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Home Rule in West Virginia

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HOME RULE IN WEST VIRGINIA

*Robert M. Bastress, Jr.**

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I. INTRODUCTION

The history of municipal power in West Virginia reflects a consistent and persistent judicial suppression of local initiative and control interspersed by several popular attempts to loosen the judicial grip, expressed through both constitutional and legislative efforts. The most recent effort was the West Virginia Legislature’s 2019 enactment of a home rule law that made permanent a program that had existed in various forms as a pilot project. Section 8-1-5a of the West Virginia Code creates a Home Rule Board and enables municipalities approved by the Board to exercise a considerable degree of local autonomy.

This Article explores the history behind home rule and examines the West Virginia Legislature’s most recent attempt to facilitate it. The Article first provides background on the general development of local government powers and then focuses on the particular history in West Virginia. That history exposes one of the most blatant demonstrations of judicial nullification of popular sentiment that exists. The Article then turns to the most recent developments: a pilot home rule program and a subsequent statute making it permanent. Finally, the Article concludes by discussing an attempt to challenge the program’s constitutionality.

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Although West Virginia's experience reflects those in a large number of states, the statute that has emerged also offers some innovative strategies for promoting localism in the state.

II. LOCAL GOVERNMENT POWERS GENERALLY

Since at least the post-Civil War period, the default rule for local government power in the United States has been that local governments are creatures of the state that derive their existence and powers from state law.¹ (The federal Constitution makes no provision for local governmental units.) This view was solidified by the widespread adoption of "Dillon's Rule," which is named after Justice John F. Dillon of the Iowa Supreme Court, who formulated it in an 1868 decision (*Merriam v. Moody's Executors*²) and in his treatise *Commentaries on the Law of Municipal Corporations*.³ He wrote:

[A] municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incidental to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the power.⁴

Although Dillon wrote specifically about cities, his rule was readily applied to define the powers of counties and other forms of local government.⁵ Judges were

¹ See, e.g., *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907) ("The state, . . . at its pleasure, may modify or withdraw all [municipal] powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation."); *Booten v. Pinton*, 77 W. Va. 412, 421, 89 S.E. 985, 989 (1915) (concluding that municipalities "are mere creatures of the Legislature, exercising certain delegated governmental functions which the Legislature may revoke at will").

² 25 Iowa 163, 170 (1868).

³ 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS §§ 237–39 (5th ed. 1911).

⁴ *Merriam*, 25 Iowa at 170.

⁵ See, e.g., *State ex rel. Cty. Court v. Arthur*, 150 W. Va. 293, 145 S.E.2d 34 (1965); Willard D. Lorensen, *Rethinking the West Virginia Municipal Code of 1969*, 97 W. VA. L. REV. 653, 659 (1995). Dillon's Rule

reflects the view of local governments as agents of the state by requiring that all local powers be traced back to a specific delegation: whenever it is uncertain whether a locality possesses a particular power, a court should assume that the locality *lacks* that power. By denying localities broad authority, Dillon's Rule limits the number of entities that

enamored with the rule because it gave courts enormous discretion to invalidate laws they considered unwise or burdensome on local taxpayers and promoted the *laissez-faire* economic philosophy dominant in the second half of the 19th century.⁶

Home rule laws were put forth as an antidote to the courts' miserly interpretation of local government powers. "Home rule" is a generic term for statutory and state constitutional provisions that attempt to bestow on local governments some degree of local autonomy and discretion and to avoid the necessity (imposed by Dillon's Rule) of having to run to the legislature to gain express authorization for every exercise of local power.⁷ Home rule laws vary widely in design and form, but they basically either bestow the ability to initiate policies at the local level (the power of initiative) or protect against state override (the power of immunity)—or they perform both functions.⁸

In very general terms, home rule laws have taken two shapes: *imperium in imperio* (i.e., a sovereign within a sovereign) or "legislative home rule." The former term describes the original home rule law, which was created by Missouri in 1875 for the City of St. Louis⁹ and emulated by other jurisdictions.¹⁰ This form

may regulate private activity. Only through a clear and express state delegation may a locality obtain power to govern.

Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8 (1990).

⁶ See, e.g., Robert M. Bastress, Jr., *Constitutional Considerations for Local Government Reform in West Virginia*, 108 W. VA. L. REV. 125, 145 (2005); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1110 (1980); see also Lorensen, *supra* note 5, at 659 (suggesting that Dillon's endurance may be attributable to its "blessing of simplicity and the lure of reserving to the judiciary the power to substitute its policy choices for those of locally elected officials").

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

⁸ RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 346–47 (8th ed. 2016) (first citing GORDON L. CLARK, *JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY* 7 (1985); then quoting *City of New Orleans v. Bd. of Comm'rs*, 640 So. 2d 237, 242 (La. 1994)).

⁹ See *City of St. Louis v. W. Union Tel. Co.*, 149 U.S. 465, 467–68 (1893) (noting that the city's power stems from its own charter, which was authorized by the state constitution of 1875).

