THE FAILURE OF HOME RULE REFORM IN VIRGINIA: RACE, LOCALISM, AND THE CONSTITUTION OF 1971

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I. INTRODUCTION

In 1969, the drafters of the new Virginia Constitution—the Commission on Constitutional Revision (CCR)—included a proposed provision stating that "a charter county or a city may exercise any power or perform any function which is not denied to it by this Constitution, by its charter, or by laws enacted by the General Assembly. . . ."[1]

This proposed "home rule" provision was similar to a number of state constitutional provisions across the country,[2] so to the drafters it likely seemed straightforward and uncontroversial. Indeed, most states had adopted some form of home rule by the 1970s, either in a wave of Progressive Era reform or later during the mid-twentieth century.[3] It seemed natural that Virginia, in the course of bringing its 1902 Constitution into the modern era, would follow this trend.

The proposed home rule provision, however, was never included in the final draft constitution that was approved by the General Assembly and sent to the voters for ratification in 1970. It was quietly dropped. Today, over fifty years later, Virginia continues to adhere to a fairly strict form of Dillon's Rule, a rule of judicial construction that holds that local governments only enjoy those powers that are explicitly granted to them or fairly implied by the General Assembly. And though there have been

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[1] VA. COMM'N ON CONST. REVISION, THE CONSTITUTION OF VIRGINIA: REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION TO HIS EXCELLENCY, MILLS E. GODWIN, JR., GOVERNOR OF VIRGINIA, THE GENERAL ASSEMBLY OF VIRGINIA, AND THE PEOPLE OF VIRGINIA 228 (1969) [hereinafter CCR REPORT].

[2] *See* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 10-11 (1990); Kenneth Vanlandingham, *Constitutional Municipal Home Rule since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1, 2-9 (1975).

[3] *See* DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 493-95 (2001); Rick Su, *Have Cities Abandoned Home Rule?*, 44 FORDHAM URB. L.J. 181, 192-93 (2017); Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 273-74, 277 (1968).

repeated discussions of adopting home rule, the absence of a general grant of local authority in a modern, twenty-first century constitution is notable.

The CCR and the 1971 Constitution it brought about should be rightly celebrated for reforming the previous Jim Crow constitution and bringing Virginia into the modern era. But the 1971 Constitution is an imperfect document. This Essay discusses the 1971 Constitution's failure to adequately reform Virginia's local governments and places that failure in historical context. In tracing the genealogy of state-local government relations in the Commonwealth, one discovers a profound resistance to empowering local governments. As a formal matter, and despite reformers' repeated efforts, Virginia remains skeptical of devolving substantial power to local governments.

This skepticism is somewhat ironic in the home state of Thomas Jefferson, perhaps the most famous proponent of small-scale, yeoman-oriented republicanism. Jefferson had long advocated for subdividing counties into wards and devolving power to these smaller-scaled governments. He believed that his proposal, modeled after the New England township, would be "the most fundamental measure for securing good government, and for instilling the principles and exercise of self-government into every fibre [sic] of every member of our commonwealth."[4] But Jefferson's bid to remake Virginia's local governments in the wake of independence failed early on.

Almost 150 years before the General Assembly excluded the home rule language from the 1971 Constitution, Jefferson also failed to convince his fellow Virginians to reform its local government system. His proposal to divide the Commonwealth into wards never materialized during this lifetime and was rejected by the 1829-30 Convention that was called to revise Virginia's 1776 Constitution just three years after Jefferson's death.[5] The 1830 Constitution and subsequent antebellum constitutions did little to alter what Professor Daniel Farbman has labelled Virginia's "plantation localism,"[6] in which a powerful county court system, dominated by planter elites, governed slaves and poor whites alike.[7] After the Civil War,

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[4] Letter from Thomas Jefferson to Joseph C. Cabell, Esq. (June 5, 1824), *in* 14 THE WRITINGS OF THOMAS JEFFERSON 67, 70 (Andrew A. Lipscomb & Albert Ellery Bergh eds., libr. ed.) (1903).

[5] A. E. Dick Howard, *The Six Constitutions of Virginia*, *in* GOVERNING VIRGINIA 19, 25 (Anne Marie Morgan & A. R. Pete Giesen, Jr. eds., 2012).

[6] *See* Daniel Farbman, *Reconstructing Local Government*, 70 VAND. L. REV. 413, 419, 466-69 (2017).

[7] *See* VA. CONST. of 1830, art. V; PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-30, at 724-25 (Richmond, Samuel Shepherd & Co. 1830) [hereinafter PROCEEDINGS AND DEBATES OF 1829-30]; Howard, *supra* note 5.

Reconstruction-era efforts to introduce a township system to replace this unrepresentative, planter-dominated form of local government also failed once reactionary Southern Democrats regained power in the 1870s.[8] Late into the twentieth century, local government in Virginia was controlled by state officials operating through the county courts system, and specifically by the Byrd organization, a political machine run by Virginia's U.S. Senator Harry Byrd. Byrd, of course, was the father of Massive Resistance, Virginia's effort to resist and undermine the dismantling of the repressive Jim Crow system during the civil rights era.[9]

This history is informative as we reflect on the past and future of home rule in Virginia. The planters are mostly gone and local governments in the Commonwealth have been authorized by statute to exercise many of the conventional powers of local governments elsewhere.[10] But echoes of the old ways remain. The lack of effective local initiative power means that increasingly populous cities cannot address local problems in the first instance but must wait for legislative approval. And Dillon's Rule continues to be invoked to stymie local experimentation, entrenching a political culture of local passivity and permitting local officials to deflect responsibility by blaming the General Assembly for problems they would otherwise be compelled to address.

Tradition and the "Virginia way"[11] exert a strong pull. In one era, the distrust of local self-government may be driven by a planter aristocracy fearful of losing control of a restive local population. In another era, that distrust might be driven by entrenched interests comfortable with a system of legislative supremacy that serves to guard and enhance their influence in the General Assembly.

The dissatisfaction with the absence of local authority continues, however. In the fifty years since the 1971 Constitution was ratified, four commissions have been convened to consider reforms to Virginia's inter-

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[8] *See* Act of Apr. 15, 1874, ch. 188, 1874 Va. Laws 208; Farbman, *supra* note 6, at 466-69; Patrick M McSweeney, *Local Government Law in Virginia, 1870-1970*, 4 U. RICH. L. REV. 174, 188-91 (1970).

[9] *See generally* JAMES W. ELY, JR., THE CRISIS OF CONSERVATIVE VIRGINIA: THE BYRD ORGANIZATION AND THE POLITICS OF MASSIVE RESISTANCE (1976). *See also* V. O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 19-20 (1949); JOHN V. MOESER & RUTLEDGE M. DENNIS, THE POLITICS OF ANNEXATION: OLIGARCHIC POWER IN A SOUTHERN CITY 4-7 (1982).

[10] *See, e.g.*, VA. CODE ANN. § 15.1-510 (1973) (granting counties the power to adopt such measures not inconsistent with general law as may be expedient to promote health, safety, and general welfare); *id.* § 15.1-522 (1973) (vesting counties with the same constitutional and statutory powers granted to municipal governments); *id.* §§ 15.1-837 to -915 (granting broad local government powers to cities and towns through municipal charters).

[11] *See* John Chichester, *The Virginia Way*, *in* GOVERNING VIRGINIA, *supra* note 5, at 229-33 (describing the deep sense of duty, honor, civility, and integrity that characterizes Virginia's approach to governance as the "Virginia way").

governmental system.[12] Most recently, in 1992, a Governor's Advisory Commission recommended discarding the Dillon's Rule canon of strict construction, but the proposal was never taken up.[13] At the start of the second decade of the twenty-first century, highly salient state-local conflicts[14] have again emerged over Confederate monuments,[15] gun regulation,[16] environmental protection,[17] minimum wages,[18] mask mandates,[19] and anti-discrimination law.[20] Yet constitutional reform continues to elude those who, like Jefferson, have sought to empower local government in Virginia.

II. A BRIEF HISTORY OF VIRGINIA LOCAL GOVERNMENT REFORM

The historical arc of constitutional localism in Virginia begins with Jefferson's failed attempt to reform the county court system, which had dominated Virginia local government since colonial times. That initial failure was followed by other incomplete attempts to strengthen local government, all of which have reinforced the subordinate status of local government in Virginia.

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[12] *See* GOVERNOR'S ADVISORY COMM'N ON THE DILLON RULE AND LOC. GOV'T, REPORT OF THE GOVERNOR'S ADVISORY COMMISSION ON THE DILLON RULE AND LOCAL GOVERNMENT 3-4 (1992) [hereinafter COMMISSION ON THE DILLON RULE REPORT] (1975 Commission on City-County Relations (Stuart Commission), 1978 Commission on State Aid to Localities and Joint Subcommittee on Annexation (Michie Commission), 1990 Commission on Local Government Structure and Relationships (Grayson Commission), and 1992 Governor's Advisory Commission on the Dillon Rule and Local Government).

[13] *Id.* at 4, 32-33.

[14] *See generally* Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1 (2006); Richard Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018).

[15] *See, e.g.*, CHARLOTTESVILLE CITY COUNCIL, STATEMENT OF LEGISLATIVE POSITIONS FOR THE 2020 GENERAL ASSEMBLY SESSION 2 (2019), https://www.charlottesville.org/home/showdocument?id=67046; Graham Moomaw, *Virginia General Assembly Kills Legislation to Let Cities Remove Confederate Statues*, RICHMOND TIMES-DISPATCH (Jan. 31, 2018), https://www.richmond.com/news/local/government-politics/virginia-general-assembly-kills-legislation-to-let-cities-remove-confederate/article_6ccc1469-8035-5c28-b932-c12983ddfa2f.html.

[16] *See, e.g.*, Ned Oliver, *State Office Buildings Ban Guns, But Va. Law Blocks Local Governments from Restricting Weapons*, VA. MERCURY (June 1, 2019), https://www.virginiamercury.com/blog-va/state-office-buildings-ban-guns-but-va-law-blocks-local-governments-from-restricting-weapons.

[17] *See, e.g.*, Patricia Sullivan, *Why Arlington and Fairfax Can't Tax Plastic Bags—And Why that Might Change*, WASH. POST (Dec. 10, 2019), https://www.washingtonpost.com/local/virginia-politics/why-arlington-and-fairfax-cant-tax-plastic-bags--and-why-that-might-change/2019/12/09/0913fd32-1544-11ea-9110-3b34ce1d92b1_story.html.

