

## Dillon's Rule is From Mars, Home Rule is From Venus: Local Government Autonomy and the Rules of Statutory Construction

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"Even in the age of the global city, Dillon's Rule still casts a large shadow over municipal self-determination" (Sonenshein and Hogen-Esch 2006, 488).

### I. Introduction

The Tenth Amendment to the *United States Constitution* provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This provision grants the lion's share of regulatory authority in our federalist system of governance to the states and limits greatly the authority of the United States Congress.

Local governments, however, are not mentioned in the *United States Constitution*, nor does the *United States Constitution* suggest what type of authority should be possessed by local governments. This omission leads to the inexorable principle that "[local governments] are the creatures- mere political subdivisions- of the state, for purpose of exercising a part of its power" (*Atkins v. Kansas* (1903)). Therefore, any authority that local governments possess must come from grants by the state, either in the state constitution, state enabling authority or charters.

Although the extent and effect of local government autonomy has formed a source of debate and discussion for many decades, and produced a great deal of literature, few efforts attempt to measure local government autonomy. Writers either "trivialize" local government autonomy by focusing on choice-oriented, efficiency theory or ignore the

concept in favor of a focus on local government processes (Clark 1984). Likewise, the information available on local government autonomy confines itself to the narrow range of function, finances and personnel administration (Krane 2001).

Relatively few scholars know much about the constitutional, political, and fiscal ties that bind states and localities, and even fewer have much information about the complex interactions between the state and local governments engaged in the delivery of public goods and services. Research continues to suffer from this blind spot on state-local relations and, of course, so does the teaching of subnational politics.

(Hanson 1998, 3).

Many efforts to define local government autonomy use Dillon's Rule and home rule as the beginning metrics (Weeks and Hardy (1984); Krane, Rigos and Hill (2001); Geon and Turnbull (2004)). However, other commentators reject the use of Dillon's Rule and home rule labels as a proxy measure of local government autonomy (Richardson, et al., 2003; Bluestein, 2006).

This paper shows that conflating the use of Dillon's Rule or home rule with local government autonomy critically errs in the attempt to capture the true measure of local government autonomy. In addition, the terms Dillon's Rule and home rule represent completely different concepts and are not capable of comparison.

The first part of the paper briefly describes Dillon's Rule. In addition, the use and misuse of Dillon's Rule in describing local government autonomy is discussed. The paper then outlines the various depictions of home rule ~~is then discussed~~. The author then characterizes local government autonomy and describes the link, or lack thereof, between local government autonomy, Dillon's Rule and home rule. The paper concludes

that Dillon's Rule and home rule form two completely different concepts that cannot be used to attempt to rank or describe levels of local government autonomy.

## II. Dillon's Rule

### A. Introduction- Dillon's Rule as a Rule of Statutory Construction

When states delegate authority to local governments, courts are often called upon to rule upon the scope of the powers granted. Where the legislature speaks unambiguously, the court may rely on the clear language of the statute. Where the legislative grant may be interpreted in more than one way, however, courts must attempt to ascertain the legislative intent.

Dillon's Rule is a "rule of statutory construction." Courts use rules of statutory construction in interpreting all types of legislation, but Dillon's Rule specifically applies to grants of authority from state legislatures to local governments.

Rules of statutory construction apply only where the meaning of a statute is not clear and aid in determining the legislature's intent in enacting the statute (*Connecticut National Bank v. Germain* 1991). These rules are not mandatory, but provide guidelines to help courts ascertain legislative intent (*Chickasaw Nation v. U.S.* 2001). Other evidence of legislative intent can override a rule of statutory construction (Ibid). If the meaning of a statute is clear, then rules of statutory construction are not consulted.

The Supreme Court of each state makes the final determination of which rules of statutory construction will be adopted in each state court systems. Different states may adopt different rules. The United States Supreme Court makes the final ruling on the rules of statutory construction that apply in the federal courts. However, the state legislatures and Congress may essentially override the respective court systems by setting

out rules of statutory construction legislatively. These statutes may determine general rules of statutory construction or instruct the courts with respect to interpreting a category of grants of authority, or even a particular grant of authority.

## B. Dillon's Rule: Background and The Rule

The mid-1800's was a time of great municipal corruption. During that time, Judge John F. Dillon of Iowa was the nation's premier authority on municipal law. In the case of the *City of Clinton v. Cedar Rapids & Missouri River Railroad*, (1868), Dillon summarized his view of the relationship between the state government and local governments:

"Municipal corporations<sup>1</sup> owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control... We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the legislature."

Courts expressed the outlines of Dillon's Rule as early as 1816, when the Massachusetts Supreme Court held that towns are "creatures of the legislation" and may exercise "only the powers expressly granted to them" (*Stetson v. Kemp* 1816). Dillon first set out the rule that would later bear his name in *Clark v. City of Des Moines* (1865) (Richardson, et al. 2003).

