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Karly Newcomb

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# BREAKING UP WITH DILLON: A PRACTICAL CALL FOR VIRGINIA STATE & LOCAL GOVERNMENT LAW REFORM

KARLY NEWCOMB\*

## INTRODUCTION

States' long-standing allegiance to the Dillon Rule stems from the theory that it prevents localities from passing unequal and corrupt laws.<sup>1</sup> However, states with strict adherence to the Dillon Rule have stifled localities from addressing their own issues and priorities.<sup>2</sup> Though the debates surrounding the Dillon Rule's strengths and weaknesses have existed since its inception,<sup>3</sup> the burdensome effects on a locality's ability to serve and protect its citizens are constantly evolving. In particular, localities in Dillon Rule states have been unable to enact laws that directly address environmental issues, citing the Dillon Rule as their main obstacle.<sup>4</sup>

Although lobbying Virginia lawmakers for change is possible, challenges associated with the lobbying process have kept localities within the Dillon Rule's restrictive framework.<sup>5</sup> In addition to facing resource-intensive lobbying efforts, localities are hesitant to enact boundary-pushing

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\* JD Candidate, William & Mary Law School, 2021; Editor-in-Chief, *William & Mary Environmental Law and Policy Review*, Volume 45; BA Environmental Studies and Public Policy, Franklin & Marshall College, 2018, *magna cum laude*. The author would like to thank the members of the *ELPR* Board and staff for their continued dedication to Volume 45.

<sup>1</sup> Robert M. de Voursney, *The Dillon Rule in Virginia: What's Broken? What Needs to be Fixed?*, VA. NEWSLETTER (Univ. of VA) Aug. 1992, at 1–2, 4, [https://vig.coopercenter.org/sites/vig/files/Virginia\\_News\\_Letter\\_1992\\_Vol.\\_68\\_No.\\_7.pdf](https://vig.coopercenter.org/sites/vig/files/Virginia_News_Letter_1992_Vol._68_No._7.pdf) [<https://perma.cc/YK7V-NKQK>].

<sup>2</sup> Deirdre Fernandes, *Dillon Rule Spawns Odd Requests in Va. Assembly*, VIRGINIAN-PILOT (Feb. 26, 2011), [https://www.pilotonline.com/government/virginia/article\\_7b9dcc6d-e8ea-5d0f-858b-a542d3c1fe99.html](https://www.pilotonline.com/government/virginia/article_7b9dcc6d-e8ea-5d0f-858b-a542d3c1fe99.html) [<https://perma.cc/TUQ8-AFRT>].

<sup>3</sup> RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 330 (2016).

<sup>4</sup> See, e.g., Katherine Hafner & Peter Coutu, *Plastic Straws No More? Hampton Roads Catches on to National Environmental Trend*, VIRGINIAN-PILOT (July 23, 2018), [https://www.pilotonline.com/news/environment/article\\_01a96cde-8a9f-11e8-b0c1-5f9419414119.html](https://www.pilotonline.com/news/environment/article_01a96cde-8a9f-11e8-b0c1-5f9419414119.html) [<https://perma.cc/5QCM-WSG7>].

<sup>5</sup> Scott McCaffrey, *Arlington Board Optimistic for (Eventual) Success of Solar Legislation*, ARLINGTON SUN GAZETTE (Jan. 30, 2019), [https://www.insidenova.com/news/arlington/arlington-board-optimistic-for-eventual-success-of-solar-legislation/article\\_58bf0f1c-23ef-11e9-a645-0707aaf391ba.html](https://www.insidenova.com/news/arlington/arlington-board-optimistic-for-eventual-success-of-solar-legislation/article_58bf0f1c-23ef-11e9-a645-0707aaf391ba.html) [<https://perma.cc/W2TD-UL4J>].

legislation due to judicial unpredictability.<sup>6</sup> Ultimately, the Dillon Rule disincentivizes localities from seeking innovative solutions that confront some of our generation's greatest environmental challenges.

This Note is not the first call for Virginia's General Assembly to consider the adverse effects of this antiquated and ineffective rule.<sup>7</sup> The Commonwealth first contemplated a transition from the Dillon Rule in 1969.<sup>8</sup> The state's legislators drafted and proposed a new provision to the Virginia Constitution, stating that "[a] charter county or a city may exercise any power or perform any function which is not denied to it by this [C]onstitution, by its charter[,] or by laws enacted by the General Assembly."<sup>9</sup> Although similar provisions were included in other states' constitutions, the Virginia legislature opted against it.<sup>10</sup> Recently, there have been calls for the reconsideration of this rule in economic,<sup>11</sup> social justice,<sup>12</sup> and environmental contexts.<sup>13</sup>

As discussed later in this Note, there is a growing consensus that localities are better equipped to address local issues than the state legislature.<sup>14</sup> This argument is championed and frequently cited by those who appreciate federalism's capacity to allow states to create their own environmental laws and policies.<sup>15</sup> In a similar fashion, those closer to an

<sup>6</sup> "The inherent vagueness of the standard provides courts with the ability to modify or retard the local agenda, or to require localities to seek specific enabling acts from the state." Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959, 966 (1991).

<sup>7</sup> *Dillon's Rule: Good or Bad for Local Governments?*, LEAGUE OF WOMEN VOTERS OF THE FAIRFAX AREA EDUC. FUND (Oct. 2004), at 2–3, <https://static1.squarespace.com/static/58706fbb29687f06dd219990/t/5b10a409575d1ff378884313/1527817225112/lwvfa-dillon+rule-article+Oct+2004+LWVFA+Voter.pdf> [<https://perma.cc/X54H-H89K>].

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.*

<sup>10</sup> Richard Schragger, *It's Time for Home Rule in Virginia*, RICHMOND TIMES-DISPATCH (Dec. 16, 2019), [https://www.richmond.com/opinion/columnists/richard-schragger-column-it-s-time-for-home-rule-in/article\\_e6232381-4387-5594-acad-1b67e8e855ca.html](https://www.richmond.com/opinion/columnists/richard-schragger-column-it-s-time-for-home-rule-in/article_e6232381-4387-5594-acad-1b67e8e855ca.html) [<https://perma.cc/R26V-RVJ9>].

<sup>11</sup> John F. Seymour, *Richmond Is Gagging Progressive Local Governments*, WASH. POST (July 13, 2018), [https://www.washingtonpost.com/opinions/richmond-is-gagging-progressive-local-governments/2018/07/13/55b527a0-7e3d-11e8-b660-4d0f9f0351f1\\_story.html](https://www.washingtonpost.com/opinions/richmond-is-gagging-progressive-local-governments/2018/07/13/55b527a0-7e3d-11e8-b660-4d0f9f0351f1_story.html) [<https://perma.cc/RD2C-KVF2>].

<sup>12</sup> *Id.*

<sup>13</sup> Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 WM. & MARY L. REV. 823, 875–76, 878 (1990).

<sup>14</sup> See, e.g., Kate Barcellos, *Bill to Suggest Local Governance*, BARRE-MONTPELIER TIMES ARGUS (Feb. 20, 2019), [https://www.timesargus.com/news/local/bill-to-suggest-local-governance/article\\_ef621159-9a7c-51ef-84cd-0164595169da.html](https://www.timesargus.com/news/local/bill-to-suggest-local-governance/article_ef621159-9a7c-51ef-84cd-0164595169da.html) [<https://perma.cc/HZY7-38WK>].

<sup>15</sup> John Larsen, *Bottom Line on State and Federal Policy Roles*, WORLD RES. INST. (Aug.

environmental issue, such as representatives of a coastal community grappling with sea level rise, will presumably understand its particular challenges more intimately than any state government official.

A number of recent environmental efforts have largely failed due to Virginia's outdated policymaking structure.<sup>16</sup> In Alexandria, for example, the locality's inability to ban plastic bags and straws has sparked heated debates.<sup>17</sup> All in all, localities routinely point to the Dillon Rule to justify their environmental shortcomings.<sup>18</sup>

Mixed Rule<sup>19</sup> and Home Rule states have surpassed Virginia in the implementation of progressive environmental efforts in a number of ways.<sup>20</sup> Some examples include powerful regional initiatives, such as the South Florida Regional Climate Change Compact<sup>21</sup> and county-led environmental legislation, such as Washtenaw County, Michigan's net-zero emissions efforts in 2018.<sup>22</sup> Moreover, this Note will discuss recent full or partial transitions in states such as West Virginia, Nevada, and Illinois.<sup>23</sup>

This Note will also contemplate the numerous benefits and challenges that accompany different transition strategies for Virginia.<sup>24</sup> These transition options include opting for full Home Rule status,<sup>25</sup> implementing public health or environmental exceptions, or allowing Home Rule functionality to municipalities based on desire, size, or through the authorization of home rule charters.<sup>26</sup> All in all, this Note will highlight the

2008) at 1, [https://wriorg.s3.amazonaws.com/s3fs-public/pdf/bottom\\_line\\_state\\_fed.pdf](https://wriorg.s3.amazonaws.com/s3fs-public/pdf/bottom_line_state_fed.pdf) [<https://perma.cc/KX7U-6PYS>].

<sup>16</sup> See, e.g., Sarah Vogelsong, *Will This Be the Year Virginia Imposes a Plastic Bag Tax?*, VA. MERCURY (Nov. 26, 2019), <https://www.virginiamercury.com/2019/11/26/will-this-be-the-year-virginia-imposes-a-plastic-bag-tax/> [<https://perma.cc/P4T5-C697>].

<sup>17</sup> *Id.*

<sup>18</sup> See *id.*

<sup>19</sup> In this Note, "Mixed Rule States" refers to states that possess a combination of Dillon Rule and Home Rule components. Eight states fall under this category. Jon D. Russell & Aaron Bostrom, *Federalism, Dillon Rule and Home Rule*, AM. CITY CTY. EXCHANGE (Jan. 2016) at 5, <https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf> [<https://perma.cc/4A7G-HDTG>].

<sup>20</sup> See, e.g., *How Counties Are Taking Climate Action*, CLIMATE REALITY PROJECT (Apr. 17, 2019), <https://www.climate-reality-project.org/blog/how-counties-are-taking-climate-action> [<https://perma.cc/ML2K-J645>].

