simply adding the word "only" to the general Municipal Code provision. The legislative designation could be as readily viewed as simply a fall back position, with two officials clearly identified as authorized if no other particular designation existed in the city charter. The opinion in the case proceeded more upon a generalized negative view that power should be denied whenever in doubt. That is consistent with the old Dillon's Rule view (which had been rejected) and with a highly artificial "inconsistency" rule,<sup>52</sup> to be addressed shortly.

The identification of five different possible relationships between old charter provisions and the new Municipal Code provisions suggests the Legislature sought to provide some measure of flexibility. That general view combined with the express abolition of Dillon's Rule urges liberality toward finding a basis for city authority.

#### V. THE CONSTITUTIONAL MEANING OF "INCONSISTENT"

The third important interpretive rule in the Municipal Code of 1969 is the statutory definition of "inconsistent or in conflict with."<sup>53</sup> This phrase is drawn from the Home Rule Amendment of 1936. Dealing with this third interpretive rule provides the most daunting analytical challenge because in it, the Legislature confronts the judiciary head on. The Legislature seeks to spell out the meaning of a constitutional provision that is quite different than the meaning adopted in a prior judicial decision. The potential for a separation of powers turf battle is present.

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51. 305 S.E.2d at 776.

52. Justice Harshbarger did not cite *State ex rel. Plymale v. City of Huntington*, 131 S.E.2d 160 (W. Va. 1963), the tap root of the artificial inconsistency doctrine, in the *Hill* decision.

53. W. VA. CODE § 8-1-2(b)(9) (1990).

The Home Rule Amendment of 1936 concludes with the following language:

[T]he electors of each municipal corporation, wherein the population exceeds two thousand, shall have power and authority to frame, adopt and amend the charter of such corporation, or to amend an existing charter thereof, and through its legally constituted authority, may pass all laws and ordinances relating to its municipal affairs: Provided, that any such charter or amendment thereto, and any such law or ordinance so adopted, shall be invalid and void if inconsistent or in conflict with this Constitution or the general laws of the State then in effect, or thereafter, from time to time enacted.<sup>54</sup>

The "inconsistent-conflict" provision retained a measure of power for the Legislature. The operation of the Home Rule Amendment, granting power to municipalities to control "local" or "municipal" affairs, raises a difficult question of what power is left to state legislatures over matters of "state-wide" concern. The clash over this issue has been the focal point of judicial involvement in Home Rule law for decades. Opposing interests clothe themselves in the mantle of local or state-wide authority and go to the courts to settle disputes. The balance of powers in these matters are of great importance to the parties in individual cases. The verbal formula for that balance was struck in the West Virginia Constitution by the "inconsistent-conflict" phraseology.

A first ever judicial interpretation of that language concluded that if a local law was "different" than a state law it was "inconsistent" and, thus, invalid. The definition of "inconsistent" in the Municipal Code takes quite a different view. The Legislature focuses on operational inconsistency, not mere verbal difference. The statutory language provides:

"Inconsistent or in conflict with" shall mean that a charter or ordinance provision is repugnant to the Constitution of this State or to general law because such provision (i) permits or authorizes that which the Constitution or general law forbids or prohibits, or (ii) forbids or prohibits that which the Constitution or general law permits or authorizes.<sup>55</sup>

54. W. VA. CONST. art. VI, § 39(a).

55. W. VA. CODE § 8-1-2(b)(9) (1990).

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This view of inconsistency demands a good bit more than a finding of mere difference as required by the judicial formula. It focuses on the actual effect of the local and state provisions. Consistent with the two previous interpretive provisions, Section 2 narrows the areas where state law will override local provisions. Though clearly involved in a number of cases subsequent to the adoption of the Municipal Code,<sup>56</sup> the section has been noted only once where it was not really controlling.<sup>57</sup>

The commanding court interpretation of "inconsistent or in conflict" came about in *Plymale v. City of Huntington*.<sup>58</sup> *Plymale* announced the simplistic and purely verbal "difference equals inconsistency" rule. The opinion is an analytical disaster. It applied the fee statute applicable to non-Home Rule Cities to a Home Rule City and ignored a very different provision in the then controlling chapter 8A.<sup>59</sup> It ignored a self-limiting feature of the Huntington Charter that could have made the petition for referendum inadequate under the Charter itself.<sup>60</sup>

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56. *Miller v. Palmer*, 336 S.E.2d 213 (W. Va. 1985); *Hock v. City of Morgantown*, 253 S.E.2d 386 (W. Va. 1979); *Vector Co. v. Board of Zoning Appeals of the City of Martinsburg*, 184 S.E.2d 301 (W. Va. 1971).

