

The Dillon Rule:

Legal Framework for Decision-Making

This issue brief examines the legal constructs of “the Dillon Rule” and “home rule”, particularly their interconnection in how they affect local government autonomy and growth management efforts.

A phrase derived from an obscure nineteenth century Iowa railroad case pervades the decision-making of local governments in Virginia. Throughout the Commonwealth, as well as many other states, “the Dillon Rule” is thought to be pivotal in framing which local government capabilities are legally permissible and which are not. Yet the meaning of the term and its legal implications are not always well understood. Most discussions of the Dillon Rule and home rule focus on issues of local government autonomy and growth management efforts. Common questions that will be explored in this brief include:

- How much local autonomy is warranted?
- Are local governments in Virginia unduly constrained by the Dillon Rule?
- Does home rule legislation consistently provide more local autonomy?
- How does local autonomy affect growth management efforts?

Constitutional Law

The Tenth Amendment to the United States Constitution reserves to the States respectively, “all powers not delegated to the United States by the Constitution, nor prohibited by it”. It makes no mention of local governments. Local municipal governments only exist as far as they are recognized by the respective States. The powers delegated to localities are determined by each state respectively. This is true in all fifty states. What differs among the fifty states is:

- how broadly state constitutions, legislatures, and courts interpret the powers granted to local governments; and
- whether local government powers must be explicitly granted, or explicitly denied by state legislatures.

What is the Dillon Rule?

The Dillon Rule refers to a traditional doctrine dictating that courts interpret the powers granted by a state to local governments narrowly. Early state constitutions gave local governments a great deal of local autonomy through representation in state legislatures. However, widespread municipal corruption during the mid-1800s led to changes in state laws that limited local autonomy in favor of more statewide control. Judge John Dillon of Iowa was a harsh critic of local government corruption and the nation’s premier authority on municipal law at the time. In *Clark v. City of Des Moines* (1865)¹, Dillon set forth the rule of judicial construction, which would henceforth bear his name:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.²

In 1868, Dillon’s view was upheld in an Iowa State Court decision and subsequently by the U.S. Supreme Court.³ In 1891, the doctrine was fully adopted by the U.S. Supreme Court in *Merrill v. Monticello*. In the years that followed, the Dillon Rule became a widely accepted judicial doctrine in most federal and state courts. A Brookings Institution study indicates that judges in 39 states employ the Dillon Rule to define the power of local governments.⁴ States vary in how strictly they apply the Dillon Rule, and Virginia courts are widely considered to be among the most faithful adherents.

The Dillon Rule does not guide legislative decisions. The General Assembly is free to grant local authorities any power within the bounds of the U.S. and Virginia Constitutions. The Dillon Rule is applied by the courts only in situations where the grant of powers through state statutes is unclear.⁴ The degree to which the Dillon Rule is operative depends upon the degree of home rule legislation.

What is Home Rule?

“Home rule” began as a political motto in opposition to the Dillon Rule. Proponents of home rule rested their arguments on a diametrically opposed political philosophy to that put forth by Judge Dillon, a philosophy articulated in the Cooley Doctrine. In *People v. Hurlburt* (1871), Thomas M. Cooley of the Michigan Supreme Court asserted that, “local government is [a] matter of absolute right; and the state cannot take it away.”⁵

In 1875, Missouri became the first state to adopt a constitutional home rule provision and several more states followed suit.⁴ The home rule doctrine allows a municipality to exercise any function, (and here is the caveat) so long as it is not prohibited by state legislation or in conflict with the state constitution or any state statute.