[18] *See, e.g.*, CITY OF ALEXANDRIA, 2019 CITY OF ALEXANDRIA, VA LEGISLATIVE PACKAGE 5 (2019), https://www.alexandriava.gov/uploadedFiles/manager/info/2019LegislativePackageWeb.pdf.

[19] *See, e.g.*, Khalida Volou & Matthew Torres, *Seven School Districts File Lawsuit Against Gov. Youngkin Over Optional Mask Mandate Order*, WUSA90 (Jan. 25, 2022), https://www.wusa9.com/article/news/local/virginia/7-virginia-school-districts-file-lawsuit-against-gov-youngkin-over-mask-mandate/65-74bceb36-6132-4161-b37c-532403a097ba.

[20] *See, e.g.*, Patricia Davis, *Court Finds Arlington's Benefits Policy Illegal*, WASH. POST (Mar. 5, 1999), https://www.washingtonpost.com/wp-srv/local/daily/sept99/same030599.htm.

Jefferson, who had a significantly smaller role in drafting the original 1776 Virginia Constitution than he would have liked, hoped that the 1829-30 Convention would adopt his scheme for structuring local government.[21] He had long advocated for a "gradation of authorities"[22] model of government organization, embracing an "*imperio*" home rule model[23] of local government in which the state government would devolve not only administrative and judicial power, but the initiative power to administer purely local matters[24]—"the care of their poor, their roads, police, elections, the nomination of jurors, administration of justice in small cases, elementary exercises of militia"[25]—to local administrators. His aim, Jefferson wrote, was to divide Virginia's counties into local "wards," each of which would be responsible for matters of local significance and "thus be a small republic within itself."[26] This scheme was explicitly modeled on the New England township, which Jefferson admired. "The wit of man," Jefferson declared, could not "devise a more solid basis for a free, durable and well-administered republic" than his proposed system of local government.[27]

Unfortunately for Jefferson, the Virginia Constitution of 1830 did not incorporate his "gradation of authorities"[28] model for local government. Instead, it maintained the status quo, leaving in place the planter-dominated county courts, unrepresentative "self-perpetuating oligarchies,"[29] whose justices of the peace and other officers, selected by the planter elites and endowed with administrative and judicial powers, oversaw the majority of local affairs.[30] During the next two decades, Virginia's urban population grew, but the county system remained paramount, reflecting the continuing

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[21] NOBLE E. CUNNINGHAM, JR., IN PURSUIT OF REASON: THE LIFE OF THOMAS JEFFERSON 43-46, 53 (1987).

[22] Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816), *supra* note 4, at 417, 422.

[23] The term is taken from the Latin phrase, "*imperium in imperio*," meaning a "government within a government." The term came to be associated with local governments in the 1893 U.S. Supreme Court case, *City of St. Louis v. Western Union Tel. Co.*, in which the Court observed with respect to the City of St. Louis, Missouri, "[t]he city is in a very just sense an '*imperium in imperio*.' Its powers are self-appointed, and the reserved control existing in the general assembly does not take away this peculiar feature of its charter." 149 U.S. 465, 468 (1893).

[24] *See* GORDON L. CLARK, JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY 7, 78-79 (1985) (describing the *imperio* home rule model as one in which the local governments enjoy initiative power, immune from state legislative intervention, within a defined sphere of municipal affairs).

[25] Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), *in* 13 THE WRITINGS OF THOMAS JEFFERSON 394, 400 (Andrew A. Lipscomb & Albert Ellery Bergh eds., libr. ed.) (1903).

[26] Letter from Thomas Jefferson to Major John Cartwright (June 5, 1824), *in* 16 THE WRITINGS OF THOMAS JEFFERSON 42, 46 (Andrew A. Lipscomb & Albert Ellery Bergh eds., libr. ed.) (1903).

[27] *Id.*

[28] Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816), *supra* note 4.

[29] 2 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 784-87 (1974).

[30] *See* VA. CONST. of 1830, art. V; PROCEEDINGS AND DEBATES OF 1829-30, *supra* note 7; Howard, *supra* note 5.

dominance of an agricultural economy dependent on slave labor.[31] When Virginia revisited its constitution again during the Convention of 1850-51,[32] some reform finally emerged: the freehold requirement for suffrage was removed and all adult white males gained the vote;[33] the justices of the county courts were to be elected directly by the people,[34] as were all other county officers;[35] and the counties were divided into a new subunit of government, the district, each of which would contribute a justice to the county courts.[36] But the 1851 reforms did not, however, substantially challenge the traditional "plantation localism" that had long been allowed to dominate society in Virginia. Though the expanded suffrage was a clear attempt to democratize the county courts and theoretically made local government more representative, in reality, the large planters still exercised virtually absolute power over their domains, and the limited local government infrastructure that existed—in the form of county officials—was generally beholden to those planters whose wealth and influence remained largely unchecked. The needs of city or town governments generally went unmet.

A more dramatic effort to replace planter-dominated county courts with more representative local government occurred during Reconstruction.[37] As Professor Farbman has observed, the "feudal control of the planters on their plantations was eradicated with emancipation"[38] and the county governments, whose administrative and judicial authority had served to protect planters' prerogatives, had to be repurposed for a society that had added thousands of newly freed citizens.

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[31] *See* Steven Manson et al., *IPUMS National Historical Geographic Information System: Version 14.0*, NHGIS, nhgis.org (last visited Dec. 8, 2019) (1790 Census: Population Data [US, States & Counties]; 1820 Census: Population Data [US, States & Counties]; 1850 Census: Population, Agriculture & Other Data [US, States & Counties]). In the intervening three decades between the 1790 and 1820 U.S. censuses, Virginia's overall population grew by a healthy 30%, while its urban population more than doubled. Although the urban population remained small relative to the Commonwealth's overall population, it had grown appreciably and would only continue to do so in coming years. Indeed, by 1850, Virginia's urban population had nearly quadrupled in size since the Convention of 1829-30. Not only had the urban population grown, but the size of the cities in which those people lived had grown as well. By 1850, Virginia had its first city with a population of more than 25,000.

[32] WILLIAM J. VAN SCHREEVEN, THE CONVENTIONS AND CONSTITUTIONS OF VIRGINIA 1776-1966, at 7 (1967).

[33] VA. CONST. OF 1851, art. III, § 1.

[34] VA. CONST. OF 1851, art. VI, § 27.

[35] VA. CONST. OF 1851, art. VI, §§ 30-32.

[36] VA. CONST. OF 1851, art. VI, § 27.

[37] JOHN DINAN, THE VIRGINIA STATE CONSTITUTION 19 (2nd ed. 2014).

[38] Farbman, *supra* note 6, at 417.

Local government reform was central to this integrative mission. In the years immediately after the Civil War, "idealistic Yankee reformers"[39] sought to remake the fabric of southern local government by once again importing the model of the New England township. In Virginia, this reformist mission resulted in the Reconstruction Constitution, ratified in 1869 and approved by Congress in 1870, that adopted the township model for local government. That Constitution authorized the division of counties into townships, each with a body of locally elected officers, who would in turn comprise the "board of supervisors" that would govern the county as a whole.[40] The constitution also established a constitutional structure for cities and towns with a population of 5,000 or more residents, authorizing the General Assembly to organize and empower city and town governments by way of general law,[41] and for the first time also ushered in the use of special purpose districts, providing for both school districts[42] and road districts.[43]

The township model was also attempted in other southern states.[44] But in Virginia, constitutional reforms needed authorizing legislation from the General Assembly. Former slaveholders and other reactionaries noted with horror the prospect of some townships where whites would be under the control of "[a] negro sheriff, a negro attorney for the commonwealth, a negro county treasurer . . .".[45] Thus, with the retreat of Reconstruction, the township model was doomed. Radical Republicans put up a spirited defense of the township model, "framing it as the best hope for participatory self-government and the only engine for southern progress."[46] But by 1874, the Virginia Constitution was amended to remove the city and town government provisions and restore the district as the subunit of county government, and with it, the oligarchical county courts and the unrepresentative justices of the peace.[47] The brief experiment with townships in Virginia was easily dismantled. Weak county government, dominated by local elites, was preferable to collaborative self-government with former slaves.

Though the Jim Crow Constitution of 1902 did not alter this basic premise, the authors had no choice but to consider the needs of rising cities

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[39] *Id.*

[40] VA. CONST. of 1870, art. VII, § 2.

[41] VA. CONST. OF 1870, art. VI, §§ 14-21.

[42] VA. CONST. of 1870, art. VII, §§ 1, 3.

[43] VA. CONST. of 1870, art. VII, § 4.

[44] *See* Farbman, *supra* note 6, at 441-482.

[45] Address of the Conservative Members of the Late State Convention to the People of Virginia, PETERSBURG INDEX, Apr. 21, 1868, at 1.

[46] Farbman, *supra* note 6, at 468.

[47] Act of Apr. 15, 1874, ch. 188, 1874 Va. Laws 208; Farbman, *supra* note 6, at 469; McSweeney, *supra* note 8.

in a society that had previously been mostly rural. By 1900 nearly one in five Virginians lived in urban centers and one in ten lived in urban centers with a population of more than 25,000 residents.[48] In 1901, Virginia convened another constitutional convention. Two committees—the Committee on the Organization and Government of Counties (County Committee)[49] and the Committee on the Organization and Government of Cities and Towns (City and Town Committee)[50]—were tasked with assessing the status of Virginia's local governments. The former advocated little change. But the latter sought for the first time to bring a home rule article into the Virginia Constitution.

The recommendations of the City and Town Committee reflected the broader Progressive-Era trend in American state constitutional structure towards *imperio* home rule.[51] As the committee observed, no longer were cities merely large collections of people that could be administered the same way a rural, agrarian county could. The modern city had developed a "dual character."[52] The city was still, in some ways, "a governmental agency of the State"—a mere organ of state government—obligated "to carry out, within its territorial limits, the general policies of the State government."[53] But it was also now "itself a government," responsible for governing "the people resident within its limits, in accordance with their legitimate desires in all matters affecting them distinctively, and not related to the general welfare of the State."[54] The old way of governing cities was, in the eyes of the committee members, "at best unsatisfactory, if not inefficient and

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[48] *See* Manson et al., *supra* note 31 (1900 Census: Agriculture Data [US, States & Counties]; 1900 Census: Population, Housing, Agriculture & Manufacturing Data [US, States & Counties]).

[49] *Report of the Committee on the Organization and Government of Counties*, *in* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF VIRGINIA: HELD IN THE CITY OF RICHMOND, BEGINNING JUNE 12TH, 1901, at 1 (J. H. O'Bannon ed., 1901) [hereinafter Report of the County Committee].