<sup>21</sup> *About the Compact*, SE. FLA. REG'L CLIMATE CHANGE COMPACT, <https://southeastfloridaclimatecompact.org> [<https://perma.cc/KN5K-4L9U>] (last visited Nov. 2, 2020).

<sup>22</sup> *How Counties Are Taking Climate Action*, *supra* note 20.

<sup>23</sup> See *infra* Part III.

<sup>24</sup> See *infra* Part IV.

<sup>25</sup> See *infra* Section V.A.

<sup>26</sup> See *infra* Section V.B.3.

reasons why a transition is advisable and why it is a crucial moment for the Virginia legislature to act.<sup>27</sup>

A. *The Structure of Legislative Power: Federal, State, and Local Governments*

Lawmaking power is shared between the federal, state, and local governmental structures.<sup>28</sup> The United States Constitution explicitly lays out the areas of law over which the federal government has authority, including interstate commerce and national security, and leaves the residual lawmaking power to the states.<sup>29</sup> One rationale for this structure is that the Founders saw the states as being better equipped to address the localized needs of their citizens.<sup>30</sup> In addition, states are frequently seen as “laboratories” in which law and policy can be tested and refined before implementation on a larger scale.<sup>31</sup> Americans have been consistently subjected to state-tested national policy, with Massachusetts’ universal health care legislation being a recent and well-known example.<sup>32</sup>

After this, each state can determine which powers it will retain, and which powers it will delegate to its local governments.<sup>33</sup> Though state and local governments differ, the national concern with allowing Congress to intervene with state-level issues also arises in regard to state control of local legislation.<sup>34</sup> By not recognizing this, we fail to consider the differing priorities of each individual locality. Even if particular issues

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<sup>27</sup> See *infra* Introduction.F.

<sup>28</sup> *State & Local Government*, WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/state-local-government/> [<https://perma.cc/2639-PBQN>] (last visited Nov. 2, 2020).

<sup>29</sup> U.S. CONST. art. I, § 8, art. II, § 2, amend. X.

<sup>30</sup> Russell & Bostrom, *supra* note 19, at 3. In this regard, Alexander Hamilton said, “[i]t is a known fact in human nature, that its affections are commonly weak in proportion to the distance or diffusiveness of the object. Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State are apt to feel a stronger bias towards their local governments than towards the government of the Union.” *Id.*

<sup>31</sup> William Fulton, *Have States Lost Their Place as Labs of Democracy?*, GOVERNING (Apr. 2007), <https://www.governing.com/columns/urban-notebook/gov-states-cities-laboratories-democracy.html> [<https://perma.cc/3LNX-TYV7>].

<sup>32</sup> Barbara Anthony, *Beyond Obamacare: Lessons from Massachusetts* 2 (Harvard Kennedy Sch., M-RCBG Associate Working Paper Series No. 88, 2017), [https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/82\\_BeyondObamacare.pdf](https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/82_BeyondObamacare.pdf) [<https://perma.cc/MX38-HNCT>].

<sup>33</sup> BRIFFAULT & REYNOLDS, *supra* note 3, at 289.

<sup>34</sup> See Michèle Finck, *The Role of Localism in Constitutional Change: A Case Study*, 30 J.L. & POL. 53, 53–54 (2014) (arguing how localities can be agents for constitutional change).

affect the entire state, localities will differ on their willingness to take individual steps, and subsequent financial burdens, to increase environmental efforts.<sup>35</sup> For example, Virginia's coastal communities will be more willing to pass environmental laws that address offshore renewable energy, sea level rise, or even general plastic use than non-coastal communities.<sup>36</sup>

## B. *History of the Dillon Rule*

### 1. Origin

The Dillon Rule was formalized by Judge John F. Dillon in 1873 in his treatise titled *Commentaries on the Law of Municipal Corporations*.<sup>37</sup> Shortly after being published, it was adopted by many states' judiciaries across the country, including Virginia.<sup>38</sup> In 1896, the Dillon Rule was first cited by the Supreme Court of Virginia in *City of Winchester v. Redmond*.<sup>39</sup> In this case, the court relied on Judge Dillon's treatise to hold that a city council is not authorized to create rewards for individuals who provide information that leads to the conviction of arsonists.<sup>40</sup> Afterwards, the Dillon Rule gained additional prominence when the Supreme Court of the United States relied upon it in *Hunter v. City of Pittsburgh* in 1907.<sup>41</sup>

In 1969, Virginia's legislature considered, yet voted against, a constitutional amendment to reverse the Dillon Rule.<sup>42</sup> The Supreme Court of Virginia reaffirmed this principle in its 2010 decision, *Marble Technologies Inc. v. City of Hampton*.<sup>43</sup> In citing Virginia's Dillon Rule precedent,

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<sup>35</sup> Patricia Sullivan, *Why Arlington and Fairfax Can't Tax Plastic Bags—And Why That Might Change*, WASH. POST (Dec. 19, 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](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) [https://perma.cc/EMV5-A5QY].

<sup>36</sup> See Jennifer Marlon, *Estimated % of Adults Who Think Global Warming is Happening (72%), 2020*, YALE PROGRAM ON CLIMATE CHANGE COMM'N (Sept. 17, 2019), <https://climatecommunication.yale.edu/visualizations-data/ycom-us/> [https://perma.cc/6DMS-2879]. With the exception of counties with major cities, the counties of coastal Virginia have higher percentages of individuals "who think global warming is happening" than the majority of those counties in the central and western part of the state. *Id.*

<sup>37</sup> Jesse J. Richardson, Jr., *Is Home Rule the Answer? Clarifying the Influence of Dillon's Rule on Growth Management*, BROOKINGS INST. 8 (Jan. 2003), <https://www.brookings.edu/wp-content/uploads/2016/06/dillonsrule.pdf> [https://perma.cc/3P36-J4DU].

<sup>38</sup> *Id.* at 8, 45.

<sup>39</sup> *Winchester v. Redmond*, 25 S.E. 1001, 1002 (Va. 1896).

<sup>40</sup> *Id.* at 1002–03.

<sup>41</sup> *Hunter v. Pittsburgh*, 207 U.S. 161, 179–80 (1907).

<sup>42</sup> Schragger, *supra* note 10.

<sup>43</sup> 690 S.E.2d 84, 88–89 (Va. 2010).



this court held that local governments are subordinate state instrumentalities.<sup>44</sup> Thus, it remains the controlling lawmaking structure today.

According to Judge Dillon, local governments have only three types of powers: (1) those granted expressly, (2) those necessarily, fairly implied in, or incident to the powers expressly granted, and (3) those essential to the declared objectives and purposes of the corporation.<sup>45</sup> Judge Dillon saw localities as susceptible and, thus, in need of more protection from special interest politics and corruption than their state legislative counterparts.<sup>46</sup> Thus, Judge Dillon incorporated a strict construction of local government powers under the Dillon Rule; if there is any reasonable doubt as to whether or not a power has been conferred on a local government, the power has not been conferred.<sup>47</sup>

It is worth noting that the application of the Dillon Rule, in limited circumstances, has upheld innovative local measures with the assistance of creative interpretations by the Supreme Court of Virginia.<sup>48</sup> For example, in *Resource Conservation Management v. Board of Supervisors of Prince William County*, Chief Justice Carrico held that the power to zone, expressly delegated to localities, implicitly gives localities the power to prohibit the creation and use of landfills within county lines.<sup>49</sup> Unfortunately, local judges have major discretion in deciphering whether or not a power was passed on to localities. Moreover, minimal guidance is given by legal precedent to localities on how their arguments for innovative, environmental reforms would fare in Virginia's circuit and appellate courts.<sup>50</sup> Ultimately, the unpredictability and monetary cost of both lobbying efforts and suits in Virginia's courts leave environmentally concerned localities with an unclear path forward.

### C. *Nonenvironmental Calls for Dillon Rule Reform in Virginia*

Though this Note will primarily critique the Virginia application of the Dillon Rule in an environmental context, it is important to note

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<sup>44</sup> *Id.* (citing *Bd. of Zoning Appeals v. Bd. of Supervisors*, 666 S.E.2d 315, 316 (Va. 2008); *City Council of Alexandria v. Lindsey Trts.*, 520 S.E.2d 181, 182 (Va. 1999); *Bd. of Supervisors v. Countryside Invt. Co.*, 522 S.E.2d 610, 612–14 (Va. 1999); *City of Richmond v. Confrere Club of Richmond*, 387 S.E.2d 471, 473 (Va. 1990); *Commonwealth v. Bd. of Arlington Cty.*, 232 S.E.2d 30, 41 (Va. 1977)).

<sup>45</sup> BRIFFAULT & REYNOLDS, *supra* note 3, at 337.

<sup>46</sup> *Id.* at 328.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 336.

<sup>49</sup> *Res. Conservation Mgmt. v. Bd. of Supervisors*, 380 S.E.2d 879 (Va. 1989).

<sup>50</sup> BRIFFAULT & REYNOLDS, *supra* note 3, at 337.

that since its inception and widespread adoption, critics have advocated for Dillon Rule reform in order to address a variety of other seminal issues, including economic,<sup>51</sup> social justice,<sup>52</sup> and public health<sup>53</sup> concerns. These socioeconomic implications, considered in conjunction with its environmental limitations, strengthen the case for Dillon Rule reform.

### 1. Minimum Wage

Localities in Virginia are not statutorily authorized to set their own minimum wage.<sup>54</sup> Although wealthier localities have continuously lobbied state legislators for a local alternative to help their own low-wage workers, those efforts continue to be rebuffed by Virginia's state legislature.<sup>55</sup> For example, the state legislature rejected a proposed bill that would have allowed a locality to adopt a local alternative minimum wage only after a mandatory quorum.<sup>56</sup> This bill imposed no obligation on localities, but rather merely gave them the option to pursue policy reform.<sup>57</sup> Under this circumstance, it is indisputable that the Dillon Rule has effectively prevented a locality from passing legislation that would have immensely improved the quality of life of its low-income workers and improved the equitability of wages across the state.<sup>58</sup> As a whole, state laws are currently operating as a ceiling, from which local laws must match but not rise above.<sup>59</sup> This is problematic because it leaves localities with little to no room to meet the ever-changing, present needs of their citizens.