57. *State ex rel. Foster v. City of Morgantown*, 432 S.E.2d 195 (W. Va. 1993).

58. 131 S.E.2d 160 (W. Va. 1963).

59. The authorization for city fees for Home Rule Cities was included in the 1937 Act that established the basic rules for Home Rule Cities in West Virginia. It was included in Chapter 8A, Article 6, and provided as follows:

A city shall have power to charge and collect reasonable rates, fees and charges for municipal services other than those rendered as fire and police protection, subject to the provisions of chapter twenty-four of the official code of West Virginia, as amended. In the case of police power services, which may be mandatory upon those served, the charge shall be based upon and shall not substantially exceed the cost of rendering the same.

Municipal Home Rule Law, ch. 56, 1937 W. Va. Acts 238, 267. This provision was a part of the West Virginia Code from 1937 until it was repealed in 1969 as a part of the recodification eliminating separate provisions in Chapter 8A directed to Home Rule Cities.

60. The Charter language contained in Sec. 113 states: "Power of Initiative. The qualified electors shall have power to propose any ordinance, except an ordinance appropriating money or authorizing the levy of taxes. . . ." *Plymale*, 131 S.E.2d at 163. It is arguable that the imposition of a service fee is not a "tax" excluded by the initiative provision. It is also plausible that the basic policy of the limitation on initiative was to place recurring fiscal decisions beyond such control. Viewed from this perspective, the distinction between a tax and a fee would be inconsequential. The court did note that using initiative to repeal a

Nonetheless, the court proceeded into a constitutional interpretation that was totally unnecessary to the case. The entire decision is an unfortunate dictum. Still, it has been an influential decision by the court.

In the *Plymale* case, a number of Huntington citizens opposed the imposition of service fees recently adopted by the city council. They sought to use a Home Rule Charter referendum provision to force the council to submit the fee issue to a public vote. An attempt to compel a public vote on the matter had been previously attempted under the provisions of Chapter 8 (the general municipal law of the time) but that attempt had failed. The second attempt, which gave rise to the *Plymale* decision, was launched under the Charter provisions seeking an alternate route to referendum that was less burdensome. The fee opponents met the petition-signing requirements of the Charter. The Charter referendum provisions required the signatures of ten percent of the voters and could be proposed at any time; the Chapter 8 provision required the signatures of thirty percent of the voters within a short period of time after the fee ordinance was published.<sup>61</sup> The Huntington Council refused to direct the referendum as provided by the Charter and the issue was joined. The Supreme Court of Appeals of West Virginia agreed with the city council, thus denying the petitioners the right to compel a city-wide referendum.

The court's position was that the difference between the Charter provision and the statute provision made the local provision "inconsis-

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formerly adopted ordinance was valid under West Virginia law.

The distinction between fees and taxes has a history of its own and has not been addressed in the context of the meaning of "taxes" in municipal referendum cases in West Virginia. The Supreme Court of Appeals of West Virginia has acknowledged the distinction in *City of Charleston v. Board of Educ. of Kanawha County*, 209 S.E.2d 55 (W. Va. 1974) (permitting a city to charge a fire service fee to a tax exempt Board of Education). The federal judiciary seems to have a more difficult time with this distinction. See *United States v. City of Huntington*, 999 F.2d 71 (4th Cir. 1993) (holding that a municipal fee for fire service and flood protection was a tax and not a fee and could not be charged against agencies of the United States government), *cert. denied*, 114 S. Ct. 1048 (1994).

61. From 1933 until 1955, the fee-enabling statute had required a petition of ten percent of voters. The ten-percent rule was a standard threshold for referendum provisions generally. The raising of the percentage regarding challenges to fee ordinances in 1955 does suggest legislative sympathy toward discouraging nuisance protests.

tent" with general law and thus, the general law of the state prevailed. Simple as that.

It remains a mystery as to why the fee-enabling provisions of Chapter 8 were deemed controlling while the different fee-enabling statute of Chapter 8A, the Home Rule provisions of the time, were totally ignored. Huntington was a Home Rule City, having adopted a charter by voter referendum in 1957. What would have been the result had the proper statute been identified and applied will be considered later. First, a look at the statute which was employed by the court.

The fee-enabling provision of the general municipal law has a puzzling history. It emerged (according to the Code organizers in 1933) as a replacement for a 1921 statute that authorized the dedication of a property tax levy to support municipal bands (that's right, bands not bonds).<sup>62</sup> A decade after the 1921 band tax was authorized, conditions had changed. The Tax Limitation Amendment of 1932<sup>63</sup> had stripped local government of much of its revenue-raising power by placing limits on property tax rates that survive to the present day. The 1933 revision of the special fee authorization shifted concern from the luxury of municipal bands to "essential or special services" that "public health, safety, comfort and/or well being demands."<sup>64</sup> The original municipal band law required voter approval before the tax levy could be imposed. But that, of course, was a property tax that local authorities had power to impose at that time, and the 1923 law was a timeless dedication of a portion of the property tax to the support of a municipal band. The 1933 fee provision changed the rules and made the referendum an after-the-fact public vote that could reject the fee. Burdens shifted. The narrowly dedicated municipal band tax was proposed by the governing body and needed general public approval. The broader service fee was enacted by the governing body but was subject to subsequent disapproval if a proper petition was filed.

The special referendum provision in the fee statute of 1933 appears to have provided a safety valve. It was a process by which wide-

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62. Act of Apr. 29, 1921, ch. 111, 1921 W. Va. Acts 294.

63. W. VA. CONST. art. X, § 1.

64. Act. of June 3, 1933, ch. 27, 1933 W. Va. Acts 207.

spread displeasure towards the enactment of the fee could be expressed by the voters of the community through the referendum process. Some special charters included referendum provisions, but there was no state-wide guarantee for such a safety valve across the State generally. More general availability of municipal referendum power first came about later, in 1937, when the Home Rule Enabling Laws expressly authorized Home Rule Charters to include such provisions.<sup>65</sup>

Viewing the *Plymale* decision of 1963 from the legislative viewpoint at the time the fee-enabling statute was adopted in 1933 is difficult, but worth a try. It is possible to view the legislative purpose of the fee-referendum provision, as enacted in 1933, as having two possible, and quite inconsistent, purposes: one, to protect the resident payers of the fee; or two, to protect the city council from protestors to the imposition of such a fee.

First, it may have been a safety valve measure. By this purpose, the provision would allow outraged local citizens quickly to turn against the fee imposition by the ruling body of the city. Second, the purpose may have been to provide a protectionist device. This would minimize the possibility of citizen reaction allowed by specialized local referendum provisions and thus, insulate city councils from voter protest except in the most vehement reactions.

Dicey as it is to reconstruct legislative intent at such a distant past, it is difficult to conclude that the Legislature was really building a protective wall around the fee-levying powers of city governments. When adopted in 1933, a ten-percent voter petition requirement was imposed. This was consistent with the minimal rule common to municipal referendums of that time and which were carried forward in the enabling statutes of the new Home Rule enabling statutes a few years later.<sup>66</sup> The only significant restrictive limitation was one of time — an understandable concern for fiscal stability and predictability.<sup>67</sup>

65. Municipal Home Rule Law, ch. 56, 1937 W. Va. Acts 238, 255 (codified at W. VA. CODE § 8A-3-8 (repealed 1969)).

66. *Id.* The authorization provided continues, codified at W. VA. CODE § 8-12-4 (1990).

67. A publication requirement, included in the basic fee-enabling statute does extend the time for gathering protest petitioners. The statute designates a fifteen-day time limit for

The number of petitioners required to authorize a statutory referendum remained at ten percent for more than two decades until 1955, when it was raised to thirty percent. This move seems clearly to show that the Legislature wanted statutory referendums on fee matters to be both promptly done and seriously supported. But if there was a serious legislative concern to preempt and override less demanding charter referendum challenge options in Home Rule Charters, it was left unstated. It is difficult to argue from this legislative action of 1955 that there was a clear legislative intent to override voter-council power balances approved in Home Rule Cities. In sum, there is nothing in the evolution of the fee-enabling statute and its referendum position to suggest that it was crafted to protect a city council imposition of fees from negative public reaction.

Nonetheless, the practical effect of the *Plymale* decision was the adoption of the protectionist view. The possibility that the statutory authorization of referendum was simply a safety-valve mechanism was not considered. None of the background of the fee statute was alluded to in the *Plymale* decision. None of the balance of powers issues were noted or addressed. The analytic process of the opinion was to declare at length that the fee statute was, indeed, a general law and from this the court concluded that it was applicable to all municipalities.<sup>68</sup> The "general law" determination here can be a bit misleading. The distinction between a general law and a special law had a unique meaning in relation to statutes dealing with local government matters during the period between 1937 to 1969. General laws, at this time, were laws that applied to all cities regardless of whether the statutes were located in the general municipal law chapter, Chapter 8, or the Home Rule municipal law chapter, Chapter 8A. As noted earlier, it was the confu-

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the filing of the petition of protest, but the time limitation runs from the time after the publication of the ordinance imposing the fee. There is now explicit reference back to W. VA. CODE § 59-3-1 (1994). A class II legal advertisement must run once a week for two weeks, and W. VA. CODE § 59-3-2(3) (1994) states that "once a week for two weeks" means two times within fourteen days with at least six days between the first and second publication. If citizens opposed to the fees kept close watch on council actions, the time available to collect petition signatures would extend for almost a month following the adoption of such an ordinance. *Id.*

68. Again, this result occurred without noting that there was a separate and distinct fee-enabling provision specifically applicable to Home Rule Cities at that time.

sion of this code location problem that helped to lead to the general revision of municipal law that brought about the Municipal Code of 1969.<sup>69</sup>

The term "general law" has another, and quite separate, meaning in the context of state constitutional provisions that are common to many states.<sup>70</sup> These provisions are not focused specifically on municipalities.<sup>71</sup> The role of these special legislation limitations is related, but quite different.

The language of the *Plymale* decision does not reassure that the distinction between general and special laws (as demanded by broader state constitutional prohibitions against special legislation) and the unique problem of West Virginia with parallel code chapters on Home Rule Charter and Special Charter Cities was observed. If the Legislature had adopted one rule for Home Rule Cities and a different rule for non-Home Rule Cities, there should be no problem of whether one or the other is a "general law." The failure to note a separate fee statute directly aimed at Home Rule Cities makes the labored effort of the *Plymale* decision a magnificent irrelevancy.

And finally, there is a sentence in the fee statute that adds another puzzling twist to the entire matter. The sentence following the establishment of the initiative process states that the "powers hereby given to municipalities and the authorities thereof are in addition to and sup-

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69. For a discussion of *Frazier v. Easley*, 2 S.E.2d 769 (W. Va. 1939), see *supra* note 11.

70. W. VA. CONST. art. VI, § 39. After listing a series of situations in which the Legislature is specifically prohibited from enacting special laws, the provision concludes: "The legislature shall provide, by general laws, for the foregoing and all other cases for which provision can be so made; and in no case shall a special act be passed, where a general law would be proper, and can be made applicable to the case, nor in any other case in which the courts have jurisdiction, and are competent to give the relief asked for."

*Id.*

71. One of the specific limitations on special acts that has always been part of W. VA. CONST. art. VI, § 39 does prohibit meddling in the affairs of small communities: "The Legislature shall not pass local or special laws . . . for . . . Incorporating cities, towns or villages, or amending the charter of any city, town or village, containing a population of less than two thousand; . . ." *Id.*

plemental of the powers named in the respective charters thereof."<sup>72</sup> A very plausible meaning of the "supplemental and additional" language is that the statutory fee imposing authority and the referendum provision adds options in non-referendum cities and broadens it in those where tax matters otherwise would not be subject to initiative. Note the role that this statutory language regarding supplemental powers could have had on the fee protestors. Suppose the opponents of the fees in Huntington had met the standards of the statute that were relied upon by the court. Could Huntington have refused the demand on the grounds that the charter initiative limited such city-wide votes to matters not involving fiscal affairs? In such a situation, the state act would grant to the voters of the city something that the charter would appear to deny. That would present a clear inconsistency and conflict, and the Home Rule Constitutional Amendment would demand that the state law prevail. The definition clause of Article 1, Section 2 of the Municipal Code would compel the same result.