"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

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<sup>1</sup> Although the distinction between municipal corporations and other forms of local government still implies important legal ramifications in many situations, the distinction generally makes no difference with respect to the application of Dillon's Rule today. Therefore, this paper uses "local government", "municipality", "municipal corporation" and "locality" interchangeably to refer to cities, towns, counties, townships, boroughs and any other form of local government in the United States.

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.”

The rule clearly recognizes the state legislature as the sovereign power and the local government as subordinate (Richardson, et al. 2003). In 1873, Judge Dillon included this rule in his seminal treatise, *Commentaries on the Law of Municipal Corporations*. It was at this time that most state and federal courts adopted the rule. Richardson, Gough and Puentes (2003) found that 39 states have adopted Dillon’s Rule as the rule of statutory construction to interpret grants of authority to local governments. As shown in Appendix A, only 9 states, Alaska, Iowa, Massachusetts, Montana, New Jersey, Ohio, Oregon, South Carolina and Utah reject the use of Dillon’s Rule. Thirty-one states use the rule for all types of localities, while eight (Alabama, California, Colorado, Illinois, Indiana, Kansas, Louisiana and Tennessee) use the rule for certain types of localities, but not others (Richardson, et al. 2003).

The United States Supreme Court twice upheld Dillon’s Rule against attacks on its constitutionality (*Atkins v. Kansas* (1903); *City of Trenton v. New Jersey* (1923)). In the *Atkins* case, the Court opined that:

“[local governments] are the creatures, mere political subdivisions of the state for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the state. They may be created, or, having been created, their powers may be restricted or enlarged, or altogether withdrawn at the will of the legislature; the authority of the legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the municipality shall not be destroyed.”

The United States Supreme Court also commented on the power of local governments in *Community Communication Co. v. Boulder*, 455 U.S. 40 (1982). The Court in that case declared that:

“all sovereign authority within the geographic limits of the United States resides either with the Government of the United States, or [with] the States of the Union. *There exist* [sic] *within the broad domain of sovereignty but these two*. There may be cities, counties, and other[s]...but they are all derived from, or exist in, subordination to one or the other of these.” (citations omitted; emphasis in original) (*Community Communication Co.*, at page 53-54).

In effect, Dillon’s Rule merely reflects settled legal principles derived, in part, from the Tenth Amendment of the *United States Constitution* (Richardson, et al. 2003). Local governments exist only as creatures, delegates and agents of the state (Briffault, 1990) and states exercise complete hegemony over local governments (Briffault, 1990). Dillon’s Rule merely reflects the constitutional principles embodied in the Tenth Amendment to the *United States Constitution*.

Although Dillon’s Rule is most often characterized as a rule of “strict” statutory construction, that description does not necessarily fit the application of the rule. Although the rule is “strict” when compared to the “liberal” construction of statutes, the language of Dillon’s Rule suggests moderation. For example, Csoka (2007) asserts that Nevada courts, on occasion, seem to have relaxed the strict construction required by Dillon’s Rule, even while purporting to apply the rule, creating a “sensible construction” or “reasonable construction” standard.

While a strict construction should be applied to the grant of powers to municipalities..., yet if the power is clearly implied, it should not be impaired by a strict construction. A strict construction must yet be a sensible construction and be based upon the entire context. Or, as it is sometimes put, the power given by the charter is a matter of reasonable construction.

*Ronnow v. City of Las Vegas*, 65 P.2d 133 (Nev. 1937), cited in Csoka (2007, 206).

The court's language, as well as Csoka's arguments, seems to mirror USACIR's assertion that the history of Dillon's Rule dictates that the rule should *not* be interpreted as a rule of strict statutory construction (USACIR, October 1993). USACIR's research supports a view of the rule as calling for a "fair and reasonable" construction of grants of power to local governments (Ibid). However, since all rules of statutory construction seek to fairly construe the legislature's intent, the distinction seems of little consequence.

### C. Dillon's Rule Portrayed as the Determinant of Local Government Authority

Albuquerque (1998) describes Dillon's Rule as a "yoke" under which local governments must "struggle". One particularly strident critique of Dillon's Rule portrays the rule as a "strait-jacket" to local governments (Gere, 1982). Similarly, the doctrine has been described as "rigid and inflexible" (Ibid). The doctrine effects "a widespread impact upon the American community and urban landscape and has permanently colored the nature of state-local relations in each of the fifty states" (Gere, 1982). Gere (1982) further describes the principle as "so overwhelmingly weighted in favor of supreme state authority and control that hundreds of cities, towns, villages and other local communities in the United States have never known another way of life" (Gere, 1982).