¹⁰ This Author has previously argued that the first home rule law was enacted three years earlier with West Virginia's adoption of its 1872 constitution and the creation of what is now Article IX, Section 13, which conferred on counties the power to create their own forms of government. Robert M. Bastress, Jr., *Localism and the West Virginia Constitution*, 109 W. VA. L. REV. 683, 707–09 (2007). Unfortunately, the Supreme Court of Appeals gutted the local supremacy

created an initiative power and a supremacy for local governments with regards to their local “affairs” or “subjects” (or some similar term). Judicial hostility to such laws resulted in an extremely narrow construction of what were “municipal affairs” or a very broad interpretation of legislative ability to override the local law.¹¹ In response to that hostility, localism advocates proposed an alternative strategy that authorized local governments to enact any law not in conflict with federal law, the state constitution, or state statute. This strategy was designed to shift the scope of defining home rule powers from the courts (and their hostility) to the legislatures (and their greater amenability).¹² This became known as “legislative home rule.”¹³

III. WEST VIRGINIA’S HISTORY OF MUNICIPAL POWER

West Virginia was an early and faithful adherent of Dillon’s Rule.¹⁴ Under the state’s 1872 constitution, the legislature prescribed municipal charters—except for towns with populations of fewer than 2,000 people.¹⁵ The state pushed its dominance over local governance to the maximum when in 1915 the state enacted legislation that erased the Williamson City Council and replaced it with a government to be appointed by the governor, all of which was sustained by the West Virginia Supreme Court of Appeals in *Booten v. Pinson*.¹⁶

In 1929, after years of calls for constitutional reform, Governor William Conley appointed a Constitutional Review Commission to study the state’s constitution and recommend changes.¹⁷ That Commission filed its report in 1930,

provided by Section 13 in *Committee to Reform Hampshire County Government v. Thompson*, 223 W. Va. 346, 674 S.E.2d 207 (2008), and thereby refuted the contention that West Virginia pioneered home rule. ROBERT M. BASTRESS, JR., *THE WEST VIRGINIA STATE CONSTITUTION* 278–82 (2d ed. 2016).

¹¹ See, e.g., BRIFFAULT & REYNOLDS, *supra* note 8, at 347–49 (quoting *City of New Orleans*, 640 So. 2d at 242–43).

¹² See *id.* at 347.

¹³ *Id.* at 348.

¹⁴ Syl. Pt. 4, *Christie v. Malden*, 23 W. Va. 667 (1884). For later decisions applying the rule, see Lorensen, *supra* note 5, at 659 nn.18–19.

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

¹⁶ 77 W. Va. 412, 89 S.E. 985 (1915). The governor at the time, Henry Hatfield, was an extremely forceful figure and was in a dispute with the government in Williamson, so he convinced the legislature to enact a law eliminating that government and giving him the power to handpick the successor.

¹⁷ BASTRESS, *supra* note 10, at 27.

and either the legislature or the voters rejected all of its recommendations¹⁸—save one. In 1936, the electorate approved adding the “Home Rule Amendment” to the state constitution as Article VI, Section 39a.¹⁹ That amendment follows:

§ 39(a). Home Rule for Municipalities. No local or special law shall hereafter be passed incorporating cities, towns or villages, or amending their charters. The legislature shall provide by general laws for the incorporation and government of cities, towns and villages and shall classify such municipal corporations, upon the basis of population, into not less than two nor more than five classes. Such general laws shall restrict the powers of such cities, towns and villages to borrow money and contract debts, and shall limit the rate of taxes for municipal purposes, in accordance with section one, article ten of the Constitution of the State of West Virginia. Under such general laws, the electors of each municipal corporation, wherein the population exceeds two thousands, shall have power and authority to frame, adopt and amend the charter of such corporation, or to amend an existing charter thereof, and through its legally constituted authority, may pass all laws and ordinances relating to its municipal affairs: Provided, that any such charter or amendment thereto, and any such law or ordinance so adopted, shall be invalid and void if inconsistent or in conflict with this Constitution or the General Laws of the State then in effect, or thereafter, from time to time enacted.²⁰

¹⁸ Bastress, *supra* note 10, 698–99; see also Robert E. DiClerico, *The West Virginia Constitution: Securing the Popular Interest*, in *THE CONSTITUTIONALISM OF AMERICAN STATES* 216, 230 (George E. Connor & Christopher W. Hammons eds., 2008) (opining that “the political crosscurrents . . . proved so strong that the legislature declined to accept the commission’s report”).

¹⁹ The Commission described its proposed provision as follows:

[This] would be a new section intended to provide for what is commonly known as Municipal Home Rule. Under the provisions of this proposed section, cities, towns and villages would be classified according to population and a general law passed to govern the municipalities of each class. City charters would no longer be amended by the Legislature but would be amended by the local communities in accordance with general law, thus eliminating much special legislation and the evils incident thereto. The form and efficiency of municipal government are necessarily local subjects and any defects therein in the last analysis can only be corrected by the electors of the locality involved. The granting or amending by the Legislature of special charters has solved no problem of municipal government. The volume of legislation upon this subject would seem to condemn the present method. Under present method the electors of a community have been, or feel that they have been, deprived of the inherent right of governing themselves in local affairs.

D.J.F. STROTHER ET AL., *W. VA. CONST. COMM’N, THE CONSTITUTION OF WEST VIRGINIA* 15 (1930), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015030826849&view=1up&seq=1>.

²⁰ W. VA. CONST. art. VI, § 39a.

