

Dillon's Rule:

Legal Framework for Decision Making

This issue brief provides a review of the legal constructs of "Dillon's Rule" and "home rule," with particular attention to the implications for *local government autonomy* and *regional growth management efforts*.

A phrase derived from an obscure nineteenth century Iowa railroad case pervades the decision-making of local governments in Virginia, especially with regard to growth management decisions. Throughout the Commonwealth, as well as many other states, "Dillon's 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 Dillon's Rule focus on a contrast with "home-rule" authority and supposedly consequent issues of local government autonomy. Common assumptions include:

- local governments in Virginia are tightly constrained by Dillon's rule;
- adopting home-rule legislation would provide more local autonomy;
- increased local autonomy would help efforts to manage growth; and
- increased local autonomy would give municipalities more freedom to raise revenues through local taxes.

This issue brief examines the validity of these popular beliefs and outlines the relationship between Dillon's Rule, home rule and the scope of local authority.

Constitutional Law

The Tenth Amendment to the United States Constitution reserves to the states, "all powers not delegated to the United States by the Constitution, nor prohibited by it." It makes no mention of local governments. Local municipal government authority exists only in so far as it is granted by the 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 state constitutions or general statutes confer general governing powers to local governments
- whether local government powers must be explicitly granted, or explicitly denied by state legislatures; and
- how broadly courts interpret the powers granted to local governments

What is Dillon's Rule?

"Dillon's Rule" refers to a traditional doctrine dictating that courts interpret the powers granted by a state to local governments narrowly. In the mid-nineteenth century, widespread corruption in municipal government generated debate over the appropriate level of local government autonomy. 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), Dillon set forth the rule of statutory 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."

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In the years that followed, Dillon's Rule became widely accepted judicial doctrine throughout federal and state courts. In 1891, the doctrine was fully adopted by the U.S. Supreme Court in *Merrill v. Monticello*.

What is Home Rule?

As a response to the proliferation of this locally limiting view, however, another movement – for “home rule” – took flight. That movement was based on a belief in self-governance as an inherent right of local governments. At the turn of the century, home rule found its touchstone in the Cooley Doctrine, which refers to an opinion of Michigan Supreme Court Judge Thomas M. Cooley saying rules that attribute total control over local governments to the states “never are and never can be accepted in practice.” *People v. Hurlburt (1871)*

With the movement fueled by the Cooley Doctrine, states (including Virginia) began adopting constitutional home rule amendments. Typically, such amendments authorized the use of locally drafted charters to be ratified by local voters or governments, thereby providing municipal powers independent of additional state legislation. Since (and in a more direct response to court application of Dillon's Rule), many states have employed further constitutional amendments and general statutes to mandate liberal judicial interpretation of authority granted to local government (in contrast to the strict interpretation directed by Dillon's Rule).

The Courts and Limits to Home Rule

Since the way authority is granted varies throughout those states that have legislated some form of home rule, courts in different states have interpreted the scope of local authority differently over the years. Accordingly, the existence of home rule enabling legislation does not resolve questions about which powers of a given locality will be held to be legitimate by the courts.

While many consider home-rule authority and Dillon's Rule to result in diametrically opposed conditions, the reality is that home-rule authority provides what is essentially limited power to localities. That is, home rule granted by the state legislature is always subject to conditions that are or could be imposed by the same state legislature. For instance, enabling laws almost always prohibit local legislation in conflict with any state statute and frequently proscribe specific powers, such as the right to issue debt or regulate power plant siting. Furthermore, both the authority granted and the interpretation to be applied by the courts are subject to future legislative action. A fundamental principle of all home-rule enabling legislation, therefore, is that state legislatures ultimately retain control over local government.

The role of the judicial system in defining the extent of local authority is to determine whether existing enabling legislation provides sufficient authority for the legislative actions of local government. In considering home-rule legislation, that determination involves not only interpreting the enabling legislation but also any applicable limitations. State courts generally defer to legislative efforts to restrain localities' home-rule powers and have struggled to clearly differentiate between matters of purely local concern and those of statewide or regional concern.

The ideological premise of home rule may be that local governments should maintain authority over issues of primarily local concern. But as a result of the courts' inability to clearly distinguish which concerns are primarily “local” and uninhibited by other applicable limitations, liberal interpretations of home-rule authority are still subject to widely varying judicial interpretation.

A False Dichotomy

Discussion about local government autonomy in the various states often attempt to classify states into two categories: 1) Dillon's Rule states and 2) home rule states. Different definitions of those classifications, however, have produced a wide range of results over the years. Two studies by the same federal entity, the U.S. Advisory Commission on Intergovernmental Relations (USACIR) give an indication of the inconsistency. In 1962, USACIR designated every state but Alaska and Texas as Dillon's Rule states. Then in 1981, however, USACIR classified only eight states as Dillon's Rule states. Separating the question, though, and considering each classification (home rule and Dillon's Rule) independently allows for a clearer picture. The following represent two clear findings based on very general easy to understand definitions of “Dillon's Rule” states and “home rule” states:

1. By 2000, 46 states (including Virginia) had conferred home-rule authority to local governments by either constitutional amendment or general statute. The remaining four states, which have plainly eschewed provision of home rule are Alabama, Nevada, New Hampshire and Vermont.
2. A 2003 Brookings Institution study found that courts in 31 states (including Virginia) apply a rule that reads identically or very close to the rule originally set forth by Judge Dillon, while 8 more apply such a rule to at least some municipalities. Ten other state courts do not apply Dillon's Rule in any form. Those states are Alaska,

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Iowa (ironically), Massachusetts, Montana, New Jersey, New Mexico, Ohio, Oregon, South Carolina and Utah. (The distinction is complicated by jurisdictional issues in Florida.)

Consideration of the legislative and judicial landscape described by these two clear findings suggests that most states (including Virginia) could accurately be called both Dillon's Rule states and home rule states based on general definitions of each term. For example, while Virginia courts are commonly thought to apply Dillon's Rule more stringently than perhaps any in the nation, Virginia also enables its municipal governments with general home rule authority through state law. Municipalities are granted all powers "which are necessary or desirable to secure and promote the general welfare." Virginia Code Ann. § 15.2-1102 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.

Local Autonomy

As illustrated by the above findings, attempts to categorize states as either Dillon's Rule states or home-rule states often generate misunderstandings of the legal landscape because the two conditions are not mutually exclusive. A more useful consideration might be the extent to which the legislative and judicial conditions in states determine local autonomy.

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*

The 1981 USACIR study referenced above ranked states by overall degree of local discretionary authority from an examination of state constitutions and statutes, court decisions, law review articles, reports on state-local relations and interviews of select individuals.

The results indicate that application of Dillon's Rule by a state's courts (as defined by the Brookings Institution

study) did not correlate with a lack of local autonomy, nor did the absence of the Dillon's Rule doctrine in state courts imply a greater degree of local autonomy. Virginia ranked 8th. That

Arguments for increasing local authority:

- *Local officials understand unique local conditions and problems better than State representatives*
- *Local officials should be engendered to act quickly in addressing local problems*
- *Incentive to go beyond status quo in delivering services and setting policy*

is to say, only 7 states of 50 states were deemed to allow more local autonomy. What's more, only 2 of the 10 states with the most local discretionary autonomy were states in which courts did not employ Dillon's Rule. While Oregon and Alaska (where courts do not apply Dillon's Rule) ranked 1 and 5 respectively, Massachusetts and New Mexico (which also do not apply Dillon's Rule) ranked 43 and 48 respectively.