### 2. Smoking Ban

In Harrisonburg and Rockingham counties, local organizations planned to submit a proposal to its councilmembers in order to prohibit

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<sup>51</sup> Seymour, *supra* note 11.

<sup>52</sup> *Id.*

<sup>53</sup> Laine Griffin, *Proposed Smoking Ban Hits Snag*, DAILY NEWS RECORD (Feb. 20, 2019), [https://www.dnronline.com/news/harrisonburg/proposed-smoking-ban-hits-snag/article\\_c7e46969-b196-51fe-94d5-96dd74e89b4c.html](https://www.dnronline.com/news/harrisonburg/proposed-smoking-ban-hits-snag/article_c7e46969-b196-51fe-94d5-96dd74e89b4c.html) [<https://perma.cc/D7SL-9RKZ>].

<sup>54</sup> Jared Bernstein, *Cities Would Like to Raise Their Minimum Wages, Too, But States Keep Blocking Them*, WASH. POST (Aug. 28, 2019), <https://www.washingtonpost.com/outlook/2019/07/18/cities-would-like-raise-their-minimum-wages-too-states-keep-blocking-them/> [<https://perma.cc/PNH4-KY4U>].

<sup>55</sup> *Id.*

<sup>56</sup> See H.B. 39, Gen. Assemb., Reg. Sess. (Va. 2018).

<sup>57</sup> See *id.*; Seymour, *supra* note 11.

<sup>58</sup> Bernstein, *supra* note 54.

<sup>59</sup> This is in comparison to a state law acting as a floor, from which localities can provide stricter or more protective laws for its citizens.



tobacco use at parks and recreational facilities predominately used by children.<sup>60</sup> Instead of considering whether this power was arguably given implicitly to localities, or lobbying the state legislature for this power so they could revise their code, council members instead told interested parties that Virginia's counties are not authorized to enact this type of regulation.<sup>61</sup> In lieu of this, these organizations are planning to promote a voluntary public awareness campaign to discourage smoking in public areas where children are likely to be present.<sup>62</sup> This example not only clearly points to the specific limitations in the Dillon Rule's legal doctrine, but also the implications, based on human nature, of such a role. In this context, it is only logical that localities will choose to tell its constituents that they are unable to enact a particular rule rather than explaining that the onus was on the locality to lobby the state legislature for state code reform.

### 3. Hostile Community Environments

#### a. Symbols of White Supremacy

Removing symbols of white supremacy from public areas has had widespread support for many years.<sup>63</sup> However, state and local governments have only recently begun to respond.<sup>64</sup> Participating governments have prioritized the safety and well-being of its citizens by removing prominent symbols of white supremacy's hold on American society, including Civil War memorials, statues, and street names.<sup>65</sup> Despite the tension and discomfort felt by many constituents, localities continue to use the Dillon Rule as a scapegoat to justify their inaction.<sup>66</sup> For example, despite

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<sup>60</sup> Griffin, *supra* note 53.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Zach Rosenthal, *New Law Allows Virginia Localities to Remove Confederate Statues and Monuments*, CAVALIER DAILY (Apr. 13, 2020), <https://www.cavalierdaily.com/article/2020/04/new-law-allows-virginia-localities-to-remove-confederate-statues-and-monuments> [<https://perma.cc/2X7Q-9GMU>].

<sup>64</sup> Jess R. Phelps & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 FLA. L. REV. 627, 630 (2019) (noting that the calls for the removal of confederate statues heightened in the wake of the killings in Charleston and Charlottesville).

<sup>65</sup> Seymour, *supra* note 11; Richard C. Schragger, *When White Supremacists Invade a City*, 104 VA. L. REV. ONLINE 58 (2018).

<sup>66</sup> Amanda Lineberry, *Payne v. City of Charlottesville and the Dillon's Rule Rationale for Removal*, 104 VA. L. REV. ONLINE 45 (2018).

persistent calls from constituents in Arlington County to rename Jefferson Davis Highway, the state legislature refused to do so or allow localities to do it themselves by granting them express powers through the Virginia code.<sup>67</sup> In April 2020, the General Assembly voted to amend the Virginia code to allow “local governing bodies” to remove publicly owned monuments or memorials, but only after “publish[ing] notice of such intent in a newspaper” and a public hearing.<sup>68</sup>

b. Discrimination Based on Sexual Orientation

Prior to the passage of the Equal Rights Amendment,<sup>69</sup> Virginia’s strict adherence to the Dillon Rule impeded localities’ efforts to ensure equal treatment of citizens on the basis of sexual orientation.<sup>70</sup> Although Virginia’s Human Rights Act (“VHRA”) provides protections to groups historically discriminated against, it does not provide all of the protections that some localities would want for its citizens.<sup>71</sup> More specifically, VHRA does not mention protections based on sexual orientation.<sup>72</sup> In the underlying political context, much of this debate has centered around the conflicting values of civil rights and religious freedoms.<sup>73</sup> However, on the surface, the focus of these debates has been on the Dillon Rule.<sup>74</sup> *Bono v. Arlington County Human Rights Commission* exemplifies this discussion.<sup>75</sup>

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<sup>67</sup> Seymour, *supra* note 11.

<sup>68</sup> VA. CODE ANN. § 15.2-1812(B) (2020); Rosenthal, *supra* note 63.

<sup>69</sup> *Virginia Adds LGBTQ Protections to Anti-Discrimination Law*, MCGUIREWOODS (Apr. 14, 2020), <https://www.mcguirewoods.com/client-resources/Alerts/2020/4/virginia-adds-lgbtq-protections-to-anti-discrimination-law> [<https://perma.cc/23KB-79UR>].

<sup>70</sup> Sarah Miller, *Virginia Is for Business Owners Who Feel the Human Rights Commission Poses A Threat to Their Religious Liberties*, 14 WM. & MARY J. WOMEN & L. 659, 671–72 (2008).

<sup>71</sup> As outlined in the 2018 [Municipality Equality Index] report, . . . cities with a dedication to equality in Virginia will essentially never be able to score as well as cities in non-Dillon rule states with a comparable dedication to equality. In Virginia, Arlington County was recognized alongside Richmond as municipalities that managed to score high on the MEI index without supportive [state] laws.

Lia Tabackman, *Richmond Recognized by Human Rights Campaign as a City ‘Leading the Way to LGBTQ Equality,’* CBS 6 NEWS (Oct. 12, 2018), <https://wtvr.com/2018/10/12/richmond-recognized-by-human-rights-campaign-as-a-city-leading-the-way-to-lgbtq-equality/> [<https://perma.cc/D8ZY-SSP5>].

<sup>72</sup> See VA. CODE ANN. § 2.2-3900 (2001).

<sup>73</sup> Miller, *supra* note 70, at 665.

<sup>74</sup> *Id.* at 660.

<sup>75</sup> *Bono v. Arlington County Human Rights Comm’n*, 72 Va. Cir. 256, 256–59 (2006).

In 2006, Lilli Vincenz asked Tim Bono, owner of a production company, to duplicate two videos.<sup>76</sup> After reading the two videos' titles, "Gay and Proud" and "Second Largest Minority," Bono refused, saying that it would "go against his Christian values."<sup>77</sup> Vincenz filed a complaint with the Arlington Human Rights Commission ("AHRC"), alleging that Bono violated Arlington's Human Rights Code of Ordinances.<sup>78</sup> After the AHRC sided with Vincenz, Bono filed a claim stating that Arlington County overstepped its authority by labeling sexual orientation as a protected classification in its local code, when the state's code had not included these protections.<sup>79</sup> Soon after, the AHRC dismissed the case.<sup>80</sup> This case serves as only one example of how the Dillon Rule remains the legal vehicle by which localities refuse to address their constituents' needs. In these instances, reliance on the Dillon Rule is not based on Judge Dillon's initial fears of local government corruption,<sup>81</sup> but rather based on an underlying opposition to reform with progressive measures.

*D. Localities Are Complacent in the Dillon Rule Context*

From its inception, the Dillon Rule was never meant to impede localities from resolving their citizens' ever-changing needs, but rather it was meant merely to facilitate state oversight.<sup>82</sup> However, in practice, the Dillon Rule is a tedious roadblock that disincentivizes attempts at local policy reform.<sup>83</sup>

Localities may lobby to the state's legislature for reconsideration of certain provisions in Virginia's Code.<sup>84</sup> Yet, in reality, localities often lack resources or political influence to accomplish their ultimate goals.<sup>85</sup> In many cases, interest groups representing localities conclude that

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<sup>76</sup> *See id.*

<sup>77</sup> *See id.*

<sup>78</sup> Miller, *supra* note 70, at 671; *Liberty Counsel Defends Christian Businessman Ordered to Duplicate Homosexual Videos*, LIBERTY COUNSEL (May 2, 2006), <https://www.lc.org/newsroom/details/liberty-counsel-defends-christian-businessman-ordered-to-duplicate-homosexual-videos-1> [<https://perma.cc/YZ42-M3LB>].

<sup>79</sup> Miller, *supra* note 70, at 672.

<sup>80</sup> *Id.*

<sup>81</sup> BRIFFAULT & REYNOLDS, *supra* note 3, at 328.

<sup>82</sup> *Id.*

<sup>83</sup> Richardson, Jr., *supra* note 37, at 14.

<sup>84</sup> *Id.*

<sup>85</sup> *Regionalism and the Dillon Rule*, OLD DOMINION UNIV. (2001), <https://www.odu.edu/content/dam/odu/offices/economic-forecasting-project/docs/2001chapter6.pdf> [<https://perma.cc/AVW2-V3DA>].

lobbying will not survive a realistic cost-benefit analysis.<sup>86</sup> For this reason, the Dillon Rule carries the unintended consequence of convincing smaller, poorer, or otherwise less powerful localities to give up on reforms that substantially benefit their citizens.<sup>87</sup> In other words, Virginia's use of the Dillon Rule "cripples its municipal corporations by injecting uncertainty into the process of enacting local legislation and by making local leaders reticent to enact progressive measures lest they be challenged or overruled outright."<sup>88</sup>

### *E. Virginia's Environmental Shortcomings*

With its vast and diverse landscape within the Mid-Atlantic region, Virginia is host to a number of unique, regional environmental issues. On the coast, Virginia is vulnerable to issues such as sea level rise, recurrent flooding, and an increase in extreme weather events.<sup>89</sup> Rural communities are susceptible to environmental concerns such as water pollution,<sup>90</sup> species diversity loss,<sup>91</sup> and the health risks of various pesticides used in the farming industry.<sup>92</sup> Virginia as a whole also faces national environmental issues including widespread ozone pollution emitted from motor vehicles,<sup>93</sup> and a changing climate more generally.<sup>94</sup>

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<sup>86</sup> Gillette, *supra* note 6, at 979 (suggesting that strong lobbying efforts by one group receive much of the attention of the lawmakers at the general public's expense).

<sup>87</sup> *Id.* at 984 ("This, I suggest, is the moving force behind (or at least an *ex post* justification of) Dillon's Rule. Where interaction among players leads to decreasing social returns, and devastating returns for those who do not win, the superior strategy for all is often not to play the game.").

<sup>88</sup> Miller, *supra* note 70, at 662–63.

<sup>89</sup> See generally *Climate Change*, CHESAPEAKE BAY FOUND., <https://www.cbf.org/issues/climate-change/> [https://perma.cc/95QJ-MYAN] (last visited Nov. 2, 2020).

<sup>90</sup> See generally *Agriculture*, CHESAPEAKE BAY FOUND., <https://www.cbf.org/issues/agriculture/> [https://perma.cc/8XLK-ABLN] (last visited Nov. 2, 2020).

<sup>91</sup> See generally *Fisheries*, CHESAPEAKE BAY FOUND., <https://www.cbf.org/issues/fisheries/> [https://perma.cc/KDR9-FJ66] (last visited Nov. 2, 2020).

<sup>92</sup> See generally Louis A. Helfrich et al., *Pesticides and Aquatic Animals: A Guide to Reducing Impacts on Aquatic Systems*, VA. COOP. EXTENSION (2009), <https://www.pubs.ext.vt.edu/420/420-013/420-013.html> [https://perma.cc/CB5X-7YQU].

<sup>93</sup> *Virginia Air Quality Depends on Where You Live*, SIERRA CLUB (Apr. 18, 2018), <https://www.sierraclub.org/press-releases/2018/04/virginia-air-quality-depends-where-you-live> [https://perma.cc/72VP-WED8].

<sup>94</sup> See *What Climate Change Means for Virginia*, EPA (2016), <https://19january2017snapshot.epa.gov/sites/production/files/2016-09/documents/climate-change-va.pdf> [https://perma.cc/9K9J-SJXG].

F. *The Dillon Rule: Stifling Virginia's Environmental and Other Types of Progressive Efforts*

Virginia's strict adherence to the Dillon Rule has impeded progressive, local environmental efforts. There are a number of largely popular environmental initiatives, such as plastic bag and straw bans, which Virginia's localities cannot implement without express authorization in Virginia's code.<sup>95</sup> In order for localities to meet the constantly evolving public welfare desires of their citizens, they must be equipped with more effective tools from Virginia's legislature or judiciary.

In the legislative context, Virginia's General Assembly has historically been hesitant to discuss real structural change for a number of reasons.<sup>96</sup> First, Virginia's localities have learned how to operate, albeit less successfully, within this flawed system.<sup>97</sup> This familiarity with the Dillon Rule framework has led localities to ensure that their policies are not overly progressive as to fall outside of this framework.<sup>98</sup>

Secondly, the General Assembly has distinctly political reasons for refusing to consider a Dillon Rule transition.<sup>99</sup> As is true at the national level, environmental concerns are partisan.<sup>100</sup> All in all, environmental efforts are more likely to be proposed and passed by Democratic policymakers.<sup>101</sup> In Virginia's political context, prior to the 2019 election, Republicans had held a majority in either the House or the Senate for over two decades.<sup>102</sup> During this time, as opposed to outright denying environmental

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<sup>95</sup> Hafner & Coutu, *supra* note 4.

<sup>96</sup> *See id.*

<sup>97</sup> *See id.*

<sup>98</sup> *See id.*

<sup>99</sup> Brad Kutner, *150-Year-Old Precedent Faces Changes in New, Blue Virginia*, COURTHOUSE NEWS SERV. (Nov. 17, 2019), <https://www.courthousenews.com/150-year-old-precedent-faces-changes-in-new-blue-virginia/> [<https://perma.cc/BCW6-RQGY>].

<sup>100</sup> *See* Joseph Majkut, *Report: The Growing Partisan Divide on the Environment*, NISKANENCTR. (May 16, 2018), <https://www.niskanencenter.org/report-the-growing-partisan-divide-on-the-environment/> [<https://perma.cc/B3VJ-J9X7>].

<sup>101</sup> "For example, 71% of Democrats said policies aimed at reducing climate change generally provide net benefits for the environment, compared with roughly three-in-ten Republicans." Cary Funk & Brian Kennedy, *How Americans See Climate Change in 5 Charts*, PEW RSCH. CTR. (Apr. 19, 2019), <https://www.pewresearch.org/fact-tank/2019/04/19/how-americans-see-climate-change-in-5-charts/> [<https://perma.cc/53S5-D6KB>].

<sup>102</sup> Gregory S. Schneider & Laura Vozzella, *Democrats Flip Virginia Senate and House, Taking Control of State Government for the First Time in a Generation*, WASH. POST (Nov. 5, 2019), [https://www.washingtonpost.com/polls-open-in-virginia-balance-of-power-in-state-government-is-at-stake/2019/11/05/bdb57972-ff5b-11e9-8501-2a7123a38c58\\_story.html](https://www.washingtonpost.com/polls-open-in-virginia-balance-of-power-in-state-government-is-at-stake/2019/11/05/bdb57972-ff5b-11e9-8501-2a7123a38c58_story.html) [<https://perma.cc/V94K-9QSK>].

policies based on a legitimate difference in legislative priorities, Republicans in power used the Dillon Rule in order to deny a locality the power to enact environmental policies.<sup>103</sup> Now that both chambers of the General Assembly have gained a Democratic majority, the calls for Dillon Rule reform are reinvigorated and have become more realistic.<sup>104</sup>

In addition, the General Assembly has unequally applied the Dillon Rule between the localities. For example, the General Assembly, at times, will expressly give authorities to one locality and not another.<sup>105</sup> Although Dillon Rule supporters claim that it promotes equal treatment under the law,<sup>106</sup> allowing localities to lobby for permission to do a particular action contributes to inequality among the localities. As logic follows, the wealthier localities are more likely to attract the attention of the Virginia legislature in order for them to enact a particular law. To a certain degree, localities have become the interest groups that Judge Dillon feared.<sup>107</sup>

Secondly, inequality arises when localities are the primary advocates for a specific policy change. Localities, acting as lobbyists, will predominately advocate for the specific policy goals that meet their particular needs.<sup>108</sup> As a result, the resulting policy runs the risk of being underinclusive, or reflecting the lobbying locality's preferences.<sup>109</sup> This amplifies inequality between localities that are struggling with the same issues.<sup>110</sup>

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<sup>103</sup> Kutner, *supra* note 99.

<sup>104</sup> Sullivan, *supra* note 35.

<sup>105</sup> See, e.g., VA. CODE § 18.2-287.4 (2016). This Virginia Code section limits a restriction on carrying semi-automatic guns to a handful of cities and counties. Other localities throughout Virginia have considered this ban, but would have to ultimately lobby the General Assembly to include its name to the list of counties authorized to ban these weapons. Brie Jackson, *Roanoke City Council Considering Ban on Certain Types of Guns, Plan Drawing Controversy*, WSLs 10 NEWS (Sept. 20, 2016), <https://www.wsls.com/news/2016/09/20/roanoke-city-council-considering-ban-on-certain-types-of-guns-plan-drawing-controversy/> [https://perma.cc/V9VJ-9SR6].

<sup>106</sup> de Voursney, *supra* note 1.

<sup>107</sup> BRIFFAULT & REYNOLDS, *supra* note 3, at 328.

<sup>108</sup> See generally Gillette, *supra* note 6, at 975–76.

<sup>109</sup> *Id.*

The problem is that, in each of these cases, it is unlikely that the [lobbyists] will provide the exact [lobbying] in the exact form that the public at large would prefer . . . . Even if some are willing to [lobby for all localities], they will only [ask for] the quantity and quality of the [policy] necessary to satisfy personal, rather than social preferences, and personal preferences may require more or less of the [policy] than is socially desirable.

*Id.*

<sup>110</sup> See *id.*



Multiple states have grappled with the unintended failings of the Dillon Rule by creating general exceptions.<sup>111</sup> Some of these exceptions include letting localities attain Home Rule functionality if they meet several requirements<sup>112</sup> or by becoming a Home Rule state altogether.<sup>113</sup> Even though these exceptions have their own benefits and shortcomings, they all serve the ultimate goal of expanding their localities' authority in order to implement new environmental efforts. Adherence to an antiquated, ineffective Dillon Rule leaves Virginia's localities ill-equipped to resolve the unique environmental challenges faced by their constituents.<sup>114</sup>

#### I. VIRGINIA'S DILLON RULE CONFLICTS WITH EXISTING ENVIRONMENTAL EFFORTS

As concerns regarding the sustainability of our global and regional environments continue to increase, a number of localities within Virginia, as well as in other Dillon Rule states, have grown weary of the limitations that pure Dillon Rule adherence places on environmental efforts.<sup>115</sup> Since these environmental issues will not be resolved without governmental and community intervention, this section will also consider other important environmental issues that conflict with Virginia's current lawmaking structure.

##### A. *Plastic Bans*

Images of marine wildlife suffering at the hands of six-pack rings, grocery store bags, and plastic straws have sparked a progressive movement of plastic bans across the country.<sup>116</sup> Although Virginians share this sentiment, the Dillon Rule is often invoked by local politicians to prevent appropriate legislation from moving forward.<sup>117</sup> For example, councilmembers in Virginia Beach, Chesapeake, Portsmouth, Newport News, and

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<sup>111</sup> See *infra* Section V.B.1.

<sup>112</sup> *Id.*

<sup>113</sup> See *infra* Section V.A.

