

## Federalism, Dillon Rule and Home Rule

By Honorable Jon D. Russell & Aaron Bostrom

### Introduction

In recent years, there has been a rise in local governments using what little leverage they have in their states to promote policies that have traditionally been legislated in the state capitals. Many of these local governments have seen their attempts thwarted by their state legislatures with preemption and legal challenges. A careful study of local government reveals that while their attempts at legislating big policy issues may be well-intentioned, they are not staying true to the spirit of the law that governs them.

Local governments across America follow one of two types of governing authority: Home Rule or the Dillon Rule. Home Rule, as it sounds, gives local governments governing authority to make a wide range of legislative decisions that have not been addressed by the state. By contrast, the Dillon Rule creates a framework where local governments can only legislate what the state government has decreed. Both forms of governing authority were created by the states to help carry out the mission of the states at a local level. It would be virtually impossible for state governments to administer public safety, infrastructure and zoning issues without the creation of these political sub-

divisions. States use the Dillon Rule and Home Rule as ways to keep local governments focused on what they do best. As a result, the state is able to maintain a limited local government to promote economic continuity throughout its borders. Whether a local government is governed by the Dillon Rule or Home Rule, the ultimate decision of what powers they possess resides with the states.

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## What is the Dillon Rule?

The Founding Fathers of the United States had a clear vision of how they intended government to work using a system of federalism. By outlining this vision in the Constitution and the Federalist Papers, the Founding Fathers hoped their design would allow each level of government to function properly and provide stability to the country. Since the country's founding however, the federal, state and local governments have competed for power and federalism has waned as the governing system. The Dillon Rule originated in the Iowa Supreme Court, of which Justice John Dillon was a member from 1869 to 1879. In the opinion of *City of Clinton v. Cedar Rapids and the Missouri River Rail Road Company*, Justice Dillon spelled out the terms of his municipal philosophy:

“A municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words (from the state); second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation-not simply convenient, but indispensable; and fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation.”<sup>1</sup>



Dillon did not regard local governments as equal or separate from state government, but rather as political subdivisions of the state.

The Dillon Rule was later echoed by the United States Supreme Court in *Hunter v. Pittsburgh*, 207 U.S. 161, (1907), “Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which it cannot exist.”<sup>2</sup>

Created by the state, local governments exist to perform the tasks of the state at the local level. Typically, the state issues an enabling statute, which entrusts the local government with state power within a defined scope to achieve local objectives. Since the local government's power is derived from the state, the local government is strictly limited to what the state delegates to it. If local government supersedes the authority it is given, the state has the power to modify or revoke its powers. Ultimately under the Dillon Rule, local governments are tenants of the state.

## Federalism Understood

The Dillon Rule is consistent with the principles of federalism and the Constitution. The Founders designed the federal government to be dependent on the states, while the states could stand on their own. John Madison explained, “Each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence.”<sup>3</sup>

After the American Revolution, the states understood they needed some sort of federal government to link them together. James Madison wrote, “Among the numerous advantages promised by a well-constructed Union, none deserves to be

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more accurately developed than its tendency to break and control the violence of faction.”<sup>4</sup> The Union, designed by the Founders, allowed the states to come together and endure difficult times like the Civil War and the Great Depression. In addition to preventing division, the Founders knew that they would be better off domestically and internationally with more land, resources and manpower, sharing a common market and military between states. Hence the Founders created the federal government and prescribed it to regulate interstate commerce and provide a military and navy, among other powers. Yet, for all the importance of the federal government, it is the states that provide the unique counterbalance enabling the system of federalism to work.

Knowing the importance of unity, the states ceded some of their power to the federal government in order to bring it into being. Just as the federal government is needed to unify the states, the states are necessary to prevent the tyranny of the federal government over the people. The states also keep the federal government in check by limiting it to its expressed powers. Essentially, the federal government’s legislative powers consist of those listed in Article One, Section Eight of the Constitution. Likewise, the judicial and executive branches are also confined to their enumerated powers listed in the Constitution. Alternatively, the states retained their power in all areas and to the degree not enumerated or detailed. The Tenth Amendment of the Constitution reads, “The 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.”<sup>5</sup> Therefore, while the federal government’s powers consist of an enumerated few, state powers are both numerous and indefinite.