[50] *Report of the Committee on the Organization and Government of Cities and Towns*, *in* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF VIRGINIA: HELD IN THE CITY OF RICHMOND, BEGINNING JUNE 12TH, 1901, *supra* note 49, at 1 [hereinafter Report of the City and Town Committee].

[51] *See* HOWARD LEE MCBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE 113 (1916) (cataloguing the adoption of home rule provisions similar to Missouri's 1875 constitutional home rule provision—the first in the nation); JON C. TEAFORD, THE UNHERALDED TRIUMPH: CITY GOVERNMENT IN AMERICA, 1870-1900, at 103-31 (1984) (describing the early spread of constitutional home rule provision in the United States); David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2288-92 (2003) (describing the popularization of municipal government scholarship in the late nineteenth and early twentieth centuries that both contributed to, and was symptomatic of, a growing national movement towards limited *imperio* home rule for America's cities).

[52] Report of the City and Town Committee, *supra* note 50, at 1.

[53] *Id. See also* Barron, *supra* note 51, at 2278. Professor Barron notes that this understanding of local governments as "mere creatures, agents, or subdivisions of the states in which they were located" typified American local government law for most of the nineteenth century.

[54] Report of the City and Town Committee, *supra* note 50, at 1.

inadequate."[55] What was needed instead was "to give the municipalities sufficiently large powers for the proper degree of local self-government," and for the General Assembly to resist "the temptation for interference . . . with the purely local affairs of such municipalities."[56] The City and Town Committee therefore recommended that "the general assembly [ ] give the largest possible powers of local self-government to cities and towns" and furthermore, that "some powers related to *home rule* . . . ought to be secured to these municipalities beyond the power of the Legislature to deny, and some, which should be withheld from them beyond the power of the Legislature to grant."[57]

The Constitution of 1902 mostly failed along this dimension, as it did along so many others. It is rightly remembered for its racist motivations, its repudiation of Virginia's Reconstruction Constitution and its noble ideals, and its effective entrenchment of white supremacy.[58] Nevertheless, there were some advances in the area of local government reform. For example, the 1902 Constitution recognized independent cities for the first time, empowered to govern themselves separately from the counties.[59] What is more, for the first time in Virginia's history, the state constitution recognized the need for some limited local government initiative authority to deal with pressing local issues, especially in the industrializing cities. It placed constitutional restraints on the General Assembly's power to pass "special legislation" or infringe on the local government interest in regulating certain narrow areas of local affairs.[60] Like other Progressive-Era state constitutions, Virginia's 1902 Constitution contained a mix of grants to and limitations on local government, at once acknowledging the needs of urbanizing areas but also imposing constraints.[61]

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[55] *Id.* at 5.

[56] *Id.* at 6.

[57] *Id.*

[58] *See* 2 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION SATE OF VIRGINIA: HELD IN THE CITY OF RICHMOND JUNE 12, 1901, TO JUNE 26, 1902, at 3076 (J. H. Lindsay ed., 1906); WYTHE HOLT, VIRGINIA'S CONSTITUTIONAL CONVENTION OF 1901-02, at 233-44, 254-59 (1990); Wythe J. Holt, Jr., *Constitutional Revision in Virginia, 1902 and 1928: Some Lessons on Roadblocks to Institutional Reform*, 54 Va. L. Rev. 903, 908-09 (1968).

[59] *See* VA. CONST. OF 1902, art. VIII.

[60] *See* VA. CONST. OF 1902, art. IV, §§ 63, 65 (restricting the use of special legislation and providing local governments with "powers of local and special legislation" by general law); *id.* art. VIII, § 117 (requiring the General Assembly to organize and empower city and town governments by way of general law and limiting the General Assembly's power to pass special legislation related to those general laws); *id.* § 124 (providing limited initiative power to local governments to control their streets immune from intervention by the General Assembly).

[61] *See* VA. CONST. OF 1902, art. VIII, §§ 125, 127-28 (restricting the authority of local governments to sell public property, issue bonds, or set local property tax rates). *See also* HOLT, *supra* note 58, at 204-

In this period, other states adopted constitutional home rule articles as part of the first wave of constitutional home rule reform. Those reforms often embraced an *imperio* theory harkening back to Jefferson: the notion that local governments could act as mini-sovereigns within their sphere of competence.[62] Virginia's reforms were much more limited. Notably, at the turn of the twentieth century, Virginia still had no large cities—nothing equivalent to Baltimore, Philadelphia, Chicago, St. Louis, or New York. Richmond, the largest city in the Commonwealth, had a population of about 85,000 in 1900—twice the size of the next largest municipality in the Commonwealth.[63] The relative dispersal of the Commonwealth's population, and the lack of a dominant city—politically or economically—meant that the campaign for home rule had no central champion as the Commonwealth entered the twentieth century.

At 178 pages, the 1902 Constitution was akin to a bloated statute. It cannot be said to have embraced any real kind of devolution, but kept power consolidated in the legislature. Subsequent revisions of the Virginia Constitution—in 1928, 1945, and 1956—were limited in scope and what changes they wrought were chiefly cosmetic.[64] Thus, when the Commission on Constitutional Revision was assembled in 1968 to once again consider revisions to the Virginia Constitution, it was dealing with a document that exhibited a striking resemblance to the Constitution of 1902. That document still bore the imprint of the county court system, though with some recognition that cities and towns had distinct interests and needs.

III. ASCENDENCY OF DILLON'S RULE

It is against this constitutional and demographic backdrop that the Supreme Court of Virginia was also considering the legal authority of local governments—and not to those governments' advantage. In the late 1800s, the Court adopted a highly restrictive version of Dillon's Rule, a judicial limitation on the power of Virginia local governments that has now been the law of Virginia for 140 years. The judicial embrace of Dillon's Rule and its rigorous application by the courts limited the effect of the already-limited 1902 constitutional reforms. More importantly, it chilled future exercises of

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05 (noting that the 1902 Constitution reinforced the control of the county courts—"the local institutional seats of corrupt political power"—over local government).

[62] CLARK, *supra* note 24; Briffault, *supra* note 2, at 10.

[63] U.S. DEP'T OF COM., BUREAU OF THE CENSUS, STATE COMPENDIUM: VIRGINIA 19-20 (1925).

[64] DINAN, *supra* note 37, at 3; A. E. Dick Howard, *Constitutional Revision: Virginia and the Nation*, 9 U. RICH. L. REV. 1, 3 (1974).

local power, entrenching a legal and political culture that took for granted the limits on local authority.

Dillon's Rule became the dominate rule in the late nineteenth century across the United States during a time of boom and bust, when successful towns were growing rapidly into cities and unsuccessful ones were failing spectacularly. In the mid- and late 1800s, states, cities, and towns found themselves financially overcommitted in economic downturns, having issued bonds supporting railroad and other development.[65] Numerous states and a significant number of cities around the country failed to repay their debts. For reformist-minded policymakers, restricting local authority was a way to counter local corruption and limit local giveaways to speculative enterprises.[66] Municipal government had to be constrained to pursue the public good and the public good had to be policed by courts interpreting any legislative grant of authority as narrowly as possible.

This position came to be represented by John F. Dillon, Chief Justice of the Iowa Supreme Court, judge on the U.S Court of Appeals for the Eighth Circuit, and later the Storrs Professor of Law at Yale University.[67] Dillon was the author of a seminal work on municipal corporations.[68] Writing for the Iowa Supreme Court in 1868 in *City of Clinton v. Cedar Rapids & Missouri River Railroad*,[69] Dillon first articulated the logic behind what would become his eponymous rule: local governments are public corporations and, unlike private corporations whose powers must be jealously guarded against state interference, are not entitled to constitutional protection.[70] By 1872, Dillon's Rule was widely understood to stand for the proposition that local governments can exercise those powers expressly

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[65] Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 92-94 (1986).

[66] RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 817 (7th ed. 2009); ERIC H. MONKKONEN, THE LOCAL STATE: PUBLIC MONEY AND AMERICAN CITIES 25-26 (1995); Richard Schragger, *Democracy and Debt*, 121 Yale L.J. 860, 862-63, 875-76 (2012).

[67] Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1109 (1980).

[68] JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 101-02 (Chicago, James Cockroft & Co. 1872).

[69] 24 Iowa 455, 475 (1868) ("Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, and the corporation could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the legislature.").

[70] *See* David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 506 (1999).

granted to them by the state or essential to their purpose, and that courts should apply strict construction when interpreting state grants of local power.[71] The proposition was immensely influential. By the end of the nineteenth century, almost every state had adopted some version of Dillon's Rule.[72]

Dillon represented only one possible version of nineteenth-century local power, however. Thomas M. Cooley, Chief Justice of the Michigan Supreme Court and one of the leading constitutional theorists of his day, provided an alternative view. Although both men were concerned that widespread public corruption imperiled public rights, they possessed differing views as to the source of that corruption. Dillon believed it was the local governments who were corrupt and therefore needed to be checked by the state.[73] By contrast, Cooley believed that it was the state legislatures, captured by the "great and wealthy corporations," who posed the greater threat to public right.[74] To counter this, and by extension, to counter Dillon's Rule, Cooley argued against the notion that states enjoyed absolute supremacy over local governments, instead relying upon history to assert the existence of an inherent right of local self-government.[75] Cooley clarified his position in a concurring opinion in *People* ex rel. *Le Roy v. Hurlbut* in 1871, asserting that "[t]he state may mould local institutions according to its views of policy or expediency; but local government is matter of absolute right; and the state cannot take it away."[76] Cooley reiterated this inherent right of local self-government in his influential constitutional treatise.

Virginia's treatment of the state-local relationship and the Dillon-Cooley battle largely mirrored the nation's. In attempting to demarcate the appropriate role of municipal corporations, the Supreme Court of Virginia followed in the footsteps of many of its peer benches, adopting the "creatures of the state" understanding of local governments subject to state domination.

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[71] *See* RICHARD SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 61 (2016).

[72] *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907); SCHRAGGER, *supra* note 71; Barron, *supra* note 70, at 509 ("Dillon's work has become such an established part of modern legal culture that, if there is one rule concerning local governments about which most persons are aware, it is his assertion that state law alone defines the scope of local governmental independence."); Edwin A. Gere, Jr., *Dillon's Rule and the Cooley Doctrine: Reflections of the Political Culture*, 8 J. OF URB. HIST. 271, 277 (1982) ("Dillon's Rule, acknowledged since [1872] as the fundamental view of state-local relationships in the United States.").

[73] Barron, *supra* note 51, at 2285.

[74] *See id.*; *see also* SCHRAGGER, *supra* note 71, at 63.

[75] *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE POWER OF THE STATES OF THE AMERICAN UNION 189-90 (Boston, Little, Brown & Co. 2nd ed. 1871).

[76] 24 Mich. 44, 108 (1871) (Cooley, J., concurring).

The Court initially hewed to the idea common to both Dillon and Cooley,[77] namely, that local governments, as public corporations, were governments of enumerated powers, which could only exercise those powers expressly or impliedly conferred, and those powers incidental to express grants, but subject to regulation.[78] Though local governments were thus understood to be governments of enumerated powers subject to state control, judges were still free to construe the powers conferred on local governments however they saw fit, and were not obliged to read grants of local power narrowly. In 1882, however, the Supreme Court of Virginia adopted Dillon's Rule in full, rejecting Cooley's doctrine, and imposing Dillon's canon of strict construction, resolving all doubts as to the existence of local government power against the locality.[79] Virginia had officially become a Dillon's Rule state.[80]

Whether it anticipated it or not, the Supreme Court of Virginia's early and complete adoption of Dillon's Rule in the 1880s had an immediate and lasting impact on state-local relations in Virginia. At the very moment when the Commonwealth was undergoing changes wrought by industrialization and the responsibilities and needs of local governments were increasing, the adoption of Dillon's Rule meant that existing local government powers would be read narrowly. Industrialization meant electrification, road-building, water-works, railroads, and street cars—the vast improvements of the emerging modern metropolis. As Virginia's urban centers grew, so too

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[77] *Compare* COOLEY, *supra* note 75, at 191 ("[Local governments] have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers, acting by a delegated authority; so that while the State legislature may exercise such powers of government coming within a proper designation of legislative power as are not expressly or impliedly prohibited, *the local authorities can exercise those only which are expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant*.") (emphasis added), *with* DILLON, *supra* note 68, at 101-02 ("It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no 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 declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.").

[78] *See* Ould & Carrington v. City of Richmond, 64 Va. 464, 467 (1873) (citing to Cooley for this understanding of enumerated local government powers).

[79] *See* Kirkham v. Russell, 76 Va. 956, 961 (1882) (citing DILLON ON MUNICIPAL CORPORATIONS § 91, 3rd ed.) ("[I]n the construction of charters of corporations, whether public or private, it is a settled rule of interpretation, established by repeated decisions of the highest courts in the land, that only such powers can be exercised under them as are clearly comprehended within the words of the charter, or derived therefrom by necessary implication, regard being had to the objects of the grant. And any doubt arising out of the terms used by the legislature must be resolved in favor of the public."). Any lingering doubt as Virginia's adherence to Dillon's Rule was dismissed by 1896 when, in the case of *City of Winchester v. Redmond*, the Supreme Court of Virginia directly quoted what we know as Dillon's Rule. 93 Va. 711, 714 (1896).

[80] A. E. S., Note, *Dillon's Rule: The Case for Reform*, 68 VA. L. REV. 693, 693-701 (1982).

did the needs, role, and influence of their local governments.[81] These challenges of local governing were reflected in the Town and City Committee's home rule proposal, fueling the local government reform efforts of the 1901-02 convention.[82] The local government reforms that resulted from that convention appeared generous at the time, but Virginia's adherence to Dillon's Rule blunted any positive effect the reforms might have had. Each time the reforms were cited as evidence of a grant of local government power, courts construed the grants narrowly against local governments.[83] Dillon's Rule rigidly fixed the limits of local government power just when they needed to be the most flexible.

To get around this impediment to local power, local governments increasingly turned to municipal charters, granted through special acts of the General Assembly, and specific statutory grants of power.[84] In principle, these charters could be used to grant specific local governments powers different from or in addition to existing powers granted by general law.[85] However, the process by which a local government could obtain a charter, the powers which could be conferred by that charter, and the legitimacy of that charter were not entirely clear.[86] When the traditional charter process proved insufficient to meet their needs, local governments turned to other statutory grants of power for redress. Several statutes were meant to give additional power to city and town governments,[87] as well as county governments,[88] but when local government action taken under these statutes was challenged in court, due to Virginia's adherence to Dillon's Rule, the judges construed the grants narrowly, a result supported by Virginia Attorney General opinions.[89] As a result, as Virginia entered the second half

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[81] *See* 2 HOWARD, *supra* note 29, at 788-89.

[82] *See supra* Part II.

[83] 2 HOWARD, *supra* note 29, at 790.

[84] *Id.* at 810.

[85] *See* Portsmouth v. Weiss, 145 Va. 94, 107, 116 (1926); J. DEVEREUX WEEKS & WALTER STONEHAM, DRAFTING A VIRGINIA MUNICIPAL CHARTER 6 (1963).

[86] WEEKS & STONEHAM, *supra* note 85, at 7-14.

[87] *See, e.g.*, Uniform Charter Provisions Act, VA. CODE ANN. §§ 15.1-837 to -915 (1973) (granting broad local government powers to cities and towns through municipal charters).

[88] *See, e.g.*, VA. CODE ANN. § 15.1-510 (1973) (granting counties the power to adopt such measures not inconsistent with general law as may be expedient to promote health, safety, and general welfare); *id.* § 15.1-522 (1973) (vesting counties with the same constitutional and statutory powers granted to municipal governments).

[89] *See, e.g.*, Bd. of Supervisors v. Corbett, 206 Va. 167 (1965) (statute granting counties the same powers as municipal governments held to confer only those powers granted to those governments through general law, not through charter); Old Dominion Land Co. v. Warwick County, 172 Va. 1960 (1939) (county ordinances prohibiting use of flush toilets unless connected to an approved sewage system held invalid under a narrow reading of "general welfare"); 1968-69 OP. VA. ATT'Y GEN. 49 (concluding that ordinances designed to alleviate poverty did not fall under the general welfare provision of VA. CODE

of the twentieth century, its local governments had few powers at their disposal—those limited home rule powers granted in the Virginia Constitution, and those powers granted through charters and general law, which had been narrowly construed thanks to Dillon's Rule—to deal with a host of new and pressing local issues.[90]

IV. COMMISSION ON CONSTITUTIONAL REVISION AND THE HOME RULE PROVISION

By the late 1960s, the limitations of Dillon's Rule were evident, as they had been over fifty years before. So, it came as no surpise when in 1969, the Commission on Constitutional Revision proposed language that would do away with Dillon's Rule and provide local governments with the power to initiate legislation across the entire range of subjects up to the limits of state law. Home rule initiative articles in state constitutions were and continue to be common across the country. Many were modeled on articles proposed by the American Municipal Association (AMA) in 1953, which permitted local governments to act in the absence of a specific grant of legislative authority.[91] Some states also adopted immunity provisions, modeled on the old *imperio* model, that protected local governments from contrary state laws at least within a narrow "local" sphere of authority.[92] Virginia's constitutional reformers never contemplated immunity, but the initiative power seemed well within the norms of state constitutional revision in the late 1960s.[93] That this general legislative authority turned out to be a step too far illustrates how deeply Virginia's political culture had internalized Dillon's Rule.

ANN. § 15.1-510); *id.* at 54-55 (excluding charter powers from the grant of power to counties under VA. CODE ANN. § 15.1-522); 1962-63 OP. VA. ATT'Y GEN. 34 (determining that powers granted to municipalities under VA. CODE ANN. §§ 15.1-837 to -915 were only enjoyed by municipalities when their charters specifically included them; even where a municipal charter included those powers, they did not extend to counties under VA. CODE ANN. § 15.1-522 because they were not a grant of general law).

[90] *See* 2 HOWARD, *supra* note 29, at 791, 811; VA. METRO. AREAS STUDY COMM'N, METROPOLITAN VIRGINIA 1967: A BRIEF ASSESSMENT 10-11, 24-33 (1967). Formed in 1967, the Metropolitan Areas Study Commission was charged with studying Virginia's metropolitan areas, identifying their needs, and proposing solutions to address those needs. Among the pressing local issues identified in the Commission's report were those concerning water, sanitation, air pollution, transportation, urban development, annexation, complex intergovernmental agreements, and governmental fragmentation, all of which were exacerbated by the inadequacy of existing powers, structure, and financing. VA. METRO. AREAS STUDY COMM'N, *supra* note 90, at 24-30.

[91] Vanlandingham, *supra* note 2, at 2-5.

[92] *See* Briffault, *supra* note 2, at 10; Vanlandingham, *supra* note 2, at 8.

[93] *See* Am. Mun. Ass'n, Model Constitutional Provisions for Municipal Home Rule 6 (1953).

The unwillingness to authorize the local initiative power was somewhat surprising in light of the legislators' general receptivity to constitutional reform and the fundamental purpose of constitutional revision—to bring the nearly seventy-year-old Constitution of 1902 into the modern era. In his welcoming address to the General Assembly, Governor Mills E. Godwin, Jr. acknowledged that the effects of the "inexorable passage of time"[94] weighed heavily on the constitution. Outdated, the constitution was increasingly proving ill-equipped to address many of the most pressing issues of the day,[95] including the "vexing problems surrounding Virginia's rapid urban growth."[96] Seizing on the moment, Godwin called on the General Assembly to authorize the formation of a Commission on Constitutional Revision (CCR), unrestricted in scope, to undertake the task of reviewing the constitution and proposing such revisions as would be in the Commonwealth's best interest.[97] The General Assembly shortly thereafter passed a joint resolution authorizing the creation of a CCR to conduct a thorough review of the constitution, prepare reasonable proposals to address any perceived shortcomings, and make a final report to the Governor and General Assembly.[98]

Appointed by the Governor later that month, the members of the CCR quickly divided themselves into five subcommittees drawn along topical lines. Among those five was the Subcommittee on Local Government (SLG), charged with "studying the forms, functions, and powers of counties, cities, towns, and other units of government in Virginia, including review of

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[94] Mills E. Godwin, Jr., Governor, Address to the General Assembly (Jan. 10, 1968), *in* Senate Docket No. 1, at 10.

[95] *See* Holt, *Constitutional Revision in Virginia, 1902 and 1928*, *supra* note 58, at 904-05 (noting the issues stemming from urban growth in Virginia, including issues involving government financing, burdensome legislative workloads, weak and inflexible local governments, and voting requirements).

[96] Mills E. Godwin, Jr., Governor, Address to the General Assembly, *supra* note 94, at 9. *See also* Manson et al., *supra* note 31 (1900 Census: Agriculture Data [US, States & Counties]; 1900 Census: Population, Housing, Agriculture & Manufacturing Data [US, States & Counties]; 1960 Census: Population Data [US, States & Counties]). Since Virginia's 1901-02 Constitutional Convention, the Commonwealth's demographic shift from a rural, agrarian population to an increasingly urban population had accelerated dramatically. The intervening years between each past convention or revision had seen shifts towards urbanism too, but none as dramatic as the shift between the 1901-02 Convention and the 1968 formation of the CCR. Between 1900 and 1960, Virginia's urban population grew by 636% while the rural population contracted by 10%. As a result, for the first time in the Commonwealth's history, its urban population (66%) exceeded its rural population (44%). Although Virginia's urban population had decreased slightly by the 1970 census, that loss had been more than made up for by the 1980 census and the urban population has only continued to increase since. *Id.* (1970 Census: Count 1 - 100% Data [Block Groups, Enum, Districts, Cong. Districts, etc.]; 1980 Census: STFI 1 - 100% Data; 1990 Census: STF 3 - Sample-Based Data; 2000 Census: SF 1a – 100% Data [Areas Larger Than Block Groups]; 2010 Census: SF 1a – P & H Tables [Blocks & Larger Areas]).

[97] H.R.J. Res. 3, 1968 Gen. Assemb., 1968 Reg. Sess. (Va. 1968); CCR REPORT, *supra* note 1, at 1.

[98] *Id.*

the recommendations of the Metropolitan Areas Study Commission."[99] Accordingly, the SLG would review not only Articles VII and VIII of the Virginia Constitution, which dealt directly with local government, but also any other section or article that was seen to touch on the topic.[100] Having received its directive, the SLG set about its work that spring and continued into the summer, drafting legal memos, reviewing public comments, attending public hearings, consulting with advisors, and, eventually, drafting proposed solutions to address the problems with Virginia's local government structure the SLG had identified.

Among the most significant local government matters the SLG considered was the question of home rule. In the lead up to 1968, the United States had witnessed a second wave of home rule reform following the publication of the AMA's *Model Constitutional Provisions for Home Rule* in 1953.[101] Given the difficulties of adapting Virginia's local government structure to modern times due, in part, to the Commonwealth's adherence to Dillon's Rule, it seemed reasonable to expect that Virginia would follow the national trend towards home rule. But as the SLG conducted its research that summer, it became clear that this was hardly a settled matter. Early on in the revision process, home rule, or something like it, was supported by many Virginians and Virginian organizations, including the Virginia Association of Counties (VACo),[102] the ACLU of Virginia,[103] and an assortment of city and county attorneys, Democratic organizers, and local leaders.[104] There were, of course, those who opposed home rule or thought it unnecessary, including legal scholars[105] and, somewhat counterintuitively, the Virginia Municipal League (VML).[106]

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[99] CCR REPORT, *supra* note 1, at 2; *see also supra* note 85 and accompanying text.

[100] CCR REPORT, *supra* note 1, at 2.

[101] *See* Vanlandingham, *supra* note 2, at 3-5, n.9.

[102] *See* Memorandum from Prof. A.E. Dick Howard, Exec. Sec'y, CCR, to CCR and Staff (July 29, 1968) 2 (on file with the University of Virginia Law Library) (regarding recommendations from the Executive Board of the Virginia Association of Counties, proposing that Virginia's local governments be given all powers not delegated to the federal or state government or prohibited by the constitutions or laws of the same).

[103] *See* Letter from Lauren Selden, Exec. Dir., ACLU of Virginia, to Prof. A. E. Dick Howard, Exec. Sec'y, CCR 3 (Sept. 9, 1968) (on file with the University of Virginia Law Library) (calling for constitutional guarantees of home rule powers).

[104] *See* Memorandum from Micki Regan to Jack Spain, Jr., Summary of Public Views on Local Government 1-3 (Aug. 14, 1968) (on file with the University of Virginia Law Library) (noting the calls for home rule, a right to local representative government, and broad local powers).

[105] *See, e.g.*, Armistead L. Boothe, *The Adequacy of the Virginia Constitution of 1902*, 54 VA. L. REV. 981, 991-92 (1968); David J. Mays, *Some Thoughts on Revision of the Virginia Constitution*, 54 VA. L. REV. 974, 977-78 (1968).

[106] *See* Memorandum from the Va. Mun. League to the CCR, Recommendations of Special Committee of Virginia Municipal League on Revision of Virginia Constitution 1 (May 27, 1968) (on file

More common, however, were those who were ambivalent as to whether or not the Commonwealth should adopt home rule and argued instead for whatever solution would give local governments sufficiently broad powers to tackle local issues while generating minimal litigation.[107] Although there was little consensus as to whether or not the Commonwealth should adopt home rule, one thing was clear to the SLG: whatever recommendations the CCR made, it should be certain that they were aimed at giving local governments broad powers such that they could address the multitude of complex issues they were currently facing.

The public comments the SLG received helped to establish what the end of the Subcommittee's work should be—broad powers for all local governments—but they failed to identify the means by which to achieve that end. In selecting the means, the SLG considered three questions. The SLG first considered whether or not an amendment giving local governments all powers not specifically denied to them by the constitution, their charters, or general law would actually endow local governments with more authority than the existing broad statutory grants of power to local governments in Virginia. The SLG resolved this question in the negative. Although Virginia had, in principle, extended broad powers to its local governments through municipal charter provisions, general law provisions, and provisions designed to equalize power between local governments,[108] both the courts and the Virginia Attorney General had construed these grants so narrowly that they were incapable of fulfilling the purpose for which they were designed.[109] Accordingly, the SLG determined that only a new constitutional provision could give Virginia's local governments all powers not otherwise specifically denied to them.

The SLG then considered, were the Commonwealth to abandon Dillon's Rule as a canon of strict construction, how would it do so? In answering this

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with the University of Virginia Law Library) (advocating for the existing municipal charter right provision as the type of home rule provision "best suited" to individual communities); Letter from C. B. Mattox, Jr., Chairman, Va. Mun. League, to the CCR 2 (July 17, 1968) (on file with the University of Virginia Law Library) (advocating for the existing municipal charter right provision as the "best" type of home rule and warning that efforts to secure other home rule provisions might harm the prospects for getting more important reforms).

[107] *See, e.g.*, Weldon Cooper, *Local Government and State Constitutional Revision*, 3 VA. TOWN & CITY 17, 17-18 (1968) (arguing that the municipal charter provision should be read broadly and extended to counties such that all local governments would enjoy the same, broad powers subject to minimal state intervention).

[108] *See supra* notes 85-87 and accompanying text.

[109] *See supra* note 87 and accompanying text; Memorandum from Dan Winterbottom, Jr. to Jack Spain, Jr., Whether Va. Code Ann. §§ 15.1-510, 15.1-839, and 15.1-522 (1964 repl. Vol.) Confer on Counties, Cities, and Towns All Authority Not Denied Them in the Constitution and by More Specific Statutes 1-2 (Aug. 9, 1968) (on file with the University of Virginia Law Library).

question, the SLG looked to the constitutions of Alaska, Massachusetts, and Texas, the three states that had, by that point, reversed Dillon's Rule and granted their local governments "all powers not expressly denied."[110] That review led the SLG to conclude that the most effective way of reversing Dillon's Rule would be to adopt a constitutional amendment extending broad grants of power onto chartered local government units that met a previously determined population threshold.[111]

Finally, the SLG considered, were the Commonwealth to adopt a constitutional home rule amendment overturning Dillon's Rule, what, if any, specific limitations on local government power would need to be affixed to it? After reviewing the home rule provision in the National Municipal League's (NML) *Model State Constitution*,[112] as well as the home rule provisions of the three states that had adopted the NML's model, the SLG determined that it was best to limit the home rule provision generally, rather than clutter the constitution with specific enumerated restrictions on local home rule authority.[113] After conducting this exhaustive analysis, the SLG settled on the means by which it would achieve the stated end of granting broad powers to local governments.

The means the SLG settled on became Article VII, Section 3 of the CCR's proposed revisions to the Virginia Constitution—the home rule provision.[114] Drawn heavily from the NML *Model State Constitution* and the Alaska and Texas home rule amendments, the provision read, "[a] charter county or a city may exercise any power or perform any function which is not denied to it by this Constitution, by its charter, or by laws enacted by the General Assembly pursuant to section 2 [the provision on the organization of local government]." It was a simple, yet forceful endorsement of broad home rule authority for Virginia's local governments.[115] Faithful to the

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[110] Memorandum from Micki Regan to Jack Spain, Jr., Home Rule Statute Law in STATES WITH BROAD GRANTS OF HOME RULE 1 (Aug. 21, 1968) (on file with the University of Virginia Law Library).

[111] *Id.* at 12.

[112] MODEL STATE CONSTITUTION § 8.02 (Nat'l Mun. League, 6th ed. 1963) ("Section 8.02. Powers of Counties and Cities. A county or city may exercise any legislative power or perform any function which is not denied to it by its charter, is not denied to counties or cities generally, or to counties or cities of its class, and is within such limitations as the legislature may establish by general law. This grant of home rule powers shall not include the power to enact private or civil law governing civil relationships except as incident to an exercise of an independent county or city power, nor shall it include power to define and provide for the punishment of a felony.").

[113] Memorandum from Dan Winterbottom, Jr. to Jack Spain, Jr., Limitations Which State Constitutions Place on a City, Town, or County's Exercise of its "Home-Rule" Powers 1, 3, 6 (Aug. 14, 1968) (on file with the University of Virginia Law Library).

[114] *See* CCR REPORT, *supra* note 1, at 228.

[115] The home rule provision did not grant all powers not otherwise denied to towns. Had towns been included, the fear was that it would have resulted in too much fragmentation of local governance. Although the provision was eventually nixed by the General Assembly and had no effect on local

generally held desire among those whose input the SLG considered early on in its work, the CCR's home rule provision gave local governments sweeping power to address the issues with which they were confronted. This broad authorization was, however, balanced by the General Assembly's authority to limit by general law the powers local governments enjoyed under the provision. All in all, the provision actually afforded local governments hardly any more power than they already enjoyed in principle under the Commonwealth's existing statutory regime of local government power. The difference was that, in abolishing Dillon's Rule, this constitutional grant actually accomplished what the statutory grants had heretofore failed to do—it *actually*, not just theoretically, empowered local governments.[116]

When the CCR submitted its final report and proposals to the Governor and General Assembly for consideration on January 1, 1969, few would have thought that the home rule provision would cause much of a stir. It was hardly a revolutionary proposal, hewing closely to the national trend towards legislative home rule initiated by the AMA's *Model Provisions for Home Rule* and keeping with the legislative intent of the General Assembly's past statutory grants of enlarged local government powers.

But shortly after being made public, it was assailed from all sides, including by its most likely supporters. There is no way to know exactly what brought about this hostility. At least one commentator has suggested that the spark that set off this opposition was a line from the Executive Assistant to the Governor's summary of the CCR's proposals,[117] released shortly after the CCR's report, which "erroneous[ly]" asserted that the home rule proposal "would loosen some of the legislative reins on local governments . . . principally by reversing the present constitutional philosophy" and necessitate that the General Assembly "start from scratch and outline by statute the organization, government, powers, changes of boundaries, consolidation and dissolution of counties, cities, towns, and regional governments."[118] This was, indeed, a mischaracterization of the

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government, at least one member of the VML objected to the provision's denial of home rule power to Virginia's towns. *See* Memorandum, Hearings on Local Government 3 (Mar. 6, 1969) (on file with the University of Virginia Law Library).

[116] *See* CCR REPORT, *supra* note 1, at 228-29. The CCR Report's commentary on the home rule provision makes this very point. The proposal was not meant to upset any careful balance of state-local power, but to effectuate the balance that the General Assembly had sought to implement, but failed to realize, through statutory grants.

[117] JOHN H. WESSELL, JR., SUMMARY OF RECOMMENDATIONS TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA BY THE COMMISSION ON CONSTITUTIONAL REVISION 8 (1969).

[118] Jack Spain, Jr., *The General Assembly and Local Government: Legislating a Constitution 1969-70*, 8 U. RICH. L. REV. 387, 390 (1974) ("This summary was erroneous . . . . By the wide distribution of

CCR's proposal, and certainly did the CCR no favors. But whether this line was truly what sparked the opposition to the home rule proposal seems questionable.

Judging from the written statements of the two loudest, most influential, and most surprising critics of the home rule provision—the VML and the VACo—it seems more likely that the opposition originated more from misunderstanding, fear of the unknown, shortsightedness, and a regrettably idealized perception of local government power in Virginia under the existing regime.

From the start, the VML had been against home rule.[119] When the CCR released its proposal for a home rule provision, the VML reiterated its opposition, arguing as it had before that Virginia's local governments received "good treatment from [the] General Assembly" and enjoyed powers that were "presently sufficient;" home rule was an unnecessary reform that would have an "unknown" impact on local government.[120] Unlike the VML, the VACo had originally been supportive of some form of home rule,[121] but after reviewing the CCR's home rule provision, the VACo reversed course and advocated strongly against home rule. Echoing the VML's arguments, the VACo maintained that "Virginia's localities are quite well equipped to discharge the responsibilities of local government . . . . and . . . [already] enjoy almost the same authority enjoyed by 'home rule' counties in other states under the present general law basis."[122] As the VACo saw it, Virginia's local governments already had "home rule without home rule;" it would be "unnecessary, redundant, and unquestionably damaging to add to the Virginia system what already exists, when in the process of making the addition, there is certain to be years of litigation, uncertainty, confusion, and maneuvering that does not now exist."[123]

The notion that the one-sentence home rule initiative provision could be "unquestionably damaging" to local governments is a little puzzling. But the VML and VACo's lack of support undoubtedly induced or at least gave cover to the General Assembly to kill the provision. After reviewing the CCR's proposals and taking comments from the public, both the House of

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this summary immediately prior to the session, the chances of the Local Government Article being adopted without substantial amendment were greatly damaged.").

[119] *See supra* note 106.

[120] Memorandum, *supra* note 113, at 4-5.

[121] *See supra* note 102.

[122] Memorandum from the Va. Ass'n of Ctys., Statement on the Proposed Revised Constitution 7 (Mar. 6, 1969) (on file with the University of Virginia Law Library).

[123] Memorandum from the Va. Ass'n of Ctys., The Concept of "Home Rule" and Va. Local Gov't 4 (Mar. 6, 1969) (on file with the University of Virginia Law Library) (emphasis added).

Delegates and the Senate excised the home rule provision, citing the "unanimous" opposition of local government representatives to the proposal.[124] And just like that, the CCR's home rule provision was dead; Virginia would remain a Dillon's Rule state.

V. THE RACIAL POLITICS OF LOCAL GOVERNMENT REFORM

It is difficult to know exactly what precipitated the ignominious end to the home rule effort in Virginia during the 1969 constitutional revision. Certainly, the most immediate justification for the General Assembly's rejection was the VML and VACo's opposition. Chiefly concerned with the uncertain effects the home rule provision would have on their constituents were it adopted, the VML and the VACo made clear that they did not want home rule and would not support the provision.[125]

There was little support for the other side. At the 1969 Hearings on Local Government, only the representatives from Fairfax County and Wytheville came out in support of the home rule provision, while the representatives from Norfolk, Richmond, Hampton, Manassas, and Vienna, as well as the representative from the Virginia Manufactures Association, all joined the VML and VACo in their opposition to the provision.[126] And although the CCR clearly believed that the home rule provision was warranted, the CCR members were barred from advocating for the provision, whereas the detractors were empowered to argue as vociferously as they wished. With the CCR members gagged and few other advocates for the provision, the General Assembly was given little reason to retain the provision.

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[124] *See* PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA PERTAINING TO AMENDMENT OF THE CONSTITUTION, EXTRA SESSION 1969, REGULAR SESSION 1970, at 312 (Charles K. Woltz ed., 1970) ("We also felt that we should adhere to the rule of strict construction of the laws pertaining to localities. There again we negated the recommendation of the Revision Commission. On [this point] *representatives from the counties, cities and towns were unanimously in agreement with the committee. They felt that we should continue to have charter rights granted by the General Assembly under strict construction of the law*.") (emphasis added); PROCEEDINGS AND DEBATES OF THE HOUSE OF DELEGATES PERTAINING TO AMENDMENT OF THE CONSTITUTION, EXTRA SESSION 1969, REGULAR SESSION 1970, at 505-06 (Charles K. Woltz ed., 1970) ("The committee does not recommend a constitutional provision proposed by the Commission to reverse the so-called 'Dillon' rule of strict construction of municipal powers. The first sentence of Section 3 as introduced, therefore, has been deleted. *The Municipal League also told the committee it was against this change because, as a matter of experience it felt the General Assembly had granted to cities the powers they need and desire*.") (emphasis added).

[125] *See* Spain, *supra* note 118, at 428 ("[T]he Commission recommended that the so-called Dillon Rule be repealed in the Constitution . . . . [T]he representatives of the city and town organizations told the General Assembly they did not desire this change, and, again, the General Assembly had little choice.").

[126] *See* Memorandum, *supra* note 113, at 1, 3-6.

The Commonwealth's shifting demographics also likely played a role. It is notable that Virginia rejected home rule at a moment of intergovernmental ferment, when the racial politics of city power was a central issue of metropolitan-area reform across the country. Throughout the postwar period, and accelerating in the 1960s, Virginia cities sought to annex county land and counties began to resist annexation as suburban development and white flight were rapidly changing the make-up of urban and formerly rural areas.[127]

Consider that by 1970, Richmond's population had been declining for at least a decade as white residents decamped to the suburbs.[128] In 1960, Richmond's African-American population had reached 42%.[129] The prospect of a majority black city alarmed the city's white leaders, who sought to delay the demographic transformation by annexing predominantly white areas of surrounding counties and changing the city council to an at-large system. In 1961, the city made an attempt to merge with neighboring Henrico County, but that effort soon failed.[130] Undeterred, in 1962, the city sought to annex large swaths of both Henrico and Chesterfield counties. When the Henrico annexation proposal failed in 1965,[131] the city refocused its efforts on Chesterfield and by 1970 was successful in annexing 44,000 residents, 97% of whom were white, and reducing the city's African-American population from 52% in 1969 to 42% in 1970.[132] That annexation was challenged by black Richmonders, who charged (correctly) that it was intended to dilute the African-American vote[133] in violation of the Fifteenth Amendment[134] and the Voting Rights Act.[135] Although the U.S. Supreme

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[127] *See* Edward L. Morton, *Municipal Annexation in Virginia, 1960-1970*, 48 U. VA. NEWSL. 33, 34 (May 15, 1972). Between 1960 and 1970 alone, Virginia's cities and towns annexed 149.17 square miles and almost 125,000 residents.

[128] Manson et al., *supra* note 31 (1950 Census: Population, Housing & Agriculture Data [US, States & Counties]; 1960 Census: Population Data [US, States, Counties]). Richmond's population decreased by 10,352 people to 219,958 between 1950 and 1960.

[129] Manson et al., *supra* note 31 (1960 Census: Population Data [US, States, Counties]).

[130] MOESER & DENNIS, *supra* note 9, at 35-39; ADVISORY COMM. FOR HENRICO CTY. & ADVISORY COMM. FOR THE CITY OF RICHMOND, REPORT OF THE ADVISORY COMMITTEES FOR THE CONSOLIDATION OF THE CITY OF RICHMOND AND HENRICO CTY. (July 31, 1961) (outlining the proposed merger).

[131] JULIAN MAXWELL HAYTER, THE DREAM IS LOST: VOTING RIGHTS AND THE POLITICS OF RACE IN RICHMOND, VIRGINIA 92 (2017).

[132] *Id.* at 107; MOESER & DENNIS, *supra* note 9, at 122.

[133] *See* City of Richmond v. United States, 422 U.S. 358, app. vol. II at 343-44, 355, 380-81 (1975). Two people testified at trial that they remembered Phil J. Bagley, Jr., the Mayor of Richmond who helped negotiate the Chesterfield annexation at issue in the case, advocating for the annexation on the grounds that he "did not believe the Niggers were qualified to run [Richmond]" and that "[a]s long as [he was] the Mayor of the City of Richmond the niggers won't take over this town."

[134] *See* Holt v. City of Richmond (*Holt I*), 344 F. Supp. 228 (E.D. Va. 1971), *rev'd en banc*, 459 F.2d 1093 (4th Cir. 1972), *cert. denied*, 408 U.S. 931 (1972).

[135] *See* City of Richmond v. United States, 376 F. Supp. 1344 (D.D.C. 1974).

Court did not review the Fifteenth Amendment challenge, preferring instead to allow the appeals court decision to stand, it did review the Voting Rights Act challenge.[136] The annexation was not reversed, but Richmond's at-large electoral system was invalidated and replaced with a system of majority-minority council districts meant to ensure African-American representation on the city council.[137]

Another example of racially-motivated boundary change involved Newport News, in which the percentage of African-Americans was increasing rapidly in the 1950s while the city's middle- and upper-income white residents began moving to the surrounding suburbs in Elizabeth City and the City of Warwick.[138] The Newport News city council, like its counterpart in Richmond, feared the prospect of black political control in the city, but unlike Richmond, Newport News was not an independent city or county and could not unilaterally annex the surrounding white suburbs.[139] Instead, the city proposed merging with the independent City of Warwick. After several years of campaigning, in 1957, Newport News and Warwick officially merged. The result was just as Newport News' white leaders had hoped: the city's African-American population dropped from 43.3% in 1950 to 34.4% in 1960 and the prospect of black political control evaporated.[140]

In Norfolk, the percentage of African-Americans was also increasing rapidly in the 1960s.[141] Fearful of the possibility that Norfolk would seek to annex its unincorporated neighbors, Virginia Beach and Princess Anne County agreed to a defensive merger in 1963, creating the City of Virginia Beach, today Virginia's largest city.[142] The new Virginia Beach, suburban and rural, grew dramatically following the merger, while the old industrial city of Norfolk stagnated on its way to becoming an increasingly African-American city.[143]

Did the opposition to home rule have anything to do with these shifting demographics, as city and state leaders contemplated the real possibility of majority-minority cities exercising home rule powers? Richmond's white leaders, both city and state officials, were certainly in agreement concerning

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[136] *See* City of Richmond v. United States, 422 U.S. 358 (1975).

[137] *Id.*; HAYTER, *supra* note 131, at 1-2.

[138] DAVID G. TEMPLE, MERGER POLITICS: LOCAL GOVERNMENT CONSOLIDATION IN TIDEWATER VIRGINIA 47 (1972).

[139] *Id.*

[140] *Id.* at 10-11, 178.

[141] *Id.* at 10.

[142] *Id.* at 73-83.

[143] U.S. CENSUS BUREAU, QUICK FACTS: NORFOLK CITY, VIRGINIA, https://www.census.gov/quickfacts/norfolkcityvirginia

the threat of impending African-American rule. As John Moeser and Rutledge Dennis observe, "[b]y 1968, the shifts in [Richmond's] population and the incursion of what many whites viewed as 'less responsive' blacks into white political sanctuaries had gained the attention of state officials."[144] White political dominance had been taken for granted for so long. Indeed, in 1969, as the General Assembly considered the home rule provision proposal, only one of the one hundred members of the Virginia House of Delegates, Dr. William Ferguson Reid of Richmond, was African-American.[145] In 1970, Douglas Wilder, another black Richmonder, was elected to the state Senate, but he was the first African-American to join that body since 1890.[146] At the local level, no Virginia county had a black constitutional officer in modern times until 1968, when an African-American county sheriff and county clerk were sworn in in Charles City County.[147] The first black-majority city council was elected in Petersburg in 1973.[148] However, Richmond did not have an African-American mayor or black-majority council until 1977.[149] Unsurprisingly, the leadership of the VML was entirely white (and male) in 1969.[150]

It is also plausible that city and county leaders did not want to upset what they perceived to be a cooperative relationship with the General Assembly and governor. The reformist Constitution of 1971 was in many ways a response to the political machine that had dominated Virginia politics for much of the twentieth century. From the turn of the century to the late 1960s, the Byrd Organization, led by former Governor and U.S. Senator Harry F. Byrd, Sr., controlled the politics of the state through its network of "courthouse cliques."[151] The county court system that both Jefferson and the Reconstruction reformers had sought to defang in previous eras was repurposed into a highly disciplined state-wide machine, one in which power was "closely held by a small group of leaders."[152]

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[144] MOESER & DENNIS, *supra* note 9, at 76.

[145] *See At Least 3 Negroes Win Mississippi Contests – Negro Wins in Virginia*, N.Y. TIMES, Nov. 8, 1967, at 38 (noting that Dr. Reid was the first African-American elected to the House of Delegates since 1891).

[146] See *First Negro Since 1890 Elected to Virginia Senate*, N.Y. TIMES, Dec. 3, 1969, at 37.

[147] *See Negro Sheriff, Clerk Sworn In*, WASH. POST, Jan. 2, 1968, at B1 (Sheriff James N. Bradby and County Clerk Iona W. Adkins).

[148] *See 4 Blacks on Council: Political History in Petersburg*, NEW J. & GUIDE, June 23, 1973, at 1.

[149] HAYTER, *supra* note 131, at 1-2, 148; *Richmond Council Elects Marsh as 1st Black Mayor*, WASH. POST, Mar. 9, 1977, at A20.

[150] *See The 1969 League Convention*, VA. TOWN & CITY, Sept. 1969, at 49, 51 (photographs of Virginia Municipal League officers); *The 1970 League Convention*, VA. TOWN & CITY, Sept. 1970, at 55, 56-7 (photographs of Virginia Municipal League officers).

[151] *See* RONALD L. HEINEMANN, HARRY BYRD OF VIRGINIA 12-13, 44-45 (1996).

[152] KEY, *supra* note 9, at 19.

The Byrd Organization controlled and distributed power through county-level constitutional officers—the sheriff, Commonwealth's attorney, clerk of the court, county treasurer, and commissioner of revenue. It maintained its stranglehold on Virginia politics in part by keeping local governments beholden to the Byrd-controlled state government for pork, patronage positions, and passage of special legislation. Even though the Organization was unpopular in the cities and more urban counties,[153] it was difficult for political competitors to gain a territorial foothold in those places, in part because state law had effectively disenfranchised large portions of the electorate. Moreover, "the punitive powers of the organization through its control of the prerequisites of local officials and its ability to obstruct local bills in the legislature . . . discourag[ed] competing factions."[154]

The fearsome shadow of the Byrd Organization, though waning in the late 1960s, would explain why groups like the VACo might have thought a constitutional home rule provision would be "unquestionably damaging"[155] to local interests. Local governments were not keen to set out on their own for fear of a political backlash in the General Assembly. They may have thought that the General Assembly would offer cities expanded authority with one hand and then punish those cities for exercising it with the other. The Byrd Organization had operated on a model of state favor for over fifty years, to the benefit of Organization-approved county constitutional officers and to the detriment of the local governments that sought to go their own way.

The Byrd Organization was coming to end in the late 1960s, just as Virginia's rural counties were becoming suburbs and its cities were moving toward African-American majorities. The rural counties had never wanted or needed expansive local government powers; their constituents favored minimal government. The newly suburbanizing counties also distrusted local power—specifically the power of cities to annex county territory. And their constituents were more interested in low taxes, something that empowered local governments might threaten. Concern that African-Americans might be exercising power in newly empowered cities was coupled with a residual fear over how the legislature might react to the actual exercise of local power and the suburban preference for minimal government. All of these forces favored the status quo.

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[153] *See id.* at 28-31 (noting that anti-establishment/anti-Byrd activism was heaviest in the urban centers of Richmond and Norfolk, as well as in the counties in the southwest corner of Virginia).

[154] *Id.* at 33.

[155] Memorandum from the Va. Ass'n of Ctys., *supra* note 122.

VI. LOCAL POWER POST-CONSTITUTIONAL REVISION

In 1970, when the new constitution was overwhelmingly approved by the Commonwealth's voters,[156] Virginia's largest city had about 300,000 residents.[157] The northern Virginia suburbs were growing, but their outsized influence on the Commonwealth's politics would still not be fully felt for another few decades. Virginia Beach, now merged with Princess Anne County, was just beginning to boom. The Richmond suburbs were expanding, but their greatest growth was yet to come.

The rejection of a home rule provision in the constitution did not end the problem of urban growth and the demands for local solutions. Virginia's local governments were compelled to work with the General Assembly to craft solutions to local issues within the existing legal framework, "an undramatic but highly workable approach to a problem," as one optimistic commentator described it.[158] But in crafting these solutions, local governments could not rely on broad interpretations of existing powers. Virginia remained a Dillon's Rule state, a fact the Supreme Court of Virginia soon made clear when it remarked that, although "[t]he Commission on Constitutional Revision recommended inclusion of a provision to reverse Dillon's Rule . . . . [the] recommendation . . . was rejected by the General Assembly, and was not incorporated in the revised Constitution . . . . [T]herefore, . . . regardless of its fate in other jurisdictions, Dillon's Rule remains in effect in [Virginia]."[159] The court's "regardless of its fate in other jurisdictions" line was telling; Virginia may have retained Dillon's Rule, but increasingly, many other states were rejecting it.[160]

Though the General Assembly deliberately chose not to reverse Dillon's Rule and grant local governments home rule as part of the 1971 Constitution, that did not end the debate over the proper balance of state-local power in Virginia. Rather, the issue of local government power and home rule continued to fester. In the first seven years after the new constitution went

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[156] *See* 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 24.

[157] Manson et al., *supra* note 31 (1970 Census: Count 1 - 100% Data [Block Groups, Enum. Districts, Cong. Districts, etc.]).

[158] 2 HOWARD, *supra* note 29, at 812.

[159] Bd. of Supervisors v. Horne, 216 Va. 113, 117 (1975).

[160] *See* A. E. S., *supra* note 80, at 710 n.85 (noting the states that had recently reversed Dillon's Rule). *See generally* ADVISORY COMM'N ON INTERGOVERNMENTAL RELS., MEASURING LOCAL DISCRETIONARY AUTHORITY (1981) (investigating the degree of local government discretionary authority in the United States and determining that the national trend was towards greater local power).

into effect, Virginia had to authorize two new commissions to investigate and propose solutions to persistent local government issues.[161]

Even so, as late as 1978, some remained wed to the notion that the General Assembly "has been 'of a mind' to extend broad authority to [Virginia's] local governments . . . . in keeping with Virginia's historic respect of local government."[162] That may have been true at one time, but by the 1980s, as the demands on and needs of local governments grew[163] while their powers did not, local governments found themselves increasingly reliant "on the vagaries of political back scratching."[164] Efforts to obtain special authority from the General Assembly to tackle issues in their own communities underscored the reality that the existing system "fail[ed] to bring local government[s] under state control, but succeed[ed] in hampering [their] effective administration."[165] A third commission authorized in 1990 to investigate local government issues produced only incomplete solutions, and so in 1992, a fourth commission was authorized, this time charged with looking specifically into the impact the Commonwealth's continued reliance on Dillon's Rule had on local governments.[166]

In what became its final report, the 1992 Governor's Advisory Commission on the Dillon Rule and Local Government (CDR) concluded that there was "not always sufficient authority at the local level to address specific local problems adequately." It further observed that the Commonwealth's frequent use of unfunded mandates left local governments "without authority to finance and deliver mandated services" and without the "financial resources to implement them effectively and accomplish executive and legislative intent." Finally, the CDR concluded that adherence

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[161] *See* COMMISSION ON THE DILLON RULE REPORT, *supra* note 12, at 3 (referencing the 1975 Commission on City-County Relations (Stuart Commission) and the 1978 Commission on State Aid to Localities and Joint Subcommittee on Annexation (Michie Commission)).

[162] M. H. Wilkinson & Clifton McCleskey, *Virginia*, *in* PARTNERSHIP WITHIN THE STATES: LOCAL SELF-GOVERNMENT IN THE FEDERAL SYSTEM 293, 300 (Stephanie Cole ed., 1978).

[163] *See* Manson et al., *supra* note 31 (1970 Census: Count 1 - 100% Data [Block Groups, Enum, Districts, Cong. Districts, etc.]; 1980 Census: STFI 1 - 100% Data). After a slight drop in 1970, by 1980, Virginia's urban population had risen considerably, and accounted for nearly two in three Virginians. Although Virginia's rural population has continued to grow in past years (albeit at an anemic rate), the proportion of urban to rural Virginians has continued to increase since 1980 and at the last census in 2010, there were three urban Virginians for each rural Virginian. *Id.* (2010 Census: SF 1a – P & H Tables [Blocks & Larger Areas]).

[164] A. E. S., *supra* note 80, at 705.

[165] *Id.* at 702.

[166] *See* COMMISSION ON THE DILLON RULE REPORT, *supra* note 12, 3-4 (referencing the 1990 Commission on Local Government Structure and Relationships (Grayson Commission) and describing the mandate and responsibilities of the 1992 Governor's Advisory Commission on the Dillon Rule and Local Government).

to Dillon's Rule stifled local innovation and resulted in inefficient and ineffective local solutions.[167]

The CDR recognized that at the heart of all three of these concerns lay Dillon's Rule, but it was not entirely sure that reversing it would actually result in the change local governments desired. Those in favor of reversing Dillon's Rule construed the Rule as an anachronistic relic of a bygone era, which in the modern age served only to hinder the ability of local governments to address complex problems with creative solutions.[168] Those who favored retaining Dillon's Rule countered that the Rule guaranteed a modicum of uniformity among Virginia's local governments, governments that already enjoyed significant autonomy, and that reversing the Rule would be harmful to the Commonwealth's economic future.[169]

Notably, these arguments were essentially the same as those made by the parties for and against Dillon's Rule during the 1969 debate on the CCR's home rule provision. And like the General Assembly before it, when confronted with these conflicting characterizations of Dillon's Rule and the current state of Virginia's local government system, the CDR erred on the side of caution and recommended that Virginia not adopt home rule, but simply lessen the restrictions imposed by Dillon's Rule by legislating that specific grants of local government power no longer be construed narrowly.[170] In effect, the CDR recommended that Virginia keep the first prong of Dillon's Rule—that local governments are governments of enumerated power and only enjoy powers expressly granted to them—and shed the second prong—that courts apply strict construction and read express grants of power narrowly.[171] It was a reasonable proposal, but it was never adopted by the General Assembly. Dillon's Rule would remain in effect in its entirety, as it does to this day.

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[167] *Id.* at 4.

[168] *Id.* at 8.

[169] *Id.* at 7-8.

[170] *Id.* at 14 ("The idea of giving local governments complete autonomy to act at their discretions (in effect repealing the 'Dillon Rule') was considered to be unwise and was rejected."). The relaxed standard of review would not, however, apply "to environmental laws, labor relations, taxation, building and fire codes, and local land use controls, all of which shall continue to be narrowly construed . . . ." *Id.* at 32.

[171] To effectuate this change, the CDR proposed the following language be added to VA. CODE ANN. § 15.1-510 (the county local power grant) and § 15.1-839 (the city local power grant):

> Except for powers relating to environmental laws, labor relations, taxation, building and fire codes, and local land use controls, all of which shall continue to be narrowly construed, the powers delegated to a county, city or town by this chapter, or by any other provision of general or special law, shall be broadly construed to effect the purpose of such delegation.

COMMISSION ON THE DILLON RULE REPORT, *supra* note 12, at 32-33.

Despite its eventual demise, it is worth remembering the CDR's proposal for empowering local governments. Although not as progressive as the CCR's home rule proposal, the CDR's recommendation to retain the express, enumerated powers prong of Dillon's Rule, but abrogate the strict construction prong, was a noteworthy step towards greater local autonomy. The recommendation implicitly acknowledged that Virginia had, by general law, granted broad powers to local governments, but that the strict construction prong of Dillon's Rule significantly limited the degree to which local governments could avail themselves of these extensive powers. In this way, the strict construction prong of Dillon's Rule acted as a dam, holding back the powers the General Assembly had intended to devolve to local governments. By abolishing the strict construction prong, the recommendation would have broken that dam and allowed the broad powers inherent in the grants to flow to local governments as the General Assembly had originally devised.

Significantly, not only would this have resulted in essentially the same intended outcome as the CCR's home rule provision—namely, extending local governments' broad powers to address the increasingly diverse and confounding array of issues they faced—it would have achieved this outcome without mentioning home rule by name, thus avoiding any lingering negative association with the failed home rule reform effort of the 1968-69 Constitutional Revision. This may have been the "undramatic but highly workable approach to a problem"[172]—the "home rule without home rule"[173] outcome favored by wary local and state officials previously.[174] And yet, it too was never implemented.

VII. CONCLUSION

In 2020, Democrats, whose electoral strength lies in the Northern Virginia suburbs and in the cities, took control of the Virginia General Assembly for the first time in almost three decades. It may have been the

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[172] 2 HOWARD, *supra* note 29, at 812.

[173] Memorandum from the Va. Ass'n of Ctys., *supra* note 122.

[174] *See* VA. ASS'N OF CTYS., 2020 LEGISLATIVE PROGRAM 15 (2019), https://www.vaco.org/wp-content/uploads/2019/11/2020LegislativeProgram.pdf. The Virginia Association of Counties essentially endorsed this solution in its 2020 Legislative Program, reversing its old position of hostility towards the notion of home rule, and advocating instead for the "relaxation of the Dillon Rule" and the introduction of "legislation maintaining and enhancing local authority and autonomy . . . ." *Id.* at 15. *See also* Sullivan, *supra* note 17 ("We want the counties to govern themselves and make decisions best for their counties. We want to put [local decisions] in the bosom of the county boards, instead of in the General Assembly") (quoting Dean Lynch, Executive Director, Virginia Association of Counties).

case in previous eras that when a local government wanted a specific power to address a particular issue, all it needed to do was submit a bill to the General Assembly which would in turn enact the bill "mechanically, often with only perfunctory review. . . . as a courtesy to [its] sponsors."[175] But in recent years, Virginia has experienced the same political polarization that has characterized national politics.[176] Across the country, state politics has witnessed escalating conflicts between "blue" cities and "red" legislatures,[177] with the result that more people are talking about the problem of state legislative overreach.

The Virginia Democrats' legislative agenda involved some amount of devolution. In the 2020 legislative session, for instance, the General Assembly permitted some cities to adopt ranked choice voting and to regulate guns on public property.[178] So too, the General Assembly approved a bill to repeal the state law that prevents local governments from removing their own Confederate monuments.[179] But an across-the-board repeal of Dillon's Rule has not yet been proposed.

This is so despite the General Assembly's legislative workload. Thousands of bills are proposed each year and hundreds are adopted, many necessitated by the inability of local governments to pass their own local laws. In 2019, for example, the City of Alexandria's legislative package—which described the laws it hoped the General Assembly would adopt that year—was over twenty-three pages long.[180]

The political culture of Dillon's Rule still predominates in Virginia. A culture of weak local government is difficult to change, especially when a new party gains power. Few elected state officials will voluntarily give away powers only recently obtained. In 2022, another round of elections returned Republicans to power in the House of Delegates; Republicans also captured the governorship and other statewide offices.[181] The new governor immediately sought to reverse local school districts' pandemic-related mandatory masking policies, precipitating litigation over the scope of local

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[175] A. E. S., *supra* note 80, at 704.

[176] *See* Chichester, *supra* note 11.

[177] *See* Schragger, *supra* note 14.

[178] *See* H.B. 1103, 2020 Gen. Assemb., 2020 Reg. Sess. (Va. 2020) (ranked voting); S.B. 35, 2020 Gen. Assemb., 2020 Reg. Sess. (Va. 2020) (gun regulation on public property).

[179] *See* S.B. 183, 2020 Gen. Assemb., 2020 Reg. Sess. (Va. 2020).

[180] CITY OF ALEXANDRIA, *supra* note 18.

[181] *Virginia GOP Completes Sweep of Elections with House Win*, NBC NEWS (Dec. 3, 2021), https://www.nbcnews.com/politics/elections/virginia-gop-completes-sweep-elections-house-win-n1285324.

control and confirming that the fight over the proper division of state-local power remains unsettled.[182]

A constitutional home rule provision—even one that repeals Dillon's Rule—would not necessarily change these political dynamics. State officials are not easily constrained by constitutional home rule grants. Those grants generally still permit legislatures (and sometimes governors) to override most local laws. Even in home rule states, there has been an epidemic of preemptive state laws. Cities may be more popular and economically successful than ever, but restrictions on city authority have been increasing in the last decade, not declining.[183]

In response to this hostile inter-governmental environment, the National League of Cities (NLC) published new model home rule principles in 2020.[184] The NLC's revised constitutional language replaces the 1953 AMA model, from which the CCR largely drew its inspiration. The NLC model reiterates that a city may exercise any power to the limits of state law.[185] It also specifically abrogates Dillon's Rule.[186] In addition, it adds a presumption against preemptive state laws, requiring that state laws that override local laws do so explicitly and only if the override serves a substantial state interest and is narrowly tailored.[187] The NLC views these protections as necessary to preserve local self-government in an age of increasing centralization. State aggrandizement continues to undermine the purposes of Progressive-Era home rule grants in those states that adopted them.[188]

In Virginia, efforts to create robust democratic self-government repeatedly foundered on the shoals of an entrenched county court system. In the twentieth century, segregationist conservatives amassed power by holding tightly onto the reins of that system, largely directed toward preserving white rule across the state. Even as that regime came to an end, the political culture of weak local governments had become deeply embedded, both because it served entrenched interests and was reinforced by the unwavering judicial embrace of Dillon's Rule. For all that the Constitution of 1971 did to unravel the reactionary politics that had preceded

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[182] *See* Volou & Torres, *supra* note 19.

[183] *See* Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1999-2008 (2018); Schragger, *supra* note 14, at 1169-1183.

[184] NAT'L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY (2020).

[185] *Id.* at 30-31.

[186] *Id.* at 31.

[187] *Id.* at 26.

[188] *Id.* at 13-17.

it, that document could not ultimately bring about a Jeffersonian-style revolution in local government.