Arguments for constrained local authority

- Limiting local authority in favor of state control ensures uniformity
- Localities do not have the high level of technical and policymaking expertise that States possess
- Local actions often have regional or statewide impacts

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Arguments for increasing local authority

- Local officials understand unique local conditions and problems better than State representatives
- Local officials should be encouraged to act quickly in addressing local problems
- Incentive to go beyond status quo in delivering services and setting policy
- State officials have little time to study the complexities of a problem in a particular locality

Home rule legislation can be categorized into three general types:

- 1) Self-executing constitutional home rule is considered the strongest form whereby localities are granted self-governance in local affairs.
- 2) Permissive constitutional home rule authorizes the state legislature to enact home rule laws to grant self-governance to localities, but does not impose on the legislature to necessarily do so.
- 3) Legislative home rule, often considered the weakest form, is extended to localities by statute and is not written into the state constitution.²

Local Autonomy

In what ways is local government autonomy desirable? In what ways is local autonomy undesirable?

Underlying the debate about home rule versus the Dillon Rule is the question of how much local autonomy is warranted. Differences of opinion depend on where one draws the line between issues of local concern, issues of regional concern, and issues of statewide concern. The fact is that many issues simultaneously span all three areas. For example, one town's growth management efforts may direct growth to adjacent communities, altering the pattern of development in the region, and also may affect economic growth at a State level.

How does Virginia rank in terms of local government discretionary authority?

Virginia is widely considered to use a strict interpretation of the Dillon Rule in granting local government authority. This means that localities are only permitted the authority explicitly given to them by the state legislature or those deemed indispensable to the powers expressly granted. Opponents of the Dillon Rule assert that this unduly constricts local governments. This assertion is challenged by a Brookings Institution study which ranks Virginia as 8th in the country in degree of local discretionary authority.⁴ Of the seven states with higher levels of local discretionary authority, five are the Dillon Rule states and only two are home rule states. The other eight home rule states rank substantially lower than Virginia in degree of local discretionary authority.

Virginia's high degree of local discretionary authority was demonstrated in 1969 when the Commission on the Constitutional Revision proposed a reversal of the Dillon Rule. The Virginia Municipal League and the Virginia Association of Counties opposed these changes because local officials felt the General Assembly had been fairly responsive to the needs and desires of local governments both through general laws and through charters.²

If the Dillon Rule were to be replaced with some form of home rule, would this increase local autonomy?

If Virginia were to grant home rule authority (through a state constitutional amendment or special charter), would this increase local government authority and provide increased flexibility to respond to local issues? This question can be broken down into two more specific questions as follows:

- Given the fact that the state legislature would necessarily retain the right to specifically restrict the authority of municipalities, on which issues would the General Assembly be likely to pass specific prohibitions?
- For those areas of authority not strictly limited by the state legislature, what types of ordinances could be challenged in court, and what is the likelihood of them being overturned?

The answer to the first question depends on the level of interest an issue has to the state. Each year localities seek special enabling statutes from the state legislature for all sorts of issues ranging from broad expansions of authority to mundane and almost administrative functions. For issues that the State has routinely opposed, it is a fair assumption that the State would restrict such authority regardless of whether home rule authority is granted.

The second question of which ordinances would be overturned by the courts is much more difficult to predict under home rule than under the Dillon Rule. Under home rule, courts maintain the right to overturn local ordinances if they are seen to have an effect that is beyond "local concern" or is in conflict with other state legislation. This leaves the courts with such broad powers of interpretation that it is difficult to predict what types of ordinances would be overturned.

Growth Management

Does local autonomy help or hurt growth management efforts?

The answer to this question depends largely on how growth management is defined, and particularly the scale at which it is defined. Many local government efforts to limit, restrict, or deter local growth would not qualify as effective growth management, according to many academic definitions. For example, if a county enacts a zoning ordinance that severely limits new growth while preserving agricultural land and open space, some of this growth

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could be shifted to adjacent counties. Many proponents of growth management would argue that this instance would not qualify under the definition of growth management because: 1) the aim was to stop growth, rather than accept and direct growth, and 2) it did not deal with growth on a metropolitan or regional level.