## Where are the Locals?

The Founders made no mention of local government in the U.S. Constitution. This necessarily implies that local governments are creations of state governments under the authority of their state constitutions. While local governments play an important role in states, it is unfounded for local jurisdictions to contend they are equal to the states. The question remaining is whether local government was created by federal or state government. Since the federal government’s responsibilities are limited to their enumerated powers, which make no mention of municipal or county government, local government must belong to the states and the people inside them. James Madison touches upon this in Federalist Paper 45: “The powers reserved to

the several States will extend to all the objects which, in the ordinary course of affairs concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”<sup>6</sup> By dispersing power across the states, the Founders hoped to prevent the abuse of federal power: “It would tend to render the government of the Union too powerful, and enable it to absorb those residuary authorities, which it might be judged proper to leave with the States for local purposes.”<sup>7</sup> Local governments are simply extensions of the state, created to deal with issues on the local level, which is exactly what the Dillon Rule stipulates.

Aside from preventing the tyranny of federal government, the Founders also understood that a government closest to the people would best serve the people. Alexander Hamilton explained,

“It is a known fact in human nature, that its affections are commonly weak in proportion to the distance or diffusiveness of the object. Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State are apt to feel a stronger bias towards their local governments than towards the government of the Union.”<sup>8</sup>

Not only would state leaders care more about their state, but they would also possess more knowledge on local issues. In this way, the Founders envisioned that competent and invested leaders would more efficiently run their respective states and jurisdictions.



## Benefits of the Dillon Rule

Although the relationship between state and local governments is a hierarchical one, it is not in the interest of the state to tie the hands of local government. State governments want to bring economic growth and prosperity to the entire state; therefore it is rational for the state to allocate the proper amount of authority to local governments that will enable them to operate most effectively. States that observe the Dillon Rule delegate power to local governments to oversee zoning, planning, parts of taxation and other areas where government closest to the people is most effective. If local governments wish to exercise authority outside what has been delegated, they may approach the state and make their case.

Dillon Rule states do not necessarily deny their local governments authority. Many Dillon Rule states issue broad enabling statutes that offer flexibility to local governments where it is deemed necessary. For example, one such statute in Virginia delegates the authority needed to “secure and promote the general welfare” and promote “safety, health, peace, good order, comfort, convenience, morals, trade, commerce, and industry.”<sup>9</sup> In a study conducted by the United States Advisory Commission on Intergovernmental Relations in 1982, eight of the top ten states with the most local discretionary authority applied the Dillon Rule. Virginia, perhaps the state that applies

the Dillon Rule most strictly, was ranked eighth.<sup>10</sup> Conversely, in a 2008 study done by Wolman, only one of nine states rejecting the Dillon Rule registered in the top ten for greatest “local government autonomy”, while six of the remaining eight found themselves outside the top twenty.<sup>11</sup> As the data show, there is no substantial link between the Dillon Rule and less local authority.

## The Dillon Rule Guards Against Runaway Local Governments

The Dillon Rule grants state government the power to rein in irresponsible or uncooperative local governments. In fact, John Dillon created the rule in a time when local government corruption ran rampant. Industrial titans and political machines like Tammany Hall interfered with local government, furthering its corruption and waste. Grafting, which is the unscrupulous use of a politician’s authority for personal gain, was a common practice in utility franchising and public works projects. To make matters worse, local governments borrowed outrageous sums of money in order to attract big businesses and railroad companies. Unable to pay businesses back, local officials dissolved their cities and left the debt to the state. Lord Bryce of England observed in 1888: “There is no denying that the government of cities is one conspicuous failure of the United States.”<sup>12</sup> Dillon realized that those in local politics easily succumb to using their power for private gain, or for the gain of their city at the expense of those around it. To halt such abuses of power, it was necessary to grant the states authority to prevent local governments from becoming too powerful or corrupt.

The Dillon Rule also guarantees a certain level of uniformity throughout the state. If the state is a body, the local governments are the limbs. Detached from the body, the limbs are useless. In the same way, local governments must remain attached to the state in order to be effective in good governance. Rather than having vastly different policies and codes in each local jurisdiction, the state can create uniform tax codes and licensing policies, making it a business-friendly environment. Without commonality between local governments on these issues, businesses find more red tape than opportunity, making it difficult for the state and businesses to prosper. Lastly, consistency throughout the state prevents local jurisdictions from taking ill-advised risks. In this way, local governments cannot implement policies that lead to the detriment of neighboring local jurisdictions. Consistent uniformity, protected by the Dillon Rule, is a prerequisite for statewide stability and prosperity.



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## The Dillon Rule Upholds Federalism on the Local Level

As previously stated, the Founders were clear in both the Ninth and Tenth Amendments that all authority outside of what was enumerated to the federal government belonged to the states and the people residing in them. The Dillon Rule, which holds that local governments are extensions of the state, is therefore consistent with the Constitution.

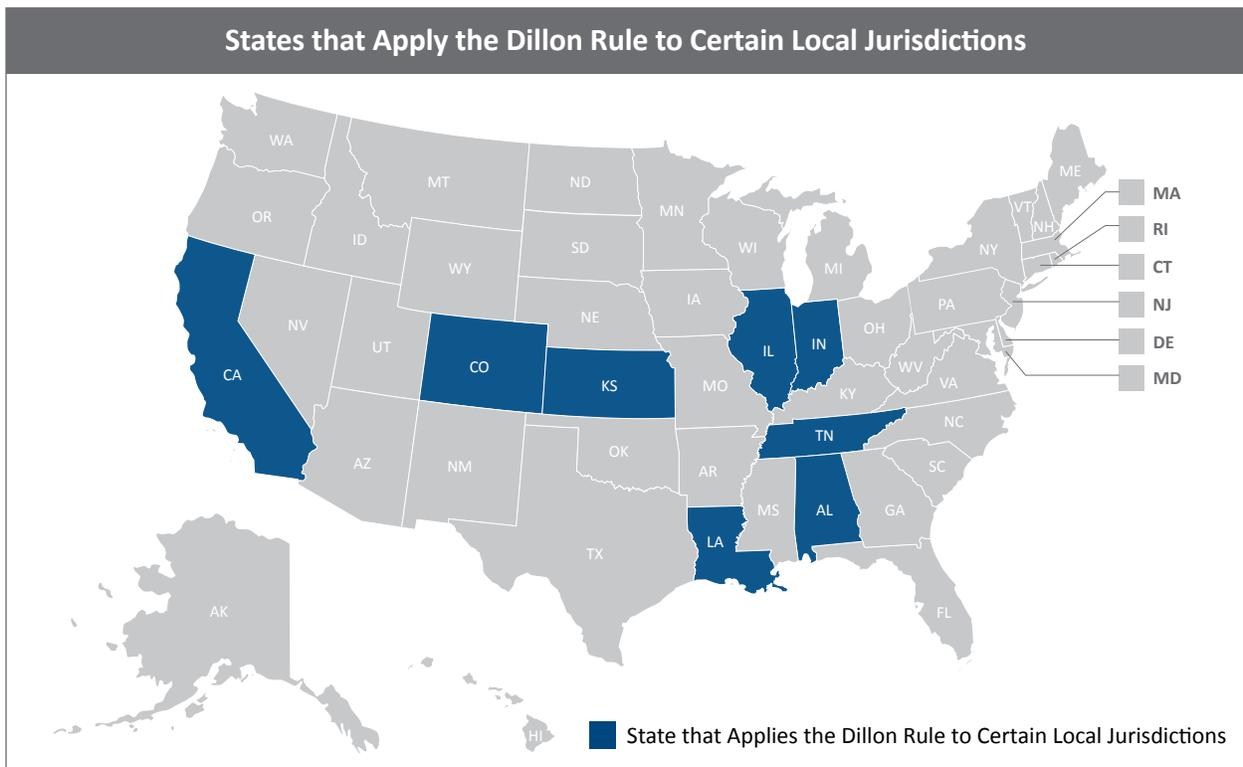
The process that takes place to implement the Dillon Rule is also constitutional. The state and its residents distribute power as they see fit. Generally, this distribution of power is made according to the state constitution. What is paramount is that the people of the state, not the federal government, make the decision.



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### The following eight states apply the Dillon Rule to certain local jurisdictions:

- Alabama – Counties only
- California – Except charter cities
- Colorado – Many cities and towns
- Illinois – Municipalities only
- Indiana – Townships only
- Kansas – Not for cities and counties
- Louisiana – For pre-1974 charter municipalities
- Tennessee – Only non-home rule municipalities



## Home Rule versus the Dillon Rule

Despite its widespread use, the Dillon Rule has critics who argue that federal, state and local governments each have their respective jurisdictions and the responsibilities attached. Rather than view local authority as a tenant of the state, these critics argue that each level of government has a separate realm of authority. Consequently, there are areas where state power should not infringe on that of local government.

This is precisely why certain local government advocates disapprove of state preemption. For example, local governments such as Denton, Texas, and Tempe, Arizona, have attempted to ban hydraulic fracturing and plastic bags, only to have their legislation or potential legislation nullified by the state. When this occurs, local government officials believe the state is abusing its power. They contend that local government can better serve the people, and yet the states continue to use their authority to bar local policy from becoming law.

To negate the Dillon Rule, local governments have pushed for states to pass Home Rule legislation. In 1871, Judge Thomas Cooley challenged the Dillon Rule by holding that local governments possess some inherent rights. Whether through constitutional or legislative changes made by the state, Home Rule charters permit local governments to conservatively pass ordinances as they see fit, provided they abide by the state laws and constitutions.

The first state to pass a Home Rule charter was Missouri in 1875. Shortly after, California, