

## HOME RULE AND PREEMPTION DEFENSES

### I. BASIC HOME RULE/PREEMPTION SUMMARY

Home rule in the United States is widespread, with at least forty states delegating some significant, presumptive authority to their cities and/or counties to initiate policies without prior state legislative authorization. Home rule stands in contrast to Dillon's Rule, whereby cities and counties have only limited default authority and must receive specific legislative authorization to adopt a particular policy. About ten states retain Dillon's Rule for most or all of their local governments. Some states have a mixed regime, providing home rule to certain local governmental units but not to others. Generally, cities are more likely to have home rule than counties, but the details vary tremendously by state.

The issue of a plastic bag ban illustrates well the distinction between home rule and Dillon's Rule. A home rule city would usually have the authority to ban plastic bags unless and until the legislature preempts the subject. In a Dillon's Rule regime, by contrast, a city seeking to ban plastic bags would need specific legislative authorization in order to move forward. Home rule was developed to permit local governments to more nimbly address local problems without having to wait for state legislative approval.

#### A. Home rule categories

##### 1. Constitutional, Statutory, and Hybrid

Within the basic framework of home rule, there are a handful of important features that vary by state. First, some home rule regimes are rooted in the state constitution. Others are defined only by state statute. Still others are a hybrid: the state constitution lays out the basics of home rule, but leaves it to the legislature to fill in the details. Similarly, in some states, the state constitution authorizes, but does not compel, the legislature to create a system of home rule for municipalities. These provisions are called "non-self-executing" home-rule provisions because they do not set up home rule on their own. Further, in some states, the foundations for home rule may be different for different types of government. The state constitution may create home rule for cities but not for counties, or vice versa. In some states, the judiciary has given the final push to home rule by interpreting a state statute delegating broad power to local entities as impliedly abolishing or fundamentally inconsistent with Dillon's Rule; in other states, the state legislation granting power to local governments makes clear that Dillon's Rule no longer applies.<sup>1</sup>

Constitutional home rule provides a firmer foundation for municipalities to legislate for two reasons. First, it is generally more difficult for the legislature to repeal a constitutional provision than a statutory provision.<sup>2</sup> Second, because constitutions trump statutes, it is possible that a

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<sup>1</sup> Compare *State v. Hutchinson*, 624 P.2d 1116, 1127 (Utah 1980) (holding that "the Dillon Rule of strict construction is not a constitutional principle, but a rule of construction, and a county, under its state, with the consent of its voters, may change the constitution based solely on a majority vote of the electorate, albeit after proponents collect a certain number of signatures to put a measure on the ballot. See NAT'L CONF. OF STATE LEGS., INITIATIVE & REFERENDUM STATES (Last Reviewed Dec. 2015), <http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx> (last visited Mar. 14, 2017) (listing sixteen states as having direct constitutional initiative).

statutory infringement on home rule might run afoul of a state's constitutional home rule provision. Thus, in states with constitutional home rule, it may be possible to have a court declare a preemptive state law unconstitutional.

## 2. Scope of Delegated Power

Whether constitutional or statutory, home rule provisions delegate presumptive power to local governments across a broad swath of subjects. In some states, such as Alaska, the scope of the delegation is as broad as the state legislature's plenary power.<sup>3</sup> In other states, the language of the home-rule provision is more specific, delegating to municipalities the power "to determine their local affairs and government" or something similar.<sup>4</sup> Many provisions speak in terms of municipal charters, empowering local voters to adopt their own charters that define both the extent and limits of local power.<sup>5</sup> Some home-rule provisions deny local power over specific subject matters, such as the power to tax or create felony offenses, either outright or at least without specific legislative approval.<sup>6</sup> Some provisions deny municipalities the power to create "civil or private law," or at least put certain limitations on municipal power to act in that realm.<sup>7</sup>

Almost all home rule provisions grant cities at least some authority in the structural, personnel, and regulatory realms. These are categories used by the National League of Cities (NLC) to describe local authority.<sup>8</sup> Structural authority is the power to design one's type of government. This might include the power to choose the number of city councilors, whether such councilors are elected by district or at-large, the length of their terms, any term limits, and perhaps rules for how their campaigns are financed. Personnel authority is the power to manage and set compensation and benefits for a city's personnel. This includes retirement, sick leave, labor agreements, and other benefits. Regulatory power, or what the NLC calls "functional" authority, is the most significant form of home rule for preemption purposes. This includes the "police power" authority to regulate for the health, safety, welfare, and morals of the community. Regulatory authority is often the most significant for preemption purposes because it is that upon which cities rely when they impose requirements on private businesses or property owners. While personnel authority would allow a city to raise wages and benefits for its own employees, regulatory authority, by contrast, allows a city to raise the minimum wage for all private employers in its geographical jurisdiction.<sup>9</sup> Regulatory authority also applies to individual

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<sup>3</sup> See ALASKA CONST. art. X, § 11 (2017) ("A home rule borough or city may exercise all legislative powers not prohibited by law or by charter."). On state legislatures' plenary power, see, e.g., *Harsha v. City of Detroit*, 246 N.W. 849, 850 (Mich. 1933) ("The legislative power is . . . coextensive with that of the Parliament of England, save as limited and restrained by the state and federal Constitutions.").

<sup>4</sup> IOWA CONST. art. III, § 38A (2017).

<sup>5</sup> E.g., OR. CONST. art. XI, § 2 (2017) ("The legal voters of every city and town are hereby granted power to enact and amend their municipal charter . . .").

<sup>6</sup> E.g., IOWA CONST. art. III, § 38A (2017) ("[Municipalities] shall not have the power to levy any tax unless expressly authorized by the general assembly."); 22 DEL. CODE ANN. § 802 (2017) (excluding the "power to define and provide for the punishment of a felony" from grant of power to municipalities).

<sup>7</sup> For an extensive treatment of this subject, see Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109 (2012).

<sup>8</sup> NAT'L LEAGUE OF CITIES, LOCAL GOVERNMENT AUTHORITY, <http://www.nlc.org/local-government-authority> (last visited Mar. 14, 2017).

<sup>9</sup> Of course, for policy reasons, a city might choose to apply a particular mandate only to a subset of private actors, such as larger businesses.

conduct. Unless expressly prohibited or limited by the state constitution, regulatory authority usually includes the power to criminalize conduct by individuals and businesses.<sup>10</sup> Many states, however, expressly limit local criminal authority to violations and misdemeanors only, prohibiting local felonies.<sup>11</sup>

The fourth category identified by the NLC is fiscal home rule – that is, the authority to raise revenue, borrow money, and spend it.<sup>12</sup> Many state constitutional restrictions and statutes highly constrain local authority in this realm, although the details vary significantly by state. Some states specifically exclude taxing authority from their grant of home-rule powers.<sup>13</sup> Other states presumptively grant the power to tax through their home-rule provisions, but impose numerous other restrictions in separate constitutional or statutory provisions.<sup>14</sup> In light of the various restrictions many states imposed, commentators consider fiscal home rule the weakest category of city authority.<sup>15</sup>

There is another potential category that falls between the four identified by the NLC. Many cities regulate more stringently those employers or businesses with which they have a contractual relationship. For instance, some cities require that city contractors pay a higher wage or provide certain benefits not required of other businesses in the city.<sup>16</sup> Cities might also impose higher standards of, say, nondiscrimination on the services they offer, such as housing and public transportation.<sup>17</sup> This area of authority might be referred to as “proprietary” authority – that is, the city’s power – comparable to that of a private firm -- to set the terms on which it offers services or enters into contracts with or licenses other private firms..

## B. Immunity from State Override

The categories of structural, personnel, fiscal, regulatory, and proprietary are particularly helpful in assessing the immunity, if any, that the state constitution confers on local lawmaking from state override. In states with a pure “legislative” system of home rule where the constitution grants all powers to cities minus those preempted by the legislature, every and all local power can be preempted so long as the legislature is sufficiently clear about its intent.

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<sup>10</sup> See generally Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409 (2001).

<sup>11</sup> E.g., 22 DEL. C. § 802 (excluding the “power to define and provide for the punishment of a felony” from grant of power to municipalities).

<sup>12</sup> See *infra* note 8.

<sup>13</sup> See, e.g., *infra* note 6 (citing the Iowa Constitution); see also MASS. CONST. art. LXXXIX, § 7 (2017) (withholding from cities and towns “the power to . . . levy, assess and collect taxes [and] to borrow money or pledge the credit of the city or town”).

<sup>14</sup> E.g., CAL. CONST. art. XIII A (severely limiting local governments’ ability to raise revenue through property and other taxes).

<sup>15</sup> See, e.g., Erin Adele Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What to Do About Them*, 91 NYU L. REV. 292, 296 (2014) (“Traditionally, states have granted local governments very limited revenue-generating authority, even as compared to other home rule powers.”).

<sup>16</sup> E.g., Scott L. Cummings & Steven A. Boucher, *Mobilizing Local Government Law for Low-Wage Workers*, 1 U. CHI. LEGAL F. 187, 193-94 (2009) (noting that “the most common approach to the living wage” “is to tie living wage compliance to a direct financial relationship between the city and private employer”).

<sup>17</sup> Some of the earliest civil rights legislation at any level of government were local ordinances preventing racial and national origin discrimination in city-owned and operated housing, which emerged in the late 1940s. See Pamela H. Rice & Milton Greenberg, *Municipal Protection of Human Rights*, 1952 WIS. L. REV. 679, 684.