Csoka (2007) characterizes Dillon's Rule as empowering judges to "second guess" policy decisions made by local legislative bodies. This "second guessing" allows a judge to determine what "reasonably" may be implied under Dillon's (Csoka 2007). Home rule deters such "second guessing" (Csoka 2007, 203).

The literature contains an incredible number of studies that attempt to measure the impact of varying levels of local government autonomy on various matters. Other studies place blame or attribute certain actions in a wide range of fields to Dillon's Rule or the lack thereof. This section briefly summarizes notable studies that incorporate the false dichotomy of Dillon's Rule and home rule to operationalize the variable of "local government autonomy" and the huge amount of influence given to the presence or absence of Dillon's Rule.

One study discusses the state role in secession conflicts in Los Angeles (San Fernando Valley) and New York City (Staten Island) (Sonenshein and Hogen-Esch 2006). The authors describe how secession proponents took the conflict to the state government to balance the playing field (Ibid). Dillon's Rule is credited with allowing state actors to enter the controversy. The ultimate conclusion of the study states that "Even in the age of the global city, Dillon's Rule still casts a large shadow over municipal self-determination" (Sonenshein and Hogen-Esch 2006, 488). That conclusion proves to be especially extraordinary given the limited nature of the inquiry of that study. Such bald assertions relating to the impact of Dillon's Rule prove to be the norm, however.

Dillon's Rule has been blamed for local governments lacking the authority to grant health benefits to unmarried domestic partners (*Arlington County v. White* 2000). Owens and Sarte (2004) baldly assert that "[t]he inability of localities [in Virginia] to address growth in a more aggressive manner is guided by the so-called Dillon Rule" (Owens and Sarte, 33-34). Hence, the toolkit to control growth is necessarily limited (Ibid, 34). The authors make no effort to even attempt to support these assertions.

Mikesell and Mullins (2007) use the typology developed by Richardson, et al. (2003) in their model of household property tax burdens. The variable was based on the existence of Dillon's Rule or not. The authors hypothesize that local governments in Dillon's Rule states would be constrained with respect to alternative methods of raising revenues, and hence would host households with higher tax burdens (Mikesell and Mullins, 105-106). The model reveals that households in Dillon's Rule states experienced 12 percent higher property tax burdens (Ibid, 110). The model also shows that property tax burdens are substantially lower in states that allow local governments to assess income and sales taxes (Ibid). The authors fail to explain the connection, or lack thereof, between the conclusions. A Dillon's Rule state may well allow local governments to assess income and sales taxes, so the results seem invalid.

Turnbull and Geon (2006) emphasize local government autonomy's role in the median voter hypothesis (that local governments behave "as if" they maximize the utility of the median income voter in the jurisdiction) and fallaciously equate local government autonomy with home rule v. Dillon's Rule. "A key point not yet considered in the economics literature regards the relationship between how much freedom local governments possess to respond to the preferences of voters and how well they accomplish that task. That is, of course, the home rule vs. Dillon's rule question addressed here" (Turnbull and Geon 2006, 489).

Turnbull and Geon (2006) hypothesize as to the impacts of home rule and Dillon's Rule. Home rule gives governments more power than Dillon's Rule to respond to voter preferences and "more closely matches the marginal cost of public goods provided and marginal benefits from local public services" (Turnbull and Geon 2006, 489-490).

However, “home rule can push the equilibrium away from the median voter hypothesis when intergovernmental competition is not strong enough to offset the local government tendency to pursue its own expansionary objectives. Under Brennan and Buchanan’s (1980) leviathan hypothesis, Dillon’s rule is precisely the type of external constraint needed to harness the expansionary proclivities of local government. The leviathan hypothesis maintains that the local government is less likely to satisfy the median voter hypothesis under the unrestricted home rule than under the restrictive Dillon’s rule” (Turnbull and Geon 2006, 490). This operationalization of local government autonomy again fails to appreciate the subtleties of Dillon’s Rule and home rule, instead oversimplifying the concepts as polar opposites.

### III. Home Rule

Home rule proves to be much more difficult to define than Dillon’s Rule. “[T]here is perhaps no term in the literature of political science or law that is susceptible to misconception and variety of meaning than ‘home rule’” (Chicago Home Rule Commission 1954). Confusion arises, in part, from the use of the term as a political motto and a legal doctrine (Sandalow 1964). In addition, “the term ‘home rule’ has acquired an almost talismanic aura over the years and often, inaccurately, connotes almost total freedom of local government from state control” (Richardson, et al. 2003, 7). In practice, however, home rule rarely provides substantial autonomy and freedom from state interference (Bluestein 2006, 2003).

One type of home rule provides the inverse of Dillon’s Rule, stating that courts will interpret grants of authority from the state to local governments liberally. Using this rule, a court would resolve any doubts with respect to the existence of the power in favor

of the local governments and assume the authority exists. Some refer to this type of home rule as “legislative home rule” (Mead 1987; Krane, Rigos, and Hill 2001).