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

The Supreme Court of Appeals, in its first decision interpreting Section 39a, declared that the section had constitutionalized Dillon’s Rule.²¹ Did the term “home rule” not mean anything? Subsequent decisions persisted to apply Dillon’s Rule to municipal powers questions²² and to ignore the intent behind and the literal language of Section 39a.²³

In 1969, the legislature overhauled the state’s Municipal Code.²⁴ In part, the legislature’s purpose was to eliminate the disarray that had developed following the 1936 enactment of Article VI, Section 39a and the subsequent establishment of two separate municipal codes—one for cities with municipal charters created by the legislature prior to 1936 and another for cities that had created their own charters pursuant to the Section 39a-granted power.²⁵ The dual track had brought about confusion and unfairness; one municipal code for all cities (subject to distinctions in treatment between cities based on population²⁶) promoted clarity and ease of application. A second legislative purpose, however, can readily be gleaned from several provisions of the West Virginia Code: a purpose to confer greater powers and discretion on cities and a plea to courts to let them exercise those enhancements.

Of particular note was the inclusion of Section 8-1-7, which specifically stated that the powers granted by the chapter (i.e., by the Municipal Code) “shall not operate to exclude the exercise of other powers and authority fairly incidental thereto or reasonably implied and within the purposes of this chapter.”²⁷ In 2007, the legislature added the language “or in accordance with the Home Rule Amendment to the constitution of this state.”²⁸ The section further stated that “[t]he provisions of the chapter shall be given full effect *without regard to the*

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

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

²³ *See supra* text accompanying note 20.

²⁴ *BASTRESS*, *supra* note 10, at 200; *Lorensen*, *supra* note 5.

²⁵ *Id.*

²⁶ Those distinctions in treatment have always, to some extent, been part of West Virginia law. *See, e.g.,* W. VA. CONST. art. VI, § 39 (prohibiting the legislature from enacting charters for towns under 2,000). In any event, Article VI, Section 39a mandated the creation of different classes of cities based on population. *See supra* text accompanying note 19.

²⁷ W. VA. CODE. ANN. § 8-1-7(a) (West 2020).

²⁸ *Id.* (emphasis added).

*common-law rule of strict construction.*²⁹ But this guidance mattered little to the Supreme Court of Appeals.

In its first case applying Section 8-1-7, *Rogers v. City of South Charleston*,³⁰ the Supreme Court of Appeals held that a statute according cities the power to sell or convey real estate did not include the power to enter into a contract creating an option for a person to buy city property (even though there was no statute precluding it). Cities enjoy only such powers as are expressly granted by the Legislature or are necessarily implied. As for Section 8-1-7, the court stated it only “relaxes the common law rule of strict construction and does not lift all restrictions on municipal power.”³¹ Subsequent decisions on municipal power have continued to cite with approval Dillon’s Rule of limited municipal power.³²

The 1969 Act did not stop with Section 8-1-7. It also included within its general provisions applicable to the entire Act Section 8-1-6, which set forth rules of interpretation and attempted to codify Article VI, Section 39a.³³ More importantly, the Act broadly defined municipal powers. Section 8-11-1(a), beginning the definition of city powers, provides:

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

- (1) Make and pass all needful ordinances, orders, bylaws, acts, resolutions, rules and regulations not contrary to the Constitution and laws of this state; and
- (2) Prescribe reasonable penalties for violation of its ordinances, orders, bylaws, acts, resolutions, rules and regulations, in the form of fines, forfeitures and confinement in the county or

²⁹ *Id.* (emphasis added).

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

³¹ *Id.* at 290, 256 S.E.2d at 561.

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

³³ Section 8-1-6 is not a model of clarity, which might explain why it has not received much attention.

regional jail or the place of confinement in the municipality, if there is one, for a term not exceeding thirty days.

There's more. In Section 8-12-2, titled "Home Rule Power for Cities," the Act in subsection (a) provides that "any city shall have plenary power and authority by charter provision . . . or by ordinance not inconsistent or in conflict" with state law "to provide for the government, regulation and control of the city's municipal affairs."³⁴ The section then goes on to set forth a non-exhaustive list of 11 broadly stated powers.³⁵

Later in Article 12, the Act lists the "General Powers of Municipalities and Governing Bodies." Section 8-12-5 currently sets forth 59 separate powers, including "(44) [The power to] protect and promote the public morals, safety, health, welfare and good order."³⁶ That, of course, is the classic statement of the general police power, which permits governments to regulate anything in any manner not prohibited by the constitution or, in this case, by state statute.

It is difficult to imagine a state code that is clearer in its conferral of broad municipal regulatory powers.³⁷ Nevertheless, courts—both the Supreme

³⁴ § 8-12-2.

³⁵ These powers follow:

- (1) The creation or discontinuance of departments of the city's government and the prescription, modification or repeal of their powers and duties;
- (2) The transaction of the city's business;
- (3) The incurring of the city's obligations;
- (4) The presentation, ascertainment, disposition and discharge of claims against the city;
- (5) The acquisition, care, management and use of the city's streets, avenues, roads, alleys, ways and property;
- (6) The levy, assessment, collection and administration of such taxes and such special assessments for benefits conferred, as have been or may be specifically authorized by the Legislature;
- (7) The operation and maintenance of passenger transportation services and facilities, if authorized by the Public Service Commission, and if so authorized, such transportation system may be operated without the corporate limits of such city, but may not be operated within the corporate limits of another municipality without the consent of the governing body thereof;
- (8) The furnishing of all local public services;
- (9) The government, protection, order, conduct, safety and health of persons or property therein;
- (10) The adoption and enforcement of local police, sanitary and other similar regulations; and
- (11) The imposition and enforcement of penalties for the violation of any of the provisions of its charter or of any of its ordinances.