If the safety-valve view of the internal initiative is sound, then there is no inconsistency between the statute and the Huntington Charter initiative. They are simply two different ways of achieving the same goal; they both give the city voters a chance to override an unpopular decision of the city council.

The plague of *Plymale* is that it encourages a disregard for the policies involved in a statute, an ordinance, or charter provisions. No judgment occurs; only text matters. The comparison of the municipal policy and the state policy is reduced to textual rote. A semi-clever computer hacker could write a program that would resolve these issues with a few key strokes.

Had the *Plymale* approach been limited to the fee statute, correction would have been relatively simple. One statute would have to be amended. The Legislature, if properly approached, would make the choice and the matter would be settled. Unfortunately, the decision has taken on a more universal quality and spread to other issues.<sup>73</sup>

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72. Act of June 3, 1933, ch. 27, 1933 W. Va. Acts 207, 209.

73. Two cases used the *Plymale* rationale when addressing the validity of municipally-created super majorities for particular actions. Requiring super majorities for particular ac-

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*Plymale* encourages gratuitous limitations based upon negative implica-  
 tions from statutory provisions that do not fairly suggest such conclu-  
 sions at all. It is the stealth rule of judicial nullification that lurks in  
 the shadow of the Dillon Rule of Strict Construction that has been  
 expressly rejected by the Legislature.

The consequences of *Plymale* and its progeny have placed a weird  
 twist on the meaning of many of the substantive provisions of the  
 Municipal Code. The Legislature attempted to neutralize that problem.  
 But those efforts have thus far been unnoticed and unavailing.

#### VI. AMENDING THE CONSTITUTION BY LEGISLATION

A final question does remain: Can a state legislative body effec-  
 tively contradict a judicial interpretation of a state constitutional term?  
 Limited only by the supremacy of national law, states normally limit  
 the authority of their legislative, executive, and judicial bodies by con-  
 stitutions and constitutional amendments adopted by a state-wide refer-  
 endum. Thus the issue: Can a West Virginia Legislature acting in 1969  
 redefine a constitutional provision adopted in 1936 and judicially inter-  
 preted in a different manner in 1963? The answer is "probably yes."

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tions is a commonly used practice. However, it foundered in West Virginia, insofar as mu-  
 nicipalities were concerned, because of the spread of *Plymale*. In *Vector Co. v. Board of*  
*Zoning Appeals of Martinsburg*, 184 S.E.2d 301 (W. Va. 1971), the court struck down a  
 provision of the city zoning ordinance which required a vote of four members of the five-  
 member Board of Zoning Appeals. The rationale of the court was that W. VA. CODE § 8-  
 24-52 (1990) prohibited this policy since that statute said: "[a] majority of the members of a  
 board shall . . . constitute a quorum. No action of a board shall be official, however, unless  
 authorized by a majority of the members of the board." This is a boiler-plate abolition of  
 the common-law rule that would allow a majority to constitute a quorum and a majority of  
 those present the authority to take official action. See, e.g., *Gregg v. City of Haven*, 766  
 P.2d 143 (Kan. 1988); *DiGiacacinto v. City of Allentown*, 406 A.2d 520 (Pa. 1979). See  
*generally* 4 MCQUILLIN ON MUNICIPAL CORPORATIONS 13.32 (3d ed. 1985). Absent the statu-  
 te, if three members of a five-member board attended a duly called meeting, two members,  
 a minority of the Board, would constitute a common-law majority and could bind the Board  
 by official action. The statute is a protection against minority rule, not a bar to selected use  
 of super majorities in particular cases. A similar result was reached in *Hock v. City of*  
*Morgantown*, 253 S.E.2d 386 (W. Va. 1979), where the zoning ordinance required a four-  
 fifths vote of City Council to rezone property in certain cases and the City Charter general-  
 ly required a positive vote of a majority of the council to adopt an ordinance or resolution.