<sup>114</sup> "It certainly can be frustrating if you're pursuing a local issue that isn't relevant to the rest of the state," said Randy Keaton, interim executive director of the Hampton Roads Planning District Commission." Virginia Lascara, *Dillon Rule Has Friends and Foes*, VA. PILOT (Feb. 13, 2015), [https://www.pilotonline.com/inside-business/article\\_deba\\_c1b1-a048-533f-8c87-c1cef92b17c5.html](https://www.pilotonline.com/inside-business/article_deba_c1b1-a048-533f-8c87-c1cef92b17c5.html) [<https://perma.cc/Y5W4-DYEZ>].

<sup>115</sup> See Butler, *supra* note 13, at 875.

<sup>116</sup> See generally Dan Bilefsky, *Canada Plans to Ban Single-Use Plastics, Joining Growing Global Movement*, N.Y. TIMES (June 10, 2019), <https://www.nytimes.com/2019/06/10/world/canada/single-use-plastic-ban.html> [<https://perma.cc/GT35-VRCX>].

<sup>117</sup> Hafner & Coutu, *supra* note 4.

Hampton have cited the Dillon Rule as the reason for why they cannot meet their citizens' requests.<sup>118</sup> Furthermore, it highlights the localities' common default of working within the Dillon Rule framework, instead of creatively venturing out of it in order to meet local needs.<sup>119</sup> When asked about a potential plastic ban, Norfolk Councilwoman Andria McClellan stated that "[w]hile we can't currently impose a ban, we do want to provide the carrot instead of the stick," referencing its 2018 public awareness campaign that provided one hundred social media users with reusable straws.<sup>120</sup> While raising public awareness to the dangers of plastic use to marine wildlife is important, the Dillon Rule serves as a major procedural roadblock to structural change, and instead incentivizes localities to opt for minimally effective policies that can be implemented within the existing Dillon Rule framework.<sup>121</sup>

### B. *Solar Legislation*

Virginia's communities, such as Arlington County, have expressed to the General Assembly their desire to promote locally a greater renewable energy presence.<sup>122</sup> The ongoing battle for solar legislation exemplifies how the Dillon Rule's framework, coupled with partisan policymaking efforts, has prevented localities from addressing concerned calls from their citizens.<sup>123</sup> Even in localities that are monetarily equipped to incessantly lobby their state legislators, an opposing political majority can halt a string of progressive policies from being implemented.<sup>124</sup>

In the solar context, a number of localities throughout northern Virginia and the Richmond suburbs, with the knowledge that the Dillon Rule would preclude them from passing any local solar legislation, persuaded several state legislators to introduce bills that would amend

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<sup>118</sup> *Id.*

<sup>119</sup> "Dillon's Rule benefits local government officials by allowing them to use the rule as an excuse to not do things that the public wants." Richardson, Jr., *supra* note 37, at 14.

<sup>120</sup> Hafner & Coutu, *supra* note 4.

<sup>121</sup> See Richardson, Jr., *supra* note 37, at 14–15; see generally Paul Hawkins, *Waging War on the Rising Seas: Fashioning a Comprehensive Approach to Combating the Effects of Sea Level Rise on Hampton Roads, Virginia Military Installations Under Existing Frameworks*, 41 WM. & MARY ENV'T L. & POL'Y REV. 265, 283 (2016).

<sup>122</sup> McCaffrey, *supra* note 5; Ivy Main, *How the General Assembly Failed Virginia Again on Clean Energy*, VA. MERCURY (Mar. 11, 2019), <https://www.virginiamercury.com/2019/03/11/how-the-general-assembly-failed-virginia-again-on-clean-energy/> [<https://perma.cc/P74N-5G8P>].

<sup>123</sup> McCaffrey, *supra* note 5; Main, *supra* note 122.

<sup>124</sup> *Id.*

the pertinent sections of the Virginia code.<sup>125</sup> Unfortunately, these bills suffered lopsided, partisan defeats.<sup>126</sup> Arlington County Board member Libby Garvey has stated that although “[w]e can’t do anything unless the state gives us permission,” within the “confines of existing state law, Arlington does try to push for incentives to encourage more use of solar power.”<sup>127</sup> Councilmember Garvey’s statements exemplify the sentiment that the current Dillon Rule framework is effectively stifling localities’ ability to adequately meet their citizens’ needs.<sup>128</sup> It forces them to either seek muted policies that fit into the existing frameworks or worse, abandon a policy goal altogether.<sup>129</sup>

### C. *Other Environmental Problems Virginians Are Unlikely to Address*

As states and localities continue to spearhead the nation’s environmental initiatives<sup>130</sup> and their constituents continue to experience the dramatic effects of an ever-changing climate,<sup>131</sup> Virginia’s environmental responsibilities will only increase. A discussion of how Virginia’s law-making restrictions preclude various policy initiatives implemented by other states will be discussed below.

#### 1. Building Energy Requirements

A popular way to reduce energy use in any community is by increasing the energy efficiency of its buildings.<sup>132</sup> Each state would create a building energy code program for residential and commercial buildings.<sup>133</sup>

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<sup>125</sup> McCaffrey, *supra* note 5; Main, *supra* note 122.

<sup>126</sup> See Main, *supra* note 122. See, e.g., H.B. 2329, Gen. Assemb. Reg. Sess. (Va. 2019); H.B. 1928, Gen. Assemb. Reg. Sess. (Va. 2019).

<sup>127</sup> See McCaffrey, *supra* note 5.

<sup>128</sup> See *id.*

<sup>129</sup> *Id.*

<sup>130</sup> See Hillary Rosner, *How State and Local Governments Are Leading the Way on Climate Policy*, AUDUBONMAG. (2019), <https://www.audubon.org/magazine/fall-2019/how-state-and-local-governments-are-leading-way> [<https://perma.cc/RF5D-P3FH>]; Andrea McArdle, *Local Green Initiatives: What Local Governance Can Contribute to Environmental Defenses Against the Onslaughts of Climate Change*, 28 FORDHAM ENV'T L. REV. 102, 102–03 (2016).

<sup>131</sup> McArdle, *supra* note 130, at 102.

<sup>132</sup> *City Climate Policy*, CTR. FOR CLIMATE AND ENERGY SOLUTIONS, <https://www.c2es.org/content/city-climate-policy/> [<https://perma.cc/4PBS-GGY5>] (last visited Nov. 2, 2020).

<sup>133</sup> See, e.g., *Building Energy Codes Program: Virginia*, U.S. DEPT OF ENERGY, <https://www.energycodes.gov/adoption/states/virginia> [<https://perma.cc/45AT-39TZ>] (last visited Nov. 2, 2020).

These programs set the mandatory levels of energy efficiency for existing and future buildings in each jurisdiction.<sup>134</sup> In Home Rule states or states that entrust cities with more autonomy, cities are free to set higher building energy code requirements than the state's minimum.<sup>135</sup> For example, in new buildings, some localities impose LEED or Energy Star Certification requirements.<sup>136</sup>

In Georgia, a Home Rule state, localities can set their own building energy codes.<sup>137</sup> To assist localities with choosing appropriate standards, the state provides two optional building codes available to any jurisdiction to adopt, including, a state minimum standard and a green building standard.<sup>138</sup>

In contrast, localities in Dillon Rule states cannot surpass the state-assigned level for building energy efficiency standards.<sup>139</sup> According to the Virginia Building Energy Codes Program, "all jurisdictions, cities, counties, and towns must comply to [the state's energy] code."<sup>140</sup> This massively reduces the strides counties and cities can make to reduce the state's overall energy use.<sup>141</sup> Localities in Virginia who seek to promote green building development can only use positive, voluntary incentives, such as the fast tracking of building permits.<sup>142</sup>

The Dillon Rule can be especially restrictive for localities located in states that do not prioritize strengthening their Building Energy Code Programs.<sup>143</sup> As localities continue to be a massive source of environmentally

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<sup>134</sup> *Id.*

<sup>135</sup> In Home Rule states, the energy code's "Jurisdictional Adoption" will contain "State as Minimum," indicating that localities can enact laws that strengthen the energy code standards above the state minimum. See *Building Energy Codes Program: Florida*, U.S. DEPT OF ENERGY, <https://www.energycodes.gov/adoption/states/florida> [<https://perma.cc/2DAA-BNDX>] (last visited Nov. 2, 2020).

<sup>136</sup> *City Climate Policy*, *supra* note 132.

<sup>137</sup> *Energy Code Stringency*, AM. COUNCIL FOR AN ENERGY-EFFICIENT ECON., <https://database.aceee.org/city/energy-code-stringency> [<https://perma.cc/383M-WN9H>] (last visited Nov. 2, 2020).

<sup>138</sup> *Id.*

<sup>139</sup> Virginia's Energy Code Program is designated "mandatory." *Building Energy Codes Program: Virginia*, *supra* note 133.

<sup>140</sup> *Id.*

<sup>141</sup> See Andrae J. Via, *Local Green Building Incentives: Overcoming the Dillon Rule in Virginia*, WILLIAMS MULLEN (Dec. 6, 2010), <https://www.williamsmullen.com/news/local-green-building-incentives-overcoming-dillon-rule-virginia> [<https://perma.cc/KM5K-BEG2>]; see, e.g., *Energy Code Stringency*, *supra* note 137.

<sup>142</sup> Via, *supra* note 141; *Energy Code Stringency*, *supra* note 137.

<sup>143</sup> See, e.g., *Building Energy Codes Program: Virginia*, *supra* note 133.

friendly energy use within each state, those within a Dillon Rule state will be handicapped in their quest to reduce its carbon emissions.<sup>144</sup>

## 2. Renewable Energy Requirements

The Dillon Rule also limits localities from enacting mandatory green energy requirements.<sup>145</sup> The challenges faced by Arlington, a county of roughly 237,000 constituents, provides a telling story of such limitations.<sup>146</sup> The county's newly adopted Community Energy Plan establishes a goal of becoming carbon neutral by 2050.<sup>147</sup> According to Rich Dooley, Arlington's Community Energy Coordinator, the Dillon Rule prevents Arlington from "requir[ing] developers to build energy-efficient buildings above what is required by the state" and can only offer incentives, such as bonus density, for going above Virginia's standards.<sup>148</sup>

## II. SUCCESSFUL EFFORTS IMPLEMENTED BY MIXED OR HOME RULE STATES

### A. *Regional Efforts*

Florida's Home Rule status allowed for the creation of the South Florida Climate Change Compact ("Compact"), which has become a model for the country in regional climate change legislation.<sup>149</sup> According to the Compact, it achieves its goals by "coordinat[ing] [climate] mitigation and adaptation activities across county lines" among Broward, Miami-Dade, Monroe, and Palm Beach counties.<sup>150</sup> Some of its work includes establishing requirements for "state agencies, water management districts, local governments, and regulated industries (e.g., electric utilities) to consider projected sea-level rise, coastal flooding, and potential storm surge in all

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<sup>144</sup> *City Climate Policy*, *supra* note 132.