Most fundamentally, home rule refers to a state constitutional provision or legislative action that provides a local government with a greater measure of self-government ability (Black 1990). Used in this way, home rule involves two components: (1) the power of local governments to manage “local” affairs; and, (2) the ability of local government to avoid interference from the state (Timmons 1993). This definition makes home rule synonymous with local government autonomy, as detailed in section IV, below.

Theorists have classified types of home rule in at least 4 different ways (Richardson, et al. 2003). The first uses the way the grant operates, or operational categorization. Operational home rule may occur in two different ways. First the state may grant authority to local governments to act in certain areas with legislative authority. Secondly, the state may be limited in regulating certain municipal affairs (Welch 1999).

Structural categorization classifies home rule according to the structure of the grant (Mead 1997; Krane, Rigos, and Hill 2001). One type of structural home rule attempts to carve out an area of exclusive local concern where local governments have the exclusive right to regulate. The second merely transposes Dillon’s Rule, as described above (Richardson, et al. 2003).

Some classify home rule based on the source of the authority (Welch 1999). If the source is found in the state constitution, then the doctrine is referred to as constitutional home rule. Legislative home rule derives from grants from the state legislature (Richardson, et al. 2003).

Finally, Richardson, Gough and Puentes (2003) suggest a fourth classification method. Under this classification system, grants of authority would be categorized based upon whether the grant addresses local government autonomy or the judicial interpretation of state grants of authority to local governments (Richardson, et al. 2003).

Regardless of the classification system, no type of home rule equates to total freedom for local governments from state oversight (Richardson, et al. 2003). In addition, only one type of home rule, a rule of statutory construction that assumes that local governments hold the authority to act unless denied by the state legislature, may fairly be compared to Dillon's Rule.

#### IV. Dillon's Rule, Home Rule and Local Government Autonomy

##### A. Introduction

Many efforts to define local government autonomy use Dillon's Rule and home rule as the beginning metrics (Weeks and Hardy (1984); Krane and Rigos (2001); Geon and Turnbull (2004)). This section discusses efforts to measure local government autonomy and the relationship of local government autonomy to concepts of home rule and Dillon's Rule. The analysis shows that most comparisons of Dillon's Rule and home rule necessarily miss the mark by comparing a rule of statutory construction (Dillon's Rule) with the much broader and amorphous concept of home rule. The identification of a state as "Dillon's Rule" or "home rule" lacks any relationship to local government autonomy.

##### B. Local Government Autonomy Defined

Perhaps the most complete definition of local government autonomy comes from Clark (1984). Clark defines local autonomy in terms of two levels. Level one includes autonomy received through constitutions, rules, standards, and mandates. Level two refers to autonomy received through implementation and political interpretation of the social institutions. Conflict abounds at the second level, surrounding the issues of application and adjudication of rules.

More importantly, Clark draws upon Bentham's (1970) theory of legal powers and provides a more expansive description of Timmons' (1993) definition of home rule to define local government autonomy based upon the two principles of power: immunity and initiative (Clark 1984). Autonomy refers to the degree to which the government

holds the power to act on matters under its own preferences in accordance to the standards set forth by the state.

Initiative refers to the power of localities to regulate the behavior of residents in the local government's own interest/preference (the first portion of the definition).

Immunity involves the power of localities to operate without oversight from the state.

The state may limit autonomy by withholding the grant of the authority or through lack of immunity.

Total initiative involves those instances where a local government holds all possible authority to act as it wishes. Total immunity refers to a situation whereby the local government may act without review or authority from the state.

Total immunity likely fails to exist, except perhaps for some narrow range of powers. Likewise, one rarely, if ever, finds absolute discretion in practice unless a particular power or area is examined.

For example, if a state statute clearly authorizes local governments in a particular state to create transfer of development rights (TDR) programs, with total discretion to dictate the terms and parameters of the program, one may say that initiative exists. Presumably, the technical skills and fiscal resources necessary to create and carry out the program must exist for true initiative to be present. If the state reserves no oversight authority over local TDR programs, then the local government can be said to possess immunity.

Clark delineates four types of autonomy in terms of the two principles of power:

- Type 1: initiative and immunity (total/absolute autonomy)
- Type 2: initiative and no immunity

- Type 3: no initiative and immunity
- Type 4: no initiative and no immunity (no local autonomy)

Therefore, Type 1 power would grant the local government absolute autonomy. The local government chooses what to regulate and in what context, without state oversight. The local government holds complete discretion over how to act. Type 2 power allows the local government to make its own decisions in terms of rules and regulations. However, the lack of immunity means that the state and/or federal government hold oversight authority. All actions are subject to review, modifications or negation.