Some proponents of effective growth management efforts believe that local efforts should be coordinated in conjunction with the state or broader region. In a Brookings Institution report, growth management is defined as “a deliberate effort on the part of different levels of government and multiple governments at the same level to achieve a balance between development and its potential social, economic, and physical effects.”⁴ Effective growth management, they argue, is hindered, not furthered by, local autonomy. In late 2010, the Council on Virginia’s Future recommended the implementation of regional efforts, through the overlay of regional organizational structures, as statewide initiatives are rarely able to take into account stark differences between regions.⁶ Still, states and regions have not been necessarily attuned to implementing growth management efforts, or necessarily effective in doing so, especially as localities are most pressed to respond to growth concerns and therefore more likely to act.

The prevalence of either the Dillon Rule or home rule in a state does not appear to affect the implementation of growth management legislation. The strongest growth management efforts in the U.S. occur regardless of the state’s perceived affiliation: Oregon and New Jersey (both home rule); Maryland, Florida, Washington and Wisconsin (all Dillon Rule). On the other hand, Fairfax, Chesterfield, and Suffolk counties in Virginia provide an example of effective bottom-up efforts. Given these findings, it would seem worth questioning whether growth management proponents should even focus on addressing shortfalls of local autonomy as dictated by the Dillon Rule rather than the general lack of legislation for growth management objectives.

Unclear Classification

The ambiguity of the term “local autonomy” is the source of much legal debate, legislation, and court cases. Many issues, especially growth management issues, are simultaneously relevant to local, regional, and statewide concerns. Home rule introduces uncertainty to local governance because there is no clear line, which distinguishes where local issues end and statewide issues begin. As a result, localities in home rule states have very little assurance that local ordinances won’t be overruled in the courts. However, these complexities apply to an interpretation of the Dillon Rule as well. What makes matters more confusing is that even in home rule states courts can, and often do, use the Dillon

Rule in interpreting court cases.

Most states, including Virginia, could accurately be considered both the Dillon Rule and home rule states based on general definitions of each term. For example, while Virginia courts are commonly thought to apply the Dillon Rule more stringently than perhaps any in the nation, Virginia also enables its municipal governments with general home rule authority through state law. Virginia Code Ann. § 15.2-1102 grants localities all powers “which are necessary or desirable to secure and promote the general welfare.” Furthermore, in the early twentieth century virtually all states, including Virginia, adopted some version of the Standard State Zoning Enabling Act (SZE), which conveys broad powers over land-use control to local governments.

A primary concern about the broad powers of the Dillon Rule lies in the fact that local lawmakers are threatened by this ambiguity. Uncertainty about the outcome of a proposed piece of legislation can create hesitation on behalf of localities.

As the home rule movement was a response to the Dillon Rule, home rule is often held as diametrically opposite to the Dillon Rule and synonymous with local government autonomy. In practice however, home rule has not provided the level of local government autonomy that most supporters had sought; it has simply rearranged procedures. Neither home rule nor any other legislation, other than a change to the Tenth Amendment of the U.S. Constitution, changes the basic legal relationship between state legislatures and local governments. As long as legislatures can make changes and courts exercise discretion, there will be some legal uncertainty.

Endnotes

¹Clark v. City of Des Moines Iowa, 1865.

²Ormsby, Sally, et. Al. (2004) The Dillon Rule: Good or Bad for Local Governments? League of Women Voters of the Fairfax Area Education Fund.

³City of Clinton v. Cedar Rapids and Missouri River Railroad Co., 24 Iowa 455 1868.

⁴Richardson, J.J., Jr., Gough, Z.M., & Puentes, R. (2003). Is Home Rule the Answer?: Clarifying the Influence of The Dillon Rule on Growth Management. Washington, D. C.: Brookings Institution Center on Urban and Metropolitan Policy.

⁵People v. Hurlburt, 24 Mich. 44 1871.

⁶Wynne, Dubby. (2010) Regionalism White Paper. Intergovernmental Relations Committee of Governor McDonnell’s Government Reform and Restructuring Commission. <http://www.reform.virginia.gov/Presentations/docs/Regionalism_White_Paper_by_Dubby_Wynne.pdf>

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