Id.

³⁶ *Id.* § 8-12-5.

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

Court of Appeals and the circuit courts—have refused to implement the clear legislative judgment and have instead continued to genuflect at Dillon’s Rule.³⁸

IV. THE WEST VIRGINIA HOME RULE PILOT PROGRAM

Thus, despite a constitutional provision authorizing home rule for cities and despite a slew of statutory provisions expressing a vision for broad municipal powers, judicial nullification continued to make it necessary for cities to run to Charleston to get some express legislative authorization to exercise any new municipal authority—and thereby run the risk of creating a presumption that the grant of a power implies the exclusion of powers not granted.³⁹ In response to the limited discretion that West Virginia cities possessed, the legislature in 2007 tried again to promote greater local flexibility when it created the Municipal Home Rule Pilot Program.⁴⁰ The law established a Municipal Home Rule Board and granted it authority to approve up to five cities to participate in the program.⁴¹ Cities were to submit their proposed home rule plan and explain how current state law prevented them from achieving efficient governance.⁴² With Board approval, cities could amend their plans at any time and could, in effect, receive waivers from compliance with some state laws found to be inhibiting.⁴³ Only four cities—Bridgeport, Charleston, Huntington, and Wheeling—participated in the original program.⁴⁴ In November of 2012, the Legislative Auditor Performance Evaluation and Research Division concluded its assessment of the program and filed a special recommendation that the legislature consider

³⁸ See *supra* note 32 (collecting cases); *infra* note 39 (providing illustrations).

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

⁴⁰ 2007 W. Va. Acts 1683–89.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Home Rule History in West Virginia*, CITY OF FAIRMONT, <https://www.fairmontwv.gov/367/Home-Rule-History-in-West-Virginia>.

extending broad-based home rule to all of the State's Class I, II, and III cities.⁴⁵ The legislature revisited the pilot program in 2014 and extended participation for up to 20 cities, including the existing 4.⁴⁶ A 2015 law raised the number to 30 Class I, II, and III cities and further authorized inclusion of up to four Class IV towns.⁴⁷ As of March 2019, 34 of West Virginia's 231 cities were operating under the home rule pilot program.⁴⁸ Finally, the legislature in 2019 made the program permanent and extended the opportunity for participation to all West Virginia cities, although limiting the number of new Class IV admittees to four per year.⁴⁹

V. THE WEST VIRGINIA HOME RULE PROGRAM

A. Description

Section 8-1-5a, the "Municipal Home Rule Program," has several distinctive features, some of which are unique to the state. The legislative findings included conclusions about the Pilot Program's success for having "brought innovative results, including novel municipal ideas that became municipal ordinances which later resulted in new statewide statutes."⁵⁰ Subsection (c)(1) extended the opportunity for home rule to all Class I, II, and III cities and provided for approval of applications for the four Class IV towns per year.⁵¹ A new subsection—(c)(3)—provides that participating cities shall pay an annual assessment of \$2,000 "for the operation and administration of the

⁴⁵ PERFORMANCE EVALUATION & RESEARCH DIV., W. VA. LEGISLATIVE AUDITOR, SPECIAL REPORT: MUNICIPAL HOME RULE PILOT PROGRAM (2012), http://www.wvlegislature.gov/Joint/PERD/perdrep/HomeRule_11_2012.pdf [<https://perma.cc/2XXX-UK3X>] [hereinafter AUDITOR'S REPORT]. Per the constitutional directive in Article VI, Section 39a, the legislature has classified West Virginia's municipalities into four classes, according to population: I (over 50,000), II (10,000 to 50,000), III (2,000 to 10,000), and IV (under 2,000). W. VA. CODE ANN. § 8-1-3 (West 2020); see also W. VA. CONST. art. VI, § 39a.

⁴⁶ 2014 W. Va. Acts 1037–59.

⁴⁷ 2015 W. Va. Acts 1840–48.

⁴⁸ Shauna Johnson, *Home Rule Is Becoming a Permanent Option for West Virginia's Cities*, W. VA. METRONews (Mar. 27, 2019, 12:54 PM), <http://wvmetronews.com/2019/03/27/home-rule-is-becoming-a-permanent-option-for-west-virginias-cities/>; accord DAVID HARDY, W. VA. MUN. HOME RULE BD., WEST VIRGINIA HOME RULE PILOT PROGRAM SUMMARY REPORT 2018, at 2 (2019), <https://revenue.wv.gov/HomeRule/Documents/AnnualSummaryReports/HomeRule.AnnualSummaryReport.2018.pdf> [<https://perma.cc/7BFF-DLHZ>].

⁴⁹ S.B. 4, 84th Leg., Reg. Sess. (W. Va. 2019).

⁵⁰ W. VA. CODE ANN. § 8-1-5a(a)(1) (West 2020). The findings also noted the challenges that cities face delivering essential services and the constraints placed on some cities by state laws and policies. *Id.* §§ 8-1-5a(a)(4), 8-1-5a(a)(5).

⁵¹ *Id.* § 8-1-5a(c)(1).

Home Rule Board.”⁵² Any balance in the fund into which the fees are paid that remains at the end of the fiscal year will remain in a special revenue account “for uses consistent with the provisions” of the home rule section.⁵³

The statute continued the practice of the more recent statutes of creating a five-member Home Rule Board consisting of the governor or a designee; the Executive Director of the West Virginia Development Office or a designee; representatives of the Business and Industry Council; representatives of the state’s largest labor organization; and representatives of the American Planning Association, all appointed by the governor with the advice and consent of the senate.⁵⁴

The Board retains the power to grant cities relief from state laws that interfere with or obstruct their ability to advance their best interests. The city’s application for special dispensation must describe how state law prevents “the municipality from carrying out its duties” in an efficient and effective manner. For example, Charles Town found burdensome a state law that prohibited alcohol sales in restaurants before 1 p.m. on Sundays.⁵⁵ This prevented the city’s restaurants and bed-and-breakfast inns from competing with restaurants in Maryland and Virginia (where alcohol was available much earlier) for the lucrative Sunday brunch business. So the city asked the Home Rule Board to approve an amendment to its plan that would allow alcohol sales on Sundays after 10 a.m., notwithstanding state law.⁵⁶ The amendment was allowed, and the legislature subsequently changed state law to permit earlier Sunday alcohol sales.⁵⁷

Similarly, Morgantown had a unique (within the state) problem dealing with university students’ propensity to burn furniture (especially mattresses and couches) on the city’s streets and sidewalks following major sporting events.⁵⁸ These frequent fires (an average of 81 fires per year over a 10-year span) cost the city in terms of police and fire personnel overtime, damage to streets and

⁵² *Id.* § 8-1-5a(c)(3).

⁵³ *Id.* § 8-1-5a(c)(5).

⁵⁴ *Id.* § 8-1-5a(d).

⁵⁵ Rusty Marks, *West Virginia’s New Sunday Alcohol Law Already Changing Breakfast Game for Several Cities*, W. VA. NEWS (Sept. 8, 2016), https://www.wvnews.com/west-virginia-s-new-sunday-alcohol-law-already-changing-breakfast/article_85df70cb-7301-5480-808a-7323258b159c.html.

⁵⁶ See Ex. 5 to Pl.’s Resp. to Def.’s Mot. to Dismiss, *Jeffries v. City of Charleston*, No. 19-C-367 (Cir. Ct. Kanawha Cnty. June 25, 2019).

⁵⁷ Carrie Hodousek, *Tomblin Signs “Brunch Bill” to Allow for Earlier Sunday Alcohol Sales*, W. VA. METRONews (Mar. 29, 2016, 5:42 PM), <http://wvmetronews.com/2016/03/29/tomblin-signs-brunch-bill-to-allow-for-earlier-sunday-alcohol-sales/>.

⁵⁸ See, e.g., Tyler Kingkade, *Morgantown Bans Sofas from Being Kept Outside in Attempt to Stop WVU Couch Fires*, HUFFPOST (Apr. 9, 2016, 5:16 PM), https://www.huffpost.com/entry/morgantown-couches-fire_n_7036350.

sidewalks, and damage to reputation.⁵⁹ The city believed that banning use and storage of indoor furniture and mattresses on porches and other exterior property would reduce the incidence of these fires, but West Virginia Code Sections 8-12-13 and 29-3-5B arguably precluded the city from enacting the sought-for ordinance.⁶⁰ Thus, to avoid protracted and possibly costly litigation over the issues presented by state law, the city requested and received Home Rule Board authorization to enact the ordinance.⁶¹

Section 8-1-5a(i) does, however, exclude certain subjects from Home Rule Board authorization to supersede or obtain a waiver from state law. It includes matters covered by federal law or the state constitution (which have preemptive effects on state lawmaking); good government laws (FOIA, bidding on municipal contracts, and open meetings); laws relating to subjects of overriding statewide concerns (criminal laws, taxation, public employee pensions, tax increment financing, building and fire codes, annexation, and ordinances that could jeopardize the receipt of federal money); or laws relating to—of course—guns and ammunition.⁶²

⁵⁹ JEFF MIKORSKI, CITY OF MORGANTOWN, MUNICIPAL HOME RULE PILOT PROGRAM APPLICATION 15–18 (2014), <https://revenue.wv.gov/homerule/Documents/Morgantown/Morgantown.pdf> [<https://perma.cc/YZ3R-ACJ9>].

⁶⁰ *Id.* at 17 (“Based upon the language within Sections 8-12-13 and 29-3-5b of the West Virginia Code, there is a very strong argument that a West Virginia municipality does not have the authority, on its own, to adopt [the] ordinance.”); *see also* W. VA. CODE ANN. §§ 8-12-13, 29-3-5B (West 2020).

⁶¹ *See* Ex. 7 to Pl.’s Resp. to Def.’s Mot. to Dismiss, *Jeffries v. City of Charleston*, No. 19-C-367 (Cir. Ct. Kanawha Cnty. June 25, 2019).