The Effect of Dillon's Rule on Virginia

The cases of Massachusetts and Virginia provide a useful comparison for reflection on the real impact of Dillon's Rule on local autonomy. In reference to the rankings from the USACIR the study, the 2003 Brookings report highlights Arlington, VA as a "stronghold of growth management" in a state that not only employs Dillon's Rule, but also is known to do so with a high degree of stringency. Massachusetts on the other hand, does not employ the Dillon's Rule at all and yet ranks among the lowest states in degree of local autonomy. The reason is that, in Massachusetts, the home rule charter prohibits cities and towns from: regulating elections, levying, assessing and collecting taxes, borrowing money or pledging the credit of the city or town, disposing of park land, enacting private or civil law governing civil relationships except as incident to an exercise of municipal power, and defining and providing for the punishment of a felony or to impose imprisonment. The Massachusetts Supreme Court has also construed many areas to be of insufficiently "local" concern to fall within the general home rule grant. Finally, any local ordinance, which conflicts with the intent of state legislation, has likewise been overturned. It is no surprise that the sentiment of local officials in Massachusetts is that the significance of home rule is *purely procedural*. In other words, the powers of local government in Massachusetts as with all states where the courts do not

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apply Dillon's Rule are all those that are not explicitly denied by the state legislature. In Massachusetts, local governments are granted broad home rule authority and the courts do not apply any form of Dillon's Rule. Nevertheless, a very low degree of local autonomy results from the plethora of categorical exclusions from local legislative authority. In this sense, the realm of local authority can be seen as a function of statewide political values that motivate state legislative action. Thus, if the Virginia General Assembly abolished the use of Dillon's Rule in Virginia courts, it could reasonably be expected that the change in procedural rules would be accompanied by legislative restriction of a wide range of powers not currently granted by the same elected officials.

Additionally, the absence of Dillon's Rule would not seem to promise any greater level of certainty for local decision making. The premise of home rule is that local governments maintain authority over issues of primary local concern. The ambiguity, however, of the term "local concern" is the source of much legal debate. Many issues, especially growth management issues, are simultaneously relevant to local, regional, and statewide concerns. Home-rule authorization by its nature can introduce 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 states where Dillon's Rule is not applied have very little assurance that local ordinances won't be overruled in the courts due to interpretation of any limitation included by the authorization. In comparison, Dillon's Rule especially as it is strictly interpreted, simply draws the line at the limits of the enabling legislation (rather than at the points proscribed by limitations in the legislation. In either case, one may not agree with where that line is drawn but that line it is not any more distinct for the absence of Dillon's Rule.

Growth Management

Does local autonomy help or hurt growth management efforts?

If application of Dillon's Rule (or lack thereof) by state courts does not determine local autonomy, the question of whether local autonomy promotes successful growth management remains. 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 because they do not address the key regional nature of growth management challenges.

For example, Rappahannock County enacted an agricultural zoning ordinance that sets minimum lot sizes of 25 acres. Agricultural zoning achieved the desired effect of the local government; it severely limited new growth in the County while preserving agricultural land and open space. On the other hand, it can be safely assumed that these policies shifted at least a portion of this growth to adjacent counties. Many proponents of growth management would note that Rappahannock's ordinance does not represent truly effective growth management in that it falls short of addressing growth on a regional level. Without coordination between Rappahannock and its neighbors, the gains produced by the new local ordinance may be unduly offset by detriment to surrounding jurisdictions.

In the previously mentioned 2003 Brookings report, which is entitled, "Is Home Rule the Answer?" 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." Effective growth management, it is argued, is therefore often hindered, rather than furthered by, local autonomy. For this reason, they claim the most effective growth management efforts in the United States have been at the state and regional level. Local autonomy may provide localities additional tools to limit, restrict, manage or stop growth but effective growth management efforts must also be coordinated at a regional or state level.

The strongest growth management efforts identified by Brookings occurred in both states in which the courts employ Dillon's Rule and those in which they do not: Oregon (no), Maryland (yes), Florida (yes), New Jersey (no), Washington (yes), and Wisconsin (yes). More importantly, in both states where Dillon's Rule is applied and those in which it is not, effective growth management efforts have been initiated top-down from the State level. Given these findings, it would seem worth questioning whether growth management proponents are well advised to focus discussion and resources on addressing shortfalls of local autonomy as dictated by Dillon's Rule rather than the lack of enabling legislation for regional and statewide growth management objectives.

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Resources

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