<sup>145</sup> Vernon Miles, *Arlington Scales Up Community Energy Plan Ambitions Despite Feasibility Concerns*, ARLINGTON NOW (July 11, 2019), <https://www.arlnow.com/2019/07/11/arlington-scales-up-community-energy-plan-ambitions-despite-feasibility-concerns/> [<https://perma.cc/VT8U-3GYU>].

<sup>146</sup> *Arlington County, Virginia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/arlingtoncountyvirginia> [<https://perma.cc/R7WR-FYL3>] (last visited Nov. 2, 2020).

<sup>147</sup> Miles, *supra* note 145.

<sup>148</sup> *Id.*

<sup>149</sup> SE. FLA. REG'L CLIMATE CHANGE COMPACT, *supra* note 21.

<sup>150</sup> *What is the Compact?*, SE. FLA. REG'L CLIMATE CHANGE COMPACT, <https://southeastfloridacclimatecompact.org/about-us/what-is-the-compact/> [<https://perma.cc/ZXE6-26ND>] (last visited Nov. 2, 2020).

infrastructure and facility-siting decisions” within their counties.<sup>151</sup> These efforts would not be possible without Florida’s Home Rule status.<sup>152</sup> The counties contained within the Compact are primarily responsible for implementing the Compact’s initiatives through local policymaking.<sup>153</sup> Furthermore, it serves as an example of the benefits that materialize when local governments are permitted to confront their own pressing environmental issues. A similar Compact could easily be mimicked in southeastern Virginia to mitigate the effects of excessive sea level rise.<sup>154</sup>

### B. County-Wide Environmental Efforts

Several states have begun to shift away from a traditional Dillon Rule structure by awarding counties Home Rule status while simultaneously maintaining its grip on a locality’s individual lawmaking.<sup>155</sup> Counties can be powerful forces in effectuating environmental goals such as reducing greenhouse gas emissions and increasing reliance on renewable energy.<sup>156</sup> For example, Washtenaw County, Michigan, began its climate change mitigation efforts by establishing the County Environmental Council with the ultimate goal of achieving “net-zero emissions for county operations by 2035.”<sup>157</sup> In addition, some of the programs enacted by Washtenaw County include “green purchasing policies for county operations, such as a ban on plastic straws and some single-use plastics, and a land conservation program protecting over 3,000 acres of natural area and farmland.”<sup>158</sup>

In a similar fashion, allowing Virginia’s counties to exercise Home Rule authority would facilitate enormous strides in counties struggling with environmental concerns. This approach also authorizes a county commission to oversee the legislative process as opposed to giving each county full lawmaking authority, which can effectively quell fears of government corruption.<sup>159</sup>

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<sup>151</sup> 2019 *State Energy, Climate, and Resilience Legislative Principles*, SE. FLA. REG’L CLIMATE CHANGE COMPACT (Oct. 29, 2018), <https://southeastfloridaclimatecompact.org/wp-content/uploads/2018/11/2019-Compact-state-principles-APPROVED.pdf> [<https://perma.cc/HQK4-W4CR>].

<sup>152</sup> *Lessons in Regional Resilience*, GEO. CLIMATE CTR. (Jan. 2017), 3–4, [https://www.georgetownclimate.org/files/report/GCC-Lessons-in-Regional-Resilience-SE\\_FL\\_Compact-Jan\\_2017-v2.pdf](https://www.georgetownclimate.org/files/report/GCC-Lessons-in-Regional-Resilience-SE_FL_Compact-Jan_2017-v2.pdf) [<https://perma.cc/S4JR-Y8W7>].

<sup>153</sup> *Id.*

<sup>154</sup> See *What is the Compact?*, *supra* note 150.

<sup>155</sup> Russell & Bostrom, *supra* note 19, at 6.

<sup>156</sup> *How Counties Are Taking Climate Action*, *supra* note 20.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> See BRIFFAULT & REYNOLDS, *supra* note 3, at 328.



### C. *Dillon Rule States with Carved out Exceptions*

Some states retain the Dillon Rule as their default doctrine, while carving out special exceptions for various types of municipalities in order to meet their unique governmental needs.<sup>160</sup> For example, in Kansas, the Dillon Rule does not apply to counties.<sup>161</sup> Additionally, in Texas, cities may adopt the Home Rule if their population exceeds 5,000 and they adopt a charter.<sup>162</sup> If applicable, they can “adopt, publish, amend, or repeal an ordinance, rule, or police regulation that is for the good government, peace, or order of the municipality.”<sup>163</sup> This language emphasizes Texas’s commitment to the resolution of uniquely local issues.<sup>164</sup>

## III. EXAMPLES OF OTHER STATE TRANSITIONS

This section will examine the reasons for and the process by which West Virginia, Nevada, and Illinois have transitioned from traditional Dillon Rule states to those with innovative governmental structures. Additionally, it will also consider the perceived successfulness of each initiative.

### A. *West Virginia’s Pilot Program*

West Virginia has long contemplated a switch from Dillon Rule adherence.<sup>165</sup> In 2007, the legislature finally enacted the Municipal Home Rule Pilot Program (“Program”) to show participating localities why more local power in their hands is beneficial to West Virginians.<sup>166</sup> This program empowered participating localities to pass local ordinances not otherwise available in Dillon Rule states.<sup>167</sup> The Program started with four cities, but expanded rapidly through the years to include thirty-four.<sup>168</sup> In 2018,

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<sup>160</sup> Russell & Bostrom, *supra* note 19, at 5.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*; TEX. LOC. GOV'T CODE § 51.072 (1987).

<sup>163</sup> *Alphabet Soup: Types of Texas Cities*, TEX. MUN. LEAGUE LEGAL DEP'T (Dec. 2017), <https://www.tml.org/DocumentCenter/View/244/Types-of-Texas-Cities-PDF> [<https://perma.cc/4RBA-3CK8>].

<sup>164</sup> *See id.*

<sup>165</sup> Willard D. Lorensen, *Rethinking the West Virginia Municipal Code of 1969*, 97 W. VA. L. REV. 653, 655–58 (1995).

<sup>166</sup> *The West Virginia Municipal Home Rule Program*, W. VA. DEP'T OF REV., <https://revenue.wv.gov/homerule/Pages/About.aspx> [<https://perma.cc/4UGK-MLWT>] (last visited Nov. 2, 2020).

<sup>167</sup> *Id.*

<sup>168</sup> Shauna Johnson, *Home Rule Is Becoming a Permanent Option for West Virginia’s Cities*, METRO NEWS (Mar. 27, 2019), <http://wvmetronews.com/2019/03/27/home-rule-is-becoming-a-permanent-option-for-west-virginias-cities/> [<https://perma.cc/8SNX-72U7>]; *see*

the Program's success was highlighted at the West Virginia Municipal League Conference by Dave Hardy, Secretary of West Virginia's Department of Revenue.<sup>169</sup> Hardy explained how the Program sparked initiatives by cities to solve problems specific to their communities.<sup>170</sup> Some ordinances enacted during this time include the allowance of Sunday brunch alcohol sales, selling municipal property without an auction, and even addressing traffic issues involving state roads.<sup>171</sup>

The Mayor of Huntington, West Virginia, Steve Williams, praised the program, noting that "Home Rule allows options besides a 'one size fits all' approach to problems that ignore the differences between cities and regions."<sup>172</sup> Due to its widespread success and favorable calls from constituents across the state, the 2019 Legislature amended their statute to make the Program permanent, opening it to all of West Virginia's municipalities.<sup>173</sup> Although this example highlights the dramatic steps Virginia's General Assembly could take, it could also use this Program, which was widely popular with both West Virginia's legislature and its citizens,<sup>174</sup> as a template if it desires.

### B. Nevada

Nevada's Legislature also recently transitioned to traditional Home Rule status in 2015.<sup>175</sup> Nevada Senate Bill 29 granted counties a limited Home Rule, which functionally granted them the authority to pass ordinances upon "matters of local concern that are not otherwise governed by

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*generally Special Report: Municipal Home Rule Program*, W. VA. LEG. AUDITOR (Nov. 2012), [http://www.wvlegislature.gov/Joint/PERD/perdrep/HomeRule\\_11\\_2012.pdf](http://www.wvlegislature.gov/Joint/PERD/perdrep/HomeRule_11_2012.pdf) [<https://perma.cc/C8MT-D46E>].

<sup>169</sup> Connor Griffith, *Home Rule Perks and Success Stories Detailed at Municipal League Conference*, W. VA. NEWS (Aug. 13, 2018), [https://www.wvnews.com/statejournal/news/home-rule-perks-and-success-stories-detailed-at-municipal-league/article\\_92b9a2b6-8b12-5740-8d6e-0b213738b1ff.html](https://www.wvnews.com/statejournal/news/home-rule-perks-and-success-stories-detailed-at-municipal-league/article_92b9a2b6-8b12-5740-8d6e-0b213738b1ff.html) [<https://perma.cc/PR4R-JQHV>].

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> W. Va. Code § 8-1-5A (2017); Steven Allen Adams, *West Virginia House of Delegates Passes Bill to Make State's Home Rule Pilot Program Permanent*, WHEELING NEWS REG. (Mar. 8, 2019), <https://www.theintelligencer.net/news/top-headlines/2019/03/west-virginia-house-of-delegates-passes-bill-to-make-states-home-rule-pilot-program-permanent/> [<https://perma.cc/XW9Y-UQ84>].

<sup>174</sup> *See* W. Va. Code § 8-1-5A (2017); Adams, *supra* note 173.