⁶² There are a few additional subjects without easily identifiable rationales. The entirety of Section 8-1-5a(i) reads as follows:

(1) The municipalities participating in the Municipal Home Rule Program may not pass an ordinance, act, resolution, rule, or regulation, under the provisions of this section, that is contrary to the following:

- (1) Environmental law;
- (2) Laws governing bidding on government construction and other contracts;
- (3) The Freedom of Information Act;
- (4) The Open Governmental Proceedings Act;
- (5) Laws governing wages for construction of public improvements;
- (6) The provisions of this section;
- (7) The provisions of §8-12-5a of this code;
- (8) The municipality’s written plan;
- (9) The Constitution of the United States or the Constitution of the State of West Virginia;
- (10) Federal law, including those governing crimes and punishment;
- (11) Chapters 60A, 61, and 62 of this code or any other provisions of this code governing state crimes and punishment;
- (12) Laws governing pensions or retirement plans;

B. Analysis

Section 8-1-5a accomplishes the goals of home rule but does so in a unique way. It is not the only home rule statute that mixes legislative and *imperium in imperio* home rule,⁶³ but its method is singular.⁶⁴ The section leaves

(13) Laws governing annexation;

(14) Laws governing taxation: Provided, That a participating municipality may enact a municipal sales tax up to one percent if it reduces or eliminates its municipal business and occupation tax: Provided, however, That if a municipality subsequently reinstates or raises the municipal business and occupation tax it previously reduced or eliminated under the Municipal Home Rule Pilot Program or the Municipal Home Rule Program, it shall reduce or eliminate the municipal sales tax enacted under the Municipal Home Rule Pilot Program or the Municipal Home Rule Program in an amount comparable to the revenue estimated to be generated by the reinstated tax: Provided further, That any municipality that imposes a municipal sales tax pursuant to this section shall use the services of the Tax Commissioner to administer, enforce, and collect the tax required by the provisions of §11-15-1 *et seq.*, §11-15A-1 *et seq.*, and §11-15B-1 *et seq.* of this code and all applicable provisions of the Streamlined Sales and Use Tax Agreement: And provided further, That the tax does not apply to the sale of motor fuel or motor vehicles;

(15) Laws governing tax increment financing;

(16) Laws governing extraction of natural resources;

(17) Marriage and divorce laws;

(18) Laws governing professional licensing or certification, including the administration and oversight of those laws, by state agencies to the extent required by law;

(19) Laws, rules, or regulations governing the enforcement of state building or fire codes;

(20) Federal laws, regulations, or standards that would affect the state's required compliance or jeopardize federal funding;

(21) Laws or rules governing procurement of architectural and engineering services: Provided, That notwithstanding any other provision of this section to the contrary, the change made in this subdivision applies prospectively and any ordinance enacted by the participating municipalities prior to the effective date of the amendments to this section during the 2019 regular legislative session and pursuant to the Municipal Home Rule Pilot Program remains in effect.

(22) The provisions of chapter 17C of this code; or

(23) Laws, rules, or regulations governing communication technologies or telecommunications carriers, as the term "telecommunications carrier" is defined by the Federal Communications Commission in 47 U.S.C. § 153 or as determined by the Public Service Commission of West Virginia.

(24) Laws governing the sale, transfer, possession, use, storage, taxation, registration, licensing, or carrying firearms, ammunition, or accessories thereof.

See W. VA. CODE ANN. § 8-1-5a(i) (West 2020).

⁶³ See, e.g., IOWA CONST. art. III, § 38A.

⁶⁴ "The [c]ourt recognizes that the State of West Virginia has a unique and individualized approach to home rule authority. This approach is unlike any other state in this Union." See Order

in place the legislative home rule model contemplated by Article VI, Section 39a and West Virginia Code Section 8-12-2, in which a city may enact any law relating to its municipal affairs not inconsistent with state law⁶⁵ but also creates a form of *imperio* immunity by allowing cities to address local matters and override state laws with the consent and authorization of the Home Rule Board. The section avoids the problems created by the restrictive judicial readings of the *imperio* immunity relating to what constitutes local or municipal affairs⁶⁶ by legislatively defining the subjects that are state matters outside the local immunity and assigning the task of determining specific local needs for protection from state law to the Home Rule Board.⁶⁷ The Board, in granting or denying immunity requests, can account for statewide concerns. This method recognizes the need for local solutions to local problems while simultaneously screening off courts from continuing to undermine home rule.⁶⁸

VI. CONSTITUTIONALITY

The question of Section 8-1-5a's constitutionality has been raised in *Jeffries v. City of Charleston*,⁶⁹ a Kanawha Circuit Court challenge to the Home Rule Board's approval of Charleston's imposition of a sales tax following a reduction in its business and occupation tax. Section 8-1-5a(i)(14) removes from Home Rule Board power the ability to grant immunities from state tax law, but it also includes a proviso that a home rule city may enact a sales tax of up to 1% if it simultaneously reduces or eliminates its business and occupation tax. There is also a separate statutory provision, West Virginia Code Section 8-13C-4, that authorizes cities to enact a sales tax if they eliminate their business and occupation tax.⁷⁰ While a complete recitation and analysis of the arguments in

Granting Def.'s Mot. to Dismiss, *Jeffries v. City of Charleston*, No. 19-C-367 (Cir. Ct. Kanawha Cnty. Jan. 14, 2020), at 11.

⁶⁵ Of course, the case law described in Part I has thus far greatly limited the effectiveness of both the constitutional and statutory grants. *See infra* Part I.

⁶⁶ *See supra* notes 32 (collecting cases), 39 (providing illustrations).

⁶⁷ *See* W. VA. CODE ANN. § 8-1-5a(i).

⁶⁸ Concededly, the Home Rule Board could become as hostile to local control as courts have been, but the experience under the Pilot Program would suggest that the Board would be a much more receptive forum for cities than courts have been. *See, e.g.*, AUDITOR'S REPORT, *supra* note 45. In addition, judicial review of a Home Rule Board's decision remains a possibility, although, to the author's knowledge, no direct appeals have occurred to date.

⁶⁹ No. 19-C-367 (Cir. Ct. Kanawha Cnty. 2019).

⁷⁰ As of January 1, 2019, the Home Rule Board authorized 31 cities to enact the alternative sales tax, of which 28 had implemented the tax. *See* HARDY, *supra* note 48, at 23.

that litigation are beyond the scope of this Article, some summary and comments on the issues are appropriate.⁷¹

First, the plaintiff uses Article VI, Section 39a as a restriction on the legislature's capacity to confer powers on cities, rather than as an expansion of municipal power. He cites to the requirement that the legislature shall provide by general laws for the governance of cities and for limiting the rate of municipal taxes. According to the plaintiff, by creating the opportunity for cities to seek exemptions from state law and to seek the power to enact a sales tax without meeting all of the limitations imposed in West Virginia Code Section 8-13C-4, Section 8-1-5a provides for the regulation of cities and municipal taxes by local law, not general law. In effect, the argument goes, the power of the Home Rule Board to grant immunities to state laws renders those laws something less than "general laws." The catch is that Section 8-1-5a is a general law; it now creates the opportunity for all West Virginia cities to seek home rule status and to enact a sales tax upon a reduction or elimination of the business and occupation tax. The statute does not require participation, but the opportunity is there for all cities to use the law—just as Section 8-13C-4 authorizes cities to enact a sales tax upon elimination of the business and occupation tax. The legislature creates the opportunity, but it is up to each city to decide whether to take advantage of either law.

Second, the plaintiff argues that Section 8-1-5a contradicts both West Virginia Constitution Article VI, Section 39a and West Virginia Code Section 8-12-2(a) because those provisions provide that municipal laws that conflict with state law are invalid.⁷² True enough, but if a city enacts a law pursuant to authority granted by the Home Rule Board and Section 8-1-5a, then the ordinance is not in conflict with state law. It would be perfectly consistent with the law as established by Section 8-1-5a. Similarly, if the Home Rule Board authorizes a city to enact a sales tax upon the "reduction" of the business and occupation tax—rather than upon its "elimination" as required by Section 8-13C-4—the city's enactment of the tax would be consistent with state law.

Third, the *Jeffries* plaintiff contends that Section 8-1-5a(i)'s authorization to the Home Rule Board to permit a city's enactment of a sales tax is an unconstitutional delegation of the tax power, citing West Virginia Constitution Article X, Sections 1 and 9 and Article VI, Section 39a. The Article X, Section 1 language relied upon states, "taxation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value."⁷³ This limitation, however, applies only to property taxes

⁷¹ Since *Jeffries*'s other arguments are specific to the Charleston ordinance and are irrelevant for present purposes, this Article does not address them.

⁷² Order Granting Def.'s Mot. to Dismiss, *Jeffries v. City of Charleston*, No. 19-C-367 (Cir. Ct. Kanawha Cnty. Jan. 14, 2020), at 11.

⁷³ W. VA. CONST. art. X, § 1.

and only within a particular taxing jurisdiction (typically, a county and, to a limited extent, the state in its imposition of a statewide property tax).⁷⁴ That conclusion is evident from the succeeding sentences in Section 1, which provide that no one species of property may be taxed higher than another but then create (thanks to the Tax Limitation Amendment of 1932) four classes of property, each with its own cap on the rate of taxation.⁷⁵ The section has no application to sales taxes.⁷⁶

Article X, Section 9 provides that “[t]he legislature may, by law, authorize the corporate authorities of cities, towns and villages, for corporate purposes, to assess and collect taxes; but such taxes shall be uniform, with respect to persons and property within the jurisdiction of the authority imposing the same.”⁷⁷ The section is largely superfluous. The legislature would undoubtedly have the power to authorize municipal taxes even in the absence of Section 9, and Section 1’s “equal and uniform” clause already imposed the uniformity requirement repeated in Section 9. In any event, Section 9 applies only to taxes on “persons and property within the jurisdiction” (here a city), which likely would not apply to sales taxes and would certainly not be offended by a sales tax assessed at a uniform rate within a city.⁷⁸

The language of Article VI, Section 39a relied upon by the *Jeffries* plaintiff states that the legislature “shall limit the rate of taxes for municipal purposes, in accordance with section one, article ten.”⁷⁹ The reference to the limits in Article X, Section 1 suggests that the limitation applies only to property taxes, but even if stretched to apply to municipal sales taxes, Section 8-1-5a(i) satisfies it. The subsection provides that a city may impose a sales tax “up to one percent.” That is a limit on the rate of taxation.

The textual provisions relied upon by the *Jeffries* plaintiff do not expressly limit the legislature’s power to delegate the tax power, no caselaw supports the contention that the legislature cannot delegate the taxing power, and Article X, Section 9 specifically provides that the legislature can authorize municipal taxes. Section 8-1-5a(i) authorizes a municipal sales tax but makes it contingent upon a reduction or elimination of the business and occupation tax and upon the approval of the Home Rule Board. That is entirely consistent with the legislative powers prescribed by Article X, Sections 1 and 9 and by Article VI, Section 39a.