Type 3 power refers to a model in which the government lacks authority to choose the actions it may or may not undertake. Instead the state and/or federal government control the local government's span of authority. However, once empowered, the local government enjoys freedom from oversight by the state and federal governments. Type 4 power essentially grants the local government no autonomy. The state decides on the rules and regulations, sets standards for how the local governments are to implement these actions, and retains the authority to review and suspend the actions<sup>2</sup>.

The United States Advisory Commission on Intergovernmental Relations (1993) adopted Clark's distinction between the power to initiate policy and the immunity from state oversight. At least one state supreme court also defines local government autonomy using initiative and immunity (*City of New Orleans v. Board of Commissioners of the Orleans Levee District* 1994). The court explained initiative as "a local government's ability to initiate legislation and regulation in the absence of express state legislative

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<sup>2</sup> Note that Clark misinterprets Dillon's Rule, placing the rule as Type 4 autonomy. In actuality, Dillon's Rule jurisdictions could span the entire range of types of governments under the Clark typology. See Richardson, Gough and Puentes (2003).

authorization” (Ibid, 242). Immunity entails “the power of localities to act without fear of the supervisory authority of the state government” (Ibid).

### C. Measuring Local Government Autonomy Using Dillon's Rule and Home Rule

Several efforts attempt to measure or classify local government autonomy. Many of these efforts use Dillon's Rule and home rule as key components of these models. Weeks and Hardy (1984) present a classification system for local government autonomy that differs from Clark's model, involving three categories. In the first category, Dillon's Rule governs and home rule fails to exist. The second category involves home rule charter governments, where local governments exercise powers granted in their own locally adopted charters. Finally, the third classification contemplates a "devolution of powers" system, where the state governments grant local governments Home Rule authority.

The Weeks and Hardy (1984) measurement mistakenly hinges on a false Dillon's Rule/home rule dichotomy (Richardson, Gough and Puentes 2003). Richardson, Gough and Puentes (2003) demonstrate the fallacy of conflating home rule and Dillon's Rule classifications with notions of local government autonomy. In addition, Weeks and Hardy (1984) appear to examine only initiative and not immunity.

In another study, Geon and Turnbull (2004) likewise make the mistake of conflating "local government autonomy" with varying degrees of "Home Rule" and "Dillon's Rule". The Geon and Turnbull (2004) study attempts to measure local government autonomy by using the labels of "strong Home Rule" (a large degree of local autonomy), "weak Home Rule", "weak Dillon's Rule" and "strong Dillon's Rule" (little or no local autonomy) (Ibid). Krane, Rigos and Hill (2001) provided the basis for this state-by-state classification. The Geon and Turnbull measure appears to look only at initiative, and not immunity.

The Clark (1984), Weeks and Hardy (1984), and Geon and Turnbull (2004) classification systems all also suffer the limitation of attempting to place local government autonomy within one of only a handful of categories. These classification systems fail to reflect the reality of the extent of local government autonomy as falling along a continuum that lacks bright-line boundaries. In actuality, local government autonomy defies compartmentalization of this type. In addition, autonomy may vary based upon the type of local government (county versus city, for example) or the particular type of power (land use versus fire protection, for example). The literature generally reflects a lack of understanding of home rule and Dillon's Rule, further limiting efforts to analyze local government autonomy.

Finally, and related to the attempt to limit the number of categories, each of these systems works best when attempting to describe a particular power, like the power to create and administer a TDR program. When these classification systems are applied to local governments generally, the categories ultimately fail since local governments hold broad authority in some areas, and little in others.

The author rejects the Weeks and Hardy (1984) and Geon and Turnbull (2004) classifications. Due to a misinterpretation of Dillon's Rule and home rule, both systems focus on the manner in which autonomy is granted to the local government, as opposed to the extent of autonomy actually held by the local government.

For example, a "strong Dillon's Rule state" may grant local governments broad autonomy (Richardson, Gough and Puentes 2003). Similarly, in the Weeks and Hardy (1984) "devolution of power" classification, broad authority could be granted from the state to the local government. Even Clark (1984) appears to define initiative in terms of

whether the local government must look to the state for enabling authority. All local governments depend upon the state legislature or state constitution for autonomy. Given this irrefutable fact, all classifications based on the presence or absence of Dillon's Rule serve little practical use.

A separate set of measurement systems use financial measures to gauge local government autonomy. Researchers using this type of measure calculate direct general expenditures to measure a local government's functional responsibilities compared to other jurisdictions. Although this measure fails to gauge policymaking responsibility, local government expenditures serve as an indicator of servicing responsibility (U.S. Commission on Intergovernmental Relations 1981). This method of measurement, however, raises an important issue with respect to local government autonomy. Of course, if local governments lack sufficient financial means to adopt and carry out enabled authority, the authority rings hollow (Briffault 1996). The literature contains myriad examples of commentators bemoaning the lack of resources and the lack of an ability to raise money as presenting severe limitations to theoretical autonomy.