<sup>175</sup> *Limited Functional Home Rule: Additional Powers Granted to Counties Through SB29*, NEV. ASS'N OF CNTYS. (2015), <http://www.nvnaco.org/wp-content/uploads/NACO-Home-Rule-White-Paper.pdf> [<https://perma.cc/2738-3PSA>].

state or federal laws.”<sup>176</sup> As noted above, counties can be powerful allies in achieving prosperous environmental goals.<sup>177</sup> This type of transition could be enticing to Virginia’s lawmakers, as they would still retain full authority to address the prominent statewide or local issues, while also letting counties address local issues that are solely important to their constituents without having to lobby for state code revisions.

Moreover, this bill passed with emphatic support because it did not abandon the Dillon Rule in its entirety.<sup>178</sup> Instead, the Nevada legislature simply acknowledged that in its current form it was serving adverse goals and that “a strict . . . application of Dillon’s Rule unnecessarily restricts a board of county commissioners from taking appropriate actions . . . to address matters of local concern . . . and thereby impedes the board from responding to and serving the needs of local citizens diligently, decisively and effectively.”<sup>179</sup> Nevada’s localities must continue to fully engage with the Dillon Rule, and counties must acquiesce to the state when it has explicitly spoken on a particular issue through legislation.<sup>180</sup> This lawmaking structure accounts for both the flexibility counties desire to meet local needs and the ultimate oversight power the state seeks to maintain.<sup>181</sup> Nevada’s experiment can serve Virginia as an alternative template for transitioning away from the Dillon Rule, as it highlights a method of effective compromise between the state and its counties.<sup>182</sup>

### C. *Illinois*

Prior to 1971, the limits encountered by Illinois’ municipalities and counties resembled the limits in Virginia.<sup>183</sup> Many communities in Illinois found constant oversight by the state to be inefficient and an impediment to their personal goals.<sup>184</sup> In 1971, the Illinois legislature amended its

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<sup>176</sup> *Id.*

<sup>177</sup> *How Counties Are Taking Climate Action*, *supra* note 20.

<sup>178</sup> Kurt Hildebrand, *Counties Welcome Home Rule Legislation*, NEV. APPEAL (June 11, 2015), <https://www.nevadaappeal.com/news/government/counties-welcome-home-rule-legislation/> [<https://perma.cc/9M9N-5CXR>].

<sup>179</sup> *Limited Functional Home Rule: Additional Powers Granted to Counties Through SB29*, *supra* note 175.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *See id.*

<sup>183</sup> *See Purpose of Home Rule*, ILL. MUN. LEAGUE, <http://iml.org/homerule> [<https://perma.cc/45EL-JZSZ>] (last visited Nov. 2, 2020); *Illinois Home Rule*, ALCOHOL POL'Y RES. CTR., <https://www.prevention.org/Resources/cb13ac9e-6945-40f1-8097-a46b30ef77ea/ILHomeRule.pdf> [<https://perma.cc/F6CM-TUZ6>] (last visited Nov. 2, 2020).

<sup>184</sup> *Illinois Home Rule*, *supra* note 183.

Constitution to create Home Rule municipalities.<sup>185</sup> According to Illinois' Constitution, localities with more than 25,000 citizens obtain automatic Home Rule status, and smaller localities may adopt Home Rule status through referendum if they have a chief executive officer.<sup>186</sup> The state legislature can still retain ultimate authority by reserving power to the state through a majority vote in both houses.<sup>187</sup>

This version of the Home Rule has been a successful system in Illinois for a number of years.<sup>188</sup> In fact, the legislature is considering further expansion of the doctrine by offering automatic Home Rule status to localities with more than 5,000 citizens.<sup>189</sup> This route is intriguing for Virginia, as it considered (1) the benefits of having larger jurisdictions be responsible for their own local issues, (2) how smaller localities can do the same with a constituent majority and a chief executive officer managing the lawmaking of the locality, and (3) how to keep ultimate oversight authority within the state legislature.<sup>190</sup> If Virginia were to pursue adoption of a similar route, it would require collective lobbying by localities to the new Democratic majority in the General Assembly<sup>191</sup> and, ultimately, an amendment to Virginia's Constitution.<sup>192</sup>

#### IV. CHALLENGES OF A TRANSITION

##### A. *Dillon Rule Is Precedent in Virginia*

First, the Dillon Rule has been unwavering precedent in the state since the Virginia Supreme Court's decision in *Winchester v. Redmond* in 1896.<sup>193</sup> In the vast majority of instances, localities have met their citizens' requests under the current doctrine or publicly admonished it as the main reason for its inability to meet citizen desires.<sup>194</sup>

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<sup>185</sup> *Id.*

<sup>186</sup> Ill. Const. art. VII, § 6; Adam W. Lasker, *Home Rule Rules, Says the Illinois Supreme Court*, ILL. BAR J. (2013), <https://www.isba.org/ibj/2013/06/lawpulse/homerulerulesays> [theillinoisupreme] [<https://perma.cc/7CVH-ZMAB>].

<sup>187</sup> *Id.*

<sup>188</sup> Andrea Guthmann, *New Report Finds Illinois Municipalities Pushing for 'Home Rule'*, WTTW (Apr. 11, 2016), <https://news.wttw.com/2016/04/11/new-report-finds-illinois-municipalities-pushing-home-rule> [<https://perma.cc/JJY9-45JN>].

<sup>189</sup> *Id.*

<sup>190</sup> ILL. CONST. art. VII, § 6.

<sup>191</sup> See Richardson, Jr., *supra* note 37, at 14–15.

<sup>192</sup> See *id.*

<sup>193</sup> *Winchester v. Redmond*, 25 S.E. 1001, 1002 (Va. 1896).

<sup>194</sup> See, e.g., Hafner & Coutu, *supra* note 4.

### B. *Benefits of the Dillon Rule*

Proponents of the Dillon Rule constantly cite a number of proven benefits.<sup>195</sup> First, the Dillon Rule promotes the uniformity of law and practice across the state, which in turn promotes fair business and social practices between cities.<sup>196</sup> It ensures that localities do not pass business-friendly legislation that would draw needed jobs and resources from other parts of the state.<sup>197</sup> It also guarantees that citizens' rights do not differ from locality to locality by vesting this authority exclusively in the state government.<sup>198</sup> Secondly, it also limits "local corruption and fiscal irresponsibility."<sup>199</sup> In this way, the Dillon Rule promotes informed decision-making and legislation that is less likely to be influenced by strong interest groups in the community.<sup>200</sup>

### C. *The Grass Is Always Greener: Problems with Home Rule*

#### 1. *Locality Inequality*

As discussed above, one of the Dillon Rule's main purposes is to prevent localities from providing distinct rights, privileges, and opportunities from one another.<sup>201</sup> For example, it is commonly accepted at the national level that corporations favor states with laws that align with their business interests.<sup>202</sup> However, the same analysis follows when viewing businesses from an intrastate perspective.<sup>203</sup> Allowing localities to pass business-friendly laws or, conversely, allowing localities the ability to place environmental restrictions on business practices, would lead to unhealthy competition between them.<sup>204</sup> At the intrastate level, this is

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<sup>195</sup> See Russell & Bostrom, *supra* note 19, at 4.

<sup>196</sup> *Id.*

<sup>197</sup> "From an economic development standpoint, it creates an even playing field and stability," said Ira Agricola, executive vice president and head of government affairs at the Hampton Roads Chamber of Commerce. "Virginia is one of the top states to do business; you have to say that a Dillon Rule is a big part of that. It makes up the pro business environment and the low tax environment, and the predictability of the government." Lascara, *supra* note 114.

<sup>198</sup> Richardson, Jr., *supra* note 37, at 15.

<sup>199</sup> *Dillon's Rule: Good or Bad for Local Governments?*, *supra* note 7.

<sup>200</sup> Richardson, Jr., *supra* note 37, at 15.

<sup>201</sup> *Id.*

<sup>202</sup> See generally *Best States for Business*, FORBES (2019), <https://www.forbes.com/best-states-for-business/list/> [<https://perma.cc/W6US-PTAL>] (last visited Nov. 2, 2020).

<sup>203</sup> Lascara, *supra* note 114.

<sup>204</sup> *Id.*

concerning because the failing of individual localities reflects the failing of the state as a whole.<sup>205</sup> The more dire the economic state of a particular locality, the more the state must step in to financially assist them.<sup>206</sup>

Because states would prefer to discourage this type of competition between localities, a regime that allows for this vying for citizens, businesses, and economic benefits is a perceived disadvantage of Home Rule states.<sup>207</sup> However, as referenced throughout this Note, the Dillon Rule carries its own set of concerns with inequality.<sup>208</sup>

## 2. Preemption

Unfortunately, although more power is initially given to localities in Home Rule states, authority still remains with a state legislature to revoke that power by passing legislation that explicitly reserves a specific area for them.<sup>209</sup> This concept is known as state preemption.<sup>210</sup> It has been primarily used when a locality's lawmaking authority moves beyond the point at which the state legislature is comfortable.<sup>211</sup> In these cases, a state legislature can introduce a bill revoking the locality's lawmaking authority in regard to a particular issue.<sup>212</sup> For example, many localities have sought to increase their minimum wage above the \$7.25 an hour federal minimum, even when their states refused to do so.<sup>213</sup> In Home Rule states, localities can pass a law that increases their minimum wage, so long as the state legislature does not preempt them.<sup>214</sup>

Although this is frequently cited as a weakness solely found in Home Rule states, preemption statutes can be enacted whether or not a

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<sup>205</sup> See generally *The State Role in Local Government Financial Distress*, PEW CHARITABLE TRUSTS (2013), [https://www.pewtrusts.org/-/media/assets/2016/04/pew\\_state\\_role\\_in\\_local\\_government\\_financial\\_distress.pdf?la=en&hash=6EC45797B4FDBF08B4F7F1C9B16FF85A4F7D4C14](https://www.pewtrusts.org/-/media/assets/2016/04/pew_state_role_in_local_government_financial_distress.pdf?la=en&hash=6EC45797B4FDBF08B4F7F1C9B16FF85A4F7D4C14) [<https://perma.cc/Z2GC-7PK8>].

<sup>206</sup> See *id.*

<sup>207</sup> BRIFFAULT & REYNOLDS, *supra* note 3, at 328.

<sup>208</sup> See *supra* Introduction.F.