There is no firmly established bright-line dogma that controls state court deference to state legislative interpretations of state constitutional provisions.<sup>74</sup> It appears that pragmatism dominates. State constitutions deal with a wide range of detailed matters. State courts commonly welcome the contribution of state legislatures in fleshing out the meanings of state constitutional provisions.<sup>75</sup> Though many state judicial opinions qualify the weight given to legislative interpretations, state courts commonly give serious consideration to legislative decisions. These matters are rarely perceived as turf battles involving high principles of protecting judicial prerogatives from legislative intrusion. More often the matter is dealt with as a matter of cooperative problem resolution.<sup>76</sup>

This Article is not the place for an extensive elaboration on the matter. It is enough for now to note that state judiciaries give credence and respect to legislative interpretations of state constitutional provisions — especially where the constitutional provision is not one that appears to be aimed at limiting legislative authority.<sup>77</sup>

The Legislature invites judicial contradiction when it seeks to expand its own power by attempting to redefine a constitutional provision. In the case of the West Virginia Home Rule Amendment, there are clear limitations on the power of the Legislature, the violation of which would provoke a negative judicial response. The Home Rule

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74. The most comprehensive piece of legal scholarship published in recent times about state constitutions in general is Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169 (1983). There the author notes that "under certain circumstances, courts will defer to legislative interpretation, as reflected in statutes, of [state] constitutional provisions." *Id.* (quoting *Jasper v. Mease Manor, Inc.*, 208 So. 2d 821 (Fla. 1968)).

75. Note the reference to *Jasper* by Williams, *supra* note 74. See also *Green v. City of Cascade*, 231 N.W.2d 882 (Iowa 1975); *United Air Lines, Inc. v. County of San Diego*, 2 Cal. Rptr. 2d 212 (1989).

76. The measure of respect given legislative interpretations of state constitutional provisions vary, but respect and careful consideration dominates the language of most opinions. See, e.g., *Anderson v. Regan*, 439 N.Y.S.2d 776 (1981); *Keller v. Smith*, 553 P.2d 1002 (Mont. 1976); *Freeman v. Jefferson County*, 334 So. 2d 902 (Ala. 1976).

77. It is interesting to note here the extraordinary deference given to legislative determinations of what is appropriate special legislation, though the state constitutional provision is clearly strongly biased against it. See, e.g., *Hedrick v. County Court of Raleigh County*, 172 S.E.2d 312 (W. Va. 1970).

Amendment was clearly intended to put an end to the granting of special legislative charters and also to prevent the division of cities into more than five classes. A legislative act that attempted to prescribe a new charter for a city in West Virginia would invite a judicial declaration that such power is now beyond the Legislature. An attempt to divide cities into six or seven classes in the face of an explicit limit in the Home Rule Amendment to no more than five classes of cities should clearly fail. Either of these attempts would be an effort to exercise power that the Home Rule Amendment has patently denied.

But if the Legislature chooses by statute not to exercise all powers that may have been given it, the law-making body is certainly not acting in an unconstitutional fashion. Indeed, the decision not to legislate is as vital to the democratic process and legislative supremacy as any power that elected representatives may exercise.<sup>78</sup> The West Virginia Legislature sought to reinforce that concept in the three interpretive provisions outlined in this Article.

The definition of conflict adopted by the Legislature is clearly an attempt to state when the Legislature does not wish to be lightly presumed to intend to override local prerogatives. The Legislature seeks to limit the collision between local and state law. There is no surrender of state sovereign power. The Legislature is free at any time, today, tomorrow, or at any time in the future, to limit the range of local options and redraw the lines between what is state and what is local. There certainly can be no offense to the reservation of the Home Rule Amendment which protects the sovereignty of the State. But if the Legislature chooses not to do so, who should complain?

*Plymale* and its coven are false profits. Dillon's Rule is dead. The powers of old Special Charter Cities merit flexible interpretation as commanded by Section 6. The conflict-inconsistent definition should be addressed and given the fair consideration that it rightfully deserves. This triumvirate of interpretive rules adopted by the Legislature deserve recognition and respect. After all, who better can declare legislative intent than the Legislature itself in statutes formally adopted, voted

78. See RICHARD NEELY, HOW COURTS GOVERN AMERICA (1981). See also *FERC v. Mississippi*, 456 U.S. 742, 790 (1982) (O'Connor, J., dissenting).

upon in open session, and spread upon the official laws of the state. From time to time, the democratic process does things right.