The author recognizes the very real obstacles that finances present to the implementation of local government autonomy. This paper fails to include finances in any meaningful way when classifying states as to local government autonomy. However, in describing a particular state, the author notes financial concerns as described in the literature.

V. Does the Presence or Absence of Dillon's Rule Impact Local Government Autonomy?

By using the Richardson, Gough and Puentes (2003) classification of Dillon's Rule states, combined with rankings of local government autonomy, the author determines whether the assumed link between Dillon's Rule and local government autonomy actually exists. This section takes the rankings from two of the most comprehensive studies of local government autonomy to see if any relationship exists.

The United States Advisory Commission on Intergovernmental Relations (USACIR) (1982) conducted the most comprehensive study of local government autonomy. This study ranks states on overall degree of local discretionary authority (USACIR, 1982). The summary of the USACIR (1982) rankings are contained in Table 1. Virginia, a state in which the authors argue the courts apply Dillon's Rule more stringently than any in the country, ranked 6<sup>th</sup> amongst the states with the most local discretionary authority. Oregon local governments hold the most discretionary authority and Oregon courts do not apply Dillon's Rule. Of the top ten states, ranked in descending order of local discretionary authority (Oregon, Maine, North Carolina, Connecticut, Alaska, Maryland, Pennsylvania, Virginia, Delaware, Louisiana) only Oregon and Alaska (5<sup>th</sup>) fail to apply Dillon's Rule. Louisiana (10<sup>th</sup>) uses Dillon's Rule only with respect to certain localities. The remaining 6 of the top ten states use Dillon's Rule in all circumstances, with North Carolina applying a modified version of the rule.

Wolman, et al. (2008) conducted an extensive study to compare local government autonomy across states. Local government autonomy was defined as "a *system* of local government in which local government units have an important role to play in the economy and the intergovernmental system, having discretion in determining what they will do without undue constraint from higher levels of government, and have the means

or capacity to do so” (Wolman, et al. 2008). This study created an index based upon three dimensions: local government importance, local government discretion and local government capacity (Ibid). The authors operationalized local government discretion, in part, through the use of the Krane, Rigos and Hill (2001) measure of structural home rule. In addition, the Richardson, Gough and Puentes (2003) assignment of Dillon’s Rule status was applied (Wolman, et al. 2008). The study did not acknowledge the lack of link between the use of Dillon’s Rule and local government autonomy.

Table 2, from Wolman, et al. (2008), summarizes the results. The nine states that Richardson, et al. (2003) identified as rejecting Dillon’s Rule ranked 4<sup>th</sup> (Ohio), 15<sup>th</sup> (South Carolina), 16<sup>th</sup> (Utah), 22<sup>nd</sup> (Iowa), 24<sup>th</sup> (Alaska), 30<sup>th</sup> (Massachusetts), 35<sup>th</sup> (Oregon), 37<sup>th</sup> (New Jersey), and 40<sup>th</sup> (Montana). Like the USACIR (1982) study, Wolman, et al. (2008), confirm that the use of Dillon’s Rule fails to directly affect local government autonomy.

## VI. Should Dillon’s Rule be Reformed?

Despite the lack of any empirical evidence showing a link between local government autonomy and the use of Dillon’s Rule, the rule continues to generate significant controversy. For example, Richardson, Gough and Puentes (2003) summarize the myriad advantages and disadvantages of the rule contained in the literature. The lack of a link raises the question of whether Dillon’s Rule should be reformed to correct existing shortcomings or even the perception of shortcomings.

Two recent recommendations for reform, Csoka (2007) and Bluestein (2006) take radically different approaches to possible reform. However, each proposal advances strong arguments for consideration. Csoka (2007) argues that grants of municipal

structural and personnel powers should be construed liberally; municipal functional powers should be construed under a “reasonable construction” standard that considers custom; and grants of municipal fiscal powers should be strictly construed (214). In addition, emergency powers granted to local governments should be broadened (Ibid).

Liberal construction of structural and personnel powers allows the electorate freedom in deciding on the structure of government, lowers the risk of legal challenge to such powers and levels the playing field for local governments competing for employees in the marketplace (Csoka 2007). The arguments that support Dillon’s Rule do not apply for structural and personnel powers (Ibid).

Local governments assume a large number of functions in today’s society. Strict construction of grants of those powers may lead to absurd results (Csoka 2007). Csoka (2007) analogizes municipalities to administrative agencies with respect to grants of functional authority. As such, these grants should be more liberally construed. However, Csoka (2007) stops short of recommending liberal construction, noting that these powers are exercised external to the locality, unlike structural and personnel powers. A “reasonable construction” standard balances these considerations (Ibid).

Finally, adherence to a strict construction standard should be maintained for grants of fiscal power (Csoka 2007). Public policy dictates that local governments be strictly monitored in how revenue is generated (Ibid).

In contrast, Bluestein (2006) focuses on the grants of authority themselves as opposed to construing the grants. She makes three recommendations for reform to improve flexibility, efficiency and predictability in the delegation of authority from the state to local governments in North Carolina (Bluestein 2006). At least two of the

recommendations apply equally well to other states claiming inhabitation of local government autonomy due to the perceived constraints of Dillon's Rule.

- (1) Reduce statutory detail. Through broadly wording enabling legislation, the legislature promotes local government flexibility in the implementation and administration of grants of authority (Bluestein 2006).
- (2) Clarify the standard of judicial review. Confusion exists in the state as to which grants of authority the broad construction set out in the statutes should apply (Richardson, et al. 2003; Bluestein 2006). In addition, the courts have inconsistently applied the statute (Richardson, et al. 2003; Bluestein 2006). Clarifying these matters would increase predictability for local governments (Bluestein 2006).
- (3) Authorize local ordinances to conform city charters and county local acts to the general law. Practically, the state legislature should not have to intervene for this purpose (Bluestein 2006).

Reducing statutory detail and authorizing local ordinances to conform city charters and county local acts to general law would reduce the burden of the courts in interpreting statutory grants of authority in any state. The Bluestein (2006) recommendations comport with the theory of Dillon's Rule advanced by Richardson, Gough and Puentes (2003). Namely, if the state legislature clearly delegates authority to local governments, Dillon's Rule will not be invoked.

## VII. Conclusions

Identifying a state as one where the judiciary uses or does not use Dillon's Rule lacks any predictive ability as to the amount of local government autonomy possessed by

local governments within the state (Bluestein 2006). This distinction also fails to provide insight as to the state's local government structure (Bluestein 2006). The Dillon's Rule/home rule distinction provides a false dichotomy (Richardson, et al. 2003; Bluestein 2006). Dillon's Rule is a rule of statutory construction, while home rule generally refers to source and/or extent of delegation of authority from the state to the local governments (Bluestein 2006). In essence, this type of analysis compares apples to oranges.

For example, Richardson, Gough and Puentes (2003) classified North Carolina as a state whose judiciary uses Dillon's Rule to construe grants of authority from the state legislature to local governments. However, North Carolina presents a unique case. The legislature has passed two statutes directing the courts to use a liberal construction of state delegations of power to local governments (Richardson, et al. 2003; Bluestein 2006). The state courts have been inconsistent with respect to strictly or liberally construing these delegations of authority (Richardson, et al. 2003; Bluestein 2006).

Bluestein (2006) examined the breadth of authority held by local governments in North Carolina and compared this authority to the power of local governments in "home rule" states. The comparison yielded the conclusion that North Carolina local governments hold as much, and often more, authority than local governments in home rule states (Bluestein 2006).

A more apt analysis to attempt to ascertain the impact of Dillon's Rule on local government autonomy would compare court decisions construing grants of authority using Dillon's Rule versus court decisions using a liberal construction standard. To date, no such analysis has occurred. Future research should explore this question.

In any case, the “talismanic aura” of home rule (Richardson, et al. 2003) almost certainly overstates the importance of local government autonomy.

[t]he virtues of enhancing local government autonomy tend to be greatly exaggerated. Localism reflects territorial economic and social inequalities and reinforces them with political power. Its benefits accrue primarily to minority of affluent localities, to the detriment of other communities and to the system of local government as a whole...Localist ideology and local political action tend not to build up public life, but rather contribute to the pervasive privatism that is the hallmark of contemporary American politics. Localism may be more of an obstacle to achieving social justice and the development of public life than a prescription for their attainment. (Briffault 1990, 1-2; cited in Bluestein 2006).

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**Table 1.**

**States Ranked by Degree of Local Discretionary Authority, 1980**

States in **bold** are not Dillon's Rule states. Source: U.S. Advisory Commission on Intergovernmental Relations. 1981. "Measuring Local Discretionary Authority." USAICR, M-131. Washington.

**A. Composite (all types of local units)**

1. **Oregon**
2. Maine
3. North Carolina
4. Connecticut
5. **Alaska**
6. Maryland
7. Pennsylvania
8. Virginia
9. Delaware
10. Louisiana
11. Texas
12. Illinois
13. Oklahoma
14. Kansas
15. **South Carolina**
16. Michigan
17. Minnesota
18. California
19. Missouri
20. **Utah**
21. Arkansas
22. New Hampshire
23. Wisconsin
24. North Dakota
25. Arizona
26. Florida
27. **Ohio**
28. Alabama
29. Kentucky
30. Georgia
31. **Montana**
32. Washington
33. Wyoming
34. Tennessee
35. New York
36. **New Jersey**
37. Indiana
38. Rhode Island
39. Vermont
40. Hawaii
41. Nebraska
42. Colorado
43. **Massachusetts**
44. **Iowa**
45. Mississippi
46. Nevada
47. South Dakota
48. **New Mexico**
49. West Virginia
50. Idaho

## B. Cities Only

1. Texas
2. Maine
3. Michigan
4. Connecticut
5. North Carolina
- 6. Oregon**
7. Maryland
8. Missouri
9. Virginia
10. Illinois
- 11. Ohio**
12. Oklahoma
- 13. Alaska**
14. Arizona
15. Kansas
16. Louisiana
17. California
18. Georgia
19. Minnesota
20. Pennsylvania
- 21. South Carolina**
22. Wisconsin
23. Alabama
24. Nebraska
25. North Dakota
26. Delaware
27. New Hampshire
- 28. Utah**
29. Wyoming
30. Florida
31. Mississippi
32. Tennessee
33. Washington
34. Arkansas
- 35. New Jersey**
36. Kentucky
37. Colorado
- 38. Montana**
39. Iowa
40. Indiana
- 41. Massachusetts**
42. Rhode Island
43. South Dakota
44. New York
45. Nevada
46. West Virginia
47. Idaho
48. Vermont
- 49. New Mexico**
50. ---

### C. Counties Only

1. **Oregon**
2. **Alaska**
3. North Carolina
4. Pennsylvania
5. Delaware
6. Arkansas
7. **South Carolina**
8. Louisiana
9. Maryland
10. **Utah**
11. Kansas
12. Minnesota
13. Virginia
14. Florida
15. Wisconsin
16. Kentucky
17. California
18. **Montana**
19. Illinois
20. Maine
21. North Dakota
22. Hawaii
23. **New Mexico**
24. Indiana
25. New York
26. Wyoming
27. Oklahoma
28. Michigan
29. Washington
30. **Iowa**
31. **New Jersey**
32. Georgia
33. Nevada
34. Tennessee
35. Mississippi
36. New Hampshire
37. Alabama
38. Arizona
39. South Dakota
40. West Virginia
41. Nebraska
42. **Ohio**
43. Texas
44. Idaho
45. Colorado
46. Vermont
47. Missouri
48. **Massachusetts**
49. ---
50. ---

**Table 2.**  
**Local Government Autonomy Overall Ranking**

States in bold are not Dillon's Rule States. Source: Wolman, H., McManmon, R., Bell, M., & Brunori, D. (n.d.). *Comparing local government autonomy across states* (Working Paper 035). Retrieved from The George Washington University, George Washington Institute of Public Policy website:

<http://www.gwu.edu/~gwipp/Comparing%20Local%20Governments%20Across%20States%20GWIPP%20working%20paper%201-17-091.pdf>

1	New York	0.845
2	Tennessee	0.681
3	Kansas	0.62
<b>4</b>	<b>Ohio</b>	<b>0.599</b>
5	Louisiana	0.52
6	Missouri	0.477
7	Maryland	0.475
8	Wyoming	0.464
9	Texas	0.438
10	Illinois	0.39
11	Alabama	0.388
12	Florida	0.378
13	Colorado	0.295
14	Virginia	0.262
<b>15</b>	<b>South Carolina</b>	<b>0.201</b>
<b>16</b>	<b>Utah</b>	<b>0.191</b>
<b>17</b>	<b>New Mexico</b>	<b>0.191</b>
18	Arizona	0.172
19	North Carolina	0.131
20	Mississippi	0.129
21	Georgia	0.129
<b>22</b>	<b>Iowa</b>	<b>0.124</b>
23	Nevada	0.103
<b>24</b>	<b>Alaska</b>	<b>0.098</b>
25	Pennsylvania	0.085

26	California	0.043
27	Indiana	0.015
28	South Dakota	0.006
29	Nebraska	0.004
<b>30</b>	<b>Massachusetts</b>	<b>-0.022</b>
31	Oklahoma	-0.033
32	Washington	-0.073
33	Wisconsin	-0.121
34	Michigan	-0.175
<b>35</b>	<b>Oregon</b>	<b>-0.22</b>
36	Idaho	-0.25
<b>37</b>	<b>New Jersey</b>	<b>-0.255</b>
38	Arkansas	-0.258
39	Kentucky	-0.331
<b>40</b>	<b>Montana</b>	<b>-0.337</b>
41	North Dakota	-0.381
42	Minnesota	-0.389
43	Maine	-0.446
44	New Hampshire	-0.544
45	Hawaii	-0.685
46	Vermont	-0.703
47	Rhode Island	-0.728
48	Connecticut	-0.753
49	West Virginia	-0.769
50	Delaware	-0.982