⁷⁴ See, e.g., *Killen v. Logan Cty. Comm’n*, 170 W. Va. 602, 295 S.E.2d 689 (1982), *overruled on other grounds by In re Tax Assessment of Foster Found.’s Woodlands Ret. Cmty.*, 223 W. Va. 14, 672 S.E.2d 150 (2008).

⁷⁵ BASTRESS, *supra* note 10, at 284–87.

⁷⁶ *Id.*

⁷⁷ W. VA. CONST. art. X, § 9.

⁷⁸ See BASTRESS, *supra* note 10, at 309.

⁷⁹ W. VA. CONST. art. VI, § 39a.

Finally, the plaintiff contends in his case that Section 8-1-5a fails to set forth adequate guidance for the Home Rule Board in making its decisions and thus constitutes an excessive delegation of legislative power. To be sure, the statute does not provide a set of specific criteria to be implemented, but there is some direction provided. The findings in Section 8-1-5a(a) declare that

(4) [m]unicipalities still face challenges delivering services required by federal and state law or demanded by their constituents; (5) [m]unicipalities are sometimes restrained by state statutes, policies, and rules that challenge their ability to carry out their duties and responsibilities in a cost-effective, efficient, and timely manner; [and] [e]stablishing the Municipal Home Rule Pilot Program as a permanent program is in the public interest.

In its subsection (e), the statute empowers the Board to

(1) Review, evaluate, make recommendations, and approve or reject, for any lawful reason, by a majority vote of the board, each aspect of the written plan, or the written plan in its entirety, submitted by a municipality;

(2) By a majority vote of the board, select, based on the municipality's written plan, new Class I, Class II, Class III, and/or Class IV municipalities to participate in the Municipal Home Rule Program;

(3) Review, evaluate, make recommendations, and approve or reject, for any lawful reason, by a majority vote of the board, the amendments to the existing approved written plans submitted by municipalities: Provided, That any new application or amendment that does not reasonably demonstrate the municipality's ability to manage its associated costs or liabilities shall be rejected;

(4) Consult with any agency affected by the written plans or the amendments to the existing approved written plans; and

(5) Perform any other powers or duties necessary to effectuate the provisions of this section: Provided, That any administrative rules established by the board for the operation of the Municipal Home Rule Program shall be published on the Municipal Home

Rule Board’s website, and made available to the public in print upon request.⁸⁰

While this guidance lacks specificity, it is also true that the judicial standards for measuring the sufficiency of a legislative delegation are quite lax due to the difficulty of articulating manageable doctrines.⁸¹ The West Virginia Supreme Court of Appeals has stated that a legislative delegation “must be sufficient to guide [the] agency in the exercise of the power conferred upon it.”⁸² “Generally, the standard is lenient, as courts require only some minimum level of guidance through articulated standards.”⁸³ Applying the standard to Section 8-1-5a leads to the conclusion that the legislature has provided the Home Rule Board with adequate guidance: it must review and decide on home rule applications and amendments based upon whether the applying city has demonstrated the need for greater flexibility or for relief from state laws or policies to carry out its duties in an effective, efficient, and timely manner. Furthermore, the statute specifically lists the subject areas that are not within the Board’s jurisdiction.⁸⁴ That combination should be sufficient to satisfy the standards applicable to the legislative delegation doctrine.

On January 14, 2020, Kanawha Circuit Judge Louis H. Bloom entered an Order Granting Defendants’ Motion to Dismiss, rejecting plaintiff’s challenges to the Charleston sales tax ordinance and to the home rule statute. The court found that “the Legislature provided adequate standards to guide” the Home Rule Board in administering the statute and did not grant to the Board unbridled authority.⁸⁵ The court also noted that the 2019 Act had expressly authorized those municipal ordinances that had been enacted by participating cities under the prior home rule pilot program. That legislation affirmation would embrace the Charleston sales tax ordinance.

⁸⁰ W. VA. CODE ANN. § 8-1-5a(e) (West 2020).

⁸¹ Indeed, the federal standard asks only “whether Congress has laid down by legislative act an intelligible principle to which the person or body authorized to take action is directed to conform.” *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). Furthermore, the U.S. Supreme Court has ruled in only two cases—ever—that a congressional delegation was inadequate, and those cases were both decided in 1935. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *see also* GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 433–37 (8th ed. 2017) (illustrating that there are very few—if any—constitutional restraints on Congress’s delegation power).

⁸² *State ex rel. W. Va. Citizens Action Grp. v. W. Va. Econ. Dev. Grant Comm’n*, 213 W. Va. 255, 580 S.E.2d 869 (2003) (quoting *Quesenberry v. Estep*, 142 W. Va. 426, 95 S.E.2d 832 (1956)).

⁸³ BASTRESS, *supra* note 10, at 155.

⁸⁴ *See* W. VA. CODE ANN. § 8-1-5a(i) (West 2020); *supra* note 62 (reciting these provisions).

⁸⁵ Order Granting Def.’s Mot. to Dismiss, *Jeffries v. City of Charleston*, No. 19-C-367 (Cir. Ct. Kanawha Cnty. Jan. 14, 2020), at 8.

VII. CONCLUSION

The West Virginia Home Rule Act, West Virginia Code Section 8-1-5a, offers municipalities in the state the opportunity to fashion local solutions to local problems in a broad range of matters that do not implicate statewide interests and in spite of what might otherwise be constrictive state laws or policies. Moreover, it confers this opportunity without initial exposure to judicial nullification, as has occurred with previous constitutional and statutory efforts to enhance local control.