<sup>209</sup> Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1114 (2007).

<sup>210</sup> *Id.*

<sup>211</sup> See Elizabeth Daigneau, *Will States Stop Cities from Combatting Climate Change?*, GOVERNING (Jan. 2017), <https://www.governing.com/topics/transportation-infrastructure/gov-climate-change-states-cities-preemption.html> [<https://perma.cc/8MXF-YXSJ>].

<sup>212</sup> *Id.*

<sup>213</sup> Jared Bernstein, *Cities Would Like to Raise Their Minimum Wages, too, but States Keep Blocking Them*, WASH. POST (Aug. 28, 2019); *Policy Brief: Fighting Preemption: The Movement for Higher Wages Must Oppose State Efforts to Block Local Minimum Wage Laws*, NAT'L EMP. L. PROJECT (July 2017), <https://s27147.pcdn.co/wp-content/uploads/Fighting-Preemption-Local-Minimum-Wage-Laws.pdf> [<https://perma.cc/9ZN6-XDBX>].

<sup>214</sup> Bernstein, *supra* note 213; NAT'L EMP. L. PROJECT, *supra* note 213.



state follows the Dillon Rule, Home Rule, or any form in between.<sup>215</sup> For example, forty-one states, including Virginia, have passed bills that preempt cities from being able to regulate ride sharing transportation networks.<sup>216</sup> Although preemption statutes are important in the Home Rule context because they are the only way states can reclaim their control from its localities, localities in Dillon Rule states are similarly harmed from such statutes.<sup>217</sup>

## V. RECOMMENDATIONS FOR VIRGINIA GENERAL ASSEMBLY

This section argues that Virginia must limit its strict Dillon Rule adherence for a variety of reasons, although the ultimate transition could take countless forms. A number of viable options are discussed below.

### A. *Full Transition to Home Rule*

The first and most drastic option for the Virginia General Assembly to take is a full transition to Home Rule status. Though largely unlikely,<sup>218</sup> considering the noteworthy benefits of this course of action is worthwhile. First, it gives localities the power to enact progressive environmental legislation that other localities and the General Assembly as a whole may not support.<sup>219</sup> These laws could include plastic straw bans or local solar energy requirements.<sup>220</sup>

An unrestricted Home Rule status also allows localities to independently address their own particular concerns, as opposed to only allowing municipalities over a certain citizen-population to make their own policymaking decisions.<sup>221</sup> In addition, Home Rule accessibility across the board will reduce the amount of time and resources local governments must spend lobbying legislators to amend the Virginia code.<sup>222</sup> It will also increase the General Assembly's efficiency by reducing the amount of time it spends on distinctly local bills.<sup>223</sup>

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<sup>215</sup> Nicole DuPuis, *City Rights in an Era of Preemption: A State-by-State Analysis*, NAT'L LEAGUE OF CITIES (2018), <https://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf> [<https://perma.cc/R7P4-PPPC>].

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Virginia's adherence to the Dillon Rule is considered one of the strictest in the nation. Diller, *supra* note 209, at 1126 n.64.

<sup>219</sup> Seymour, *supra* note 11.

<sup>220</sup> See Hafner & Coutu, *supra* note 4; Main, *supra* note 122.

<sup>221</sup> See Hildebrand, *supra* note 178.

<sup>222</sup> Richardson, Jr., *supra* note 37, at 14.

<sup>223</sup> *Id.* at 14–15.

*B. Mixed Rule State Options*

1. Allow Home Rule for Specific Types of Localities

Presently, there are eight states that apply the Dillon Rule to only certain municipalities.<sup>224</sup> There is no established political leaning of states who have chosen this category; some of these states include Tennessee, Alabama, California, and Illinois.<sup>225</sup> This type of government policymaking structure gives designated localities the most flexibility while also retaining the long-standing Dillon Rule precedent.<sup>226</sup> In this structure, the Virginia legislature could decide what types of localities warrant less oversight, such as counties or cities over a certain population.<sup>227</sup> This benefits the state legislature by letting them focus their time on other pressing issues instead of addressing constant calls from localities to change the state code.<sup>228</sup> In addition, state legislatures retain authority over smaller local governments, which are the most susceptible to the enactment of faulty or corrupt legislation.<sup>229</sup>

Providing cities or counties with Home Rule status frees them to enact progressive environmental legislation that serves as experimental for the state as a whole.<sup>230</sup> Alternatively, even if the entire state does not adopt a particular policy, cities largely contribute to the collective state's energy use, pollution, and greenhouse gas emissions.<sup>231</sup> By allowing cities and counties to address their environmental concerns, the state is promoting environmental progress without enacting any policies itself.

2. Content-Based Dillon Rule Exceptions

Another option for state legislators is to add a code provision that allows localities to pass legislation that directly improves the public health or the natural environment. In other words, Virginia would create a Dillon Rule exemption for those policies meeting the relevant criteria. The Virginia Constitution itself advocates for environmental conservation

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<sup>224</sup> *Id.* at 17–18.

<sup>225</sup> *Id.*

<sup>226</sup> *See id.*

<sup>227</sup> *See, e.g.*, TEX. LOC. GOV'T CODE § 51.072 (1987).

<sup>228</sup> Richardson, Jr., *supra* note 37, at 14.

<sup>229</sup> “Back then, local governments were better known for giving away the store . . . and that exercise of power was fleecing the taxpayers.” Kutner, *supra* note 99.

<sup>230</sup> *See* Shannon M. Roesler, *Federalism and Local Environmental Regulation*, 48 U.C. DAVIS L. REV. 1111, 1113–14 (2015).

<sup>231</sup> *See* Daigneau, *supra* note 211.

and public health to the fullest extent, stating that “it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources [and] . . . protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the . . . general welfare of the people.”<sup>232</sup> This language allows the General Assembly to slightly break from judicial precedent to more closely align with the intentions of the State’s Constitution.<sup>233</sup> In fact, Utah’s Supreme Court used similar general welfare language in their Constitution to justify a full transition to Home Rule status, claiming that this provision specifically granted localities the power to ensure general welfare.<sup>234</sup>

In addition, this could be an enticing option for the General Assembly if it wants to limit the applicability of this newly vested lawmaking power. For example, if the Assembly wanted to give localities the power to address uniquely environmental issues, but not to address social, economic, or other types of issues that may be more contested throughout the state, a specific environmental or public welfare exception may be the best option.

### 3. Allowance for Home Rule Charters

Some states allow for localities to create their own charter if they so desire to more effectively meet their citizens’ needs.<sup>235</sup> This option is complex. For example, the state of Washington gives their counties the option of either creating a county board of commissioners that will be subject to Dillon Rule requirements, or to adopt a Home Rule charter.<sup>236</sup> Of Washington’s thirty-nine counties, only seven have opted to create Home Rule charters.<sup>237</sup> The adoption of a charter is a drastic measure because “the powers, authority, and duties of county officers provided for by state law . . . are vested in the county legislative authority, unless the charter expressly assigns powers and duties to specific officers.”<sup>238</sup> This option is unpopular because along with the privileges of creating their own laws and

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<sup>232</sup> VA. CONST. art. XI, § 1.

<sup>233</sup> See, e.g., *State v. Hutchinson*, 624 P.2d 1116, 1127 (Utah 1980).

<sup>234</sup> “[T]he Dillon Rule of strict construction is not to be used to restrict the power of a county under a grant by the legislature of general welfare power or prevent counties from using reasonable means to implement specific grants of authority.” *Id.* at 1117.

<sup>235</sup> Russell & Bostrom, *supra* note 19, at 6.

<sup>236</sup> WASH. CONST. art. XI, § 4; *County Forms of Government*, MRSC OF WASH., <http://mrsc.org/Home/Explore-Topics/Governance/Forms-of-Government-and-Organization/County-Forms-of-Government.aspx> [<https://perma.cc/JUN4-9MMZ>] (last visited Nov. 2, 2020).

<sup>237</sup> *County Forms of Government*, *supra* note 236.

<sup>238</sup> *Id.*

policies, counties with Home Rule charters have the responsibility of “establish[ing] separate legislative and executive branches [and] ensur[ing] responsibility and accountability for local and regional county governance and services.”<sup>239</sup> This option is less drastic than a full Home Rule transition, but more substantive than content-based Dillon Rule exceptions or a Mixed Rule alternative structure.

## CONCLUSION

With a Democratic majority in both chambers of the General Assembly,<sup>240</sup> there is finally a clear path for much-needed state and local government law reform in Virginia. A transition into any of the previously mentioned alternative structures will give Virginia’s localities the flexibility necessary to meet the social, public health, economic, and environmental needs of their constituents. For example, allowing localities to experiment with various environmental reforms will allow them to test out various initiatives and offer the state legislature successful policies to possibly implement on a state-wide level.<sup>241</sup>

In addition to these policy considerations, the General Assembly must reconsider Dillon Rule adherence now that it fails to serve the purposes purported by Judge Dillon.<sup>242</sup> As noted above, the Dillon Rule no longer ensures equality and fairness among the localities, and in many ways, is promoting just the opposite.<sup>243</sup> Moreover, the Dillon Rule is not the only way that the state government can retain oversight authority over localities.

As a whole, the Dillon Rule has long failed to serve a changing society and climate. Allowing a locality the freedom to address an ever-changing landscape of issues intimately affecting its own constituents has proven successful in a variety of avenues across several states.<sup>244</sup> It is my hope that this Note highlights both the need and the feasibility of Dillon Rule reform in Virginia as well.

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<sup>239</sup> For an example of the powers given through a charter, see *Preamble*, KING CNTY., WASH., [https://www.kingcounty.gov/council/legislation/kc\\_code/03\\_Charter.aspx](https://www.kingcounty.gov/council/legislation/kc_code/03_Charter.aspx) [<https://perma.cc/S7TP-U9WB>] (last visited Nov. 2, 2020).

<sup>240</sup> See Sullivan, *supra* note 35.

<sup>241</sup> See Finck, *supra* note 34, at 53.

<sup>242</sup> BRIFFAULT & REYNOLDS, *supra* note 3, at 328.

<sup>243</sup> See Gillette, *supra* note 6, at 976.

<sup>244</sup> See, e.g., Griffith, *supra* note 169.