With other forms of home rule, however, the situation is more complicated. In some states, personnel, structural, proprietary, and some regulatory issues may enjoy outright or modified immunity to preemption by the state legislature or voters. In a handful of states, the constitution expressly allows for certain local enactments to trump state law.<sup>18</sup> In other states, the supreme court has read the constitution as protecting certain local enactments – usually structural, proprietary, or personnel – from state override or imposing certain conditions on state override. As will be explained in more detail in a separate memo, in some states, the state constitution and the judiciary require that in order to preempt effectively, state laws must be of a “general” or “uniform” nature. In some states this requirement is merely formalistic – preemptive legislation must treat all home-rule cities or counties equally. In other states, the requirement contains a substantive component: the courts inquire into whether the preemptive legislation truly addresses a “statewide concern,” as determined by the judiciary.<sup>19</sup> In Ohio, the courts also inquire as to whether preemptive legislation that repeals local regulatory authority in a particular sphere also implements or preserves a statewide regulatory regime.<sup>20</sup> In at least one other state, local advocates have attempted to use a similar argument to protect local authority no avail.<sup>21</sup>

In a few states that recognize local immunity, cities’ authority to initiate legislation is also limited to “local” matters, with “local” defined by the courts.<sup>22</sup> The courts often define “local” to include structural, personnel, and *some* regulatory matters like eminent domain and zoning. In most states, however, initiative authority is not so limited because the courts: 1) take a broad view of “local”; 2) classify most matters as mixed statewide/local, meaning that cities possess initiative authority but are also subject to preemption;<sup>23</sup> or 3) disavow the statewide-local typology altogether. In that third category, states, such as Alaska, permit localities to regulate any realm so long as not preempted by state law.

### C. Threshold requirements for home rule

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<sup>18</sup> *E.g.*, COLO. CONST. art. XX, § 6 (2017) (declaring that local charters and ordinances involving “local and municipal matters . . . shall supersede . . . any law of the state in conflict therewith”).

<sup>19</sup> *E.g.*, *Jacobberger v. Terry*, 320 N.W.2d 903, 905-06 (Neb. 1992) (upholding statute requiring district elections for Omaha city council due to state concern for more proportional representation of socioeconomic classes on local governing body).

<sup>20</sup> *See City of Canton v. State*, 766 N.E.2d 963, 969-70 (Ohio 2002) (invalidating targeted removal of local zoning authority because it prohibited local regulation rather than prescribed affirmatively “a rule of conduct”); *Cleveland v. State*, 989 N.E.2d 1072, 1085 (Ohio Ct. App. 2013); *see also Cleveland v. State*, No. CV-16-868008, slip op. at 4 (Ohio Ct. Common Pleas Jan. 30, 2017) (recently emailed by Ben) (upholding city ordinance requiring city residency of certain city contractors despite state statute purporting to preempt); *Lima v. State*, 909 N.E.2d 616, 626 (Ohio 2009) (Lanzinger, J., dissenting) (arguing that state preemption of city worker residency ordinances violated state constitutional home rule).

<sup>21</sup> *See White v. Josephine County* (Or. Cir. Ct. letter op. May 16, 2016) (distinguishing *Cleveland v. State* (Ohio Ct. App. 2013), in upholding state preemption of local ban on the use of genetically modified organisms in agriculture).

<sup>22</sup> *E.g.*, *Missouri Bankers Ass’n, Inc. v. St. Louis County*, 448 S.W.3d 267, 273 (Mo. 2014) (invalidating the county’s “Mortgage Foreclosure Intervention Code” because it addressed a “statewide issue” and was not the kind of “purely local concern” that the county was empowered to regulate).

<sup>23</sup> *E.g.*, *City of Longmont v. Colo. Oil & Gas Ass’n*, 369 P.3d 573 (Colo. 2016) (upholding state preemption of local fracking ban); *City of Northglenn v. Ybarra*, 62 P.3d 151 (Colo. 2003) (overruling city ban on unrelated juveniles who had committed certain sex offenses living together).

Many states establish a threshold for home rule powers and immunity. In some states, the constitution singles out specific cities for home-rule powers.<sup>24</sup> In others, the constitution or statutes establish a population minimum, or an opt-in requirement.<sup>25</sup> Some states, by contrast, automatically provide home rule to cities of a certain size but allow them to opt out.<sup>26</sup>

## CONCLUSION

The home rule movement that began in the late 1800s ultimately succeeded in delegating strong presumptive authority to cities, particularly in the regulatory realm. But this authority is now generally subject to preemption, making the scope of local authority largely a political choice for the legislature. In recent years, at least in certain states, the legislature has more frequently made the political choice to limit local regulatory autonomy. This trend could make home-rule regulatory authority more similar to fiscal authority in many states – strong in theory but in practice quite limited. Under current doctrine, and as explained in the attached chart [forthcoming], cities and counties have the strongest chance of receiving immunity to preemption when they act in the personnel and structural realms. Given its relationship to these categories, cities likely also have a decent chance at immunity when they act in the proprietary realm. These areas may be safe — or at least safer — harbors for local innovation in states where local regulatory power is under siege.

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<sup>24</sup> *E.g.*, MD. CONST. art. XI-A, § 1 (2017) (establishing home rule for the city of Baltimore and counties).

<sup>25</sup> *E.g.*, COLO. CONST. art. XX, § 6 (2017) (minimum population of 2,000 to adopt municipal home rule charter); WASH. CONST. art. XI, § 12 (2017) (requiring population of 10,000 for city to frame charter).

<sup>26</sup> *E.g.*, ILL. CONST. art VII. § 6(a) (2017) (allowing cities of 25,000 or greater to opt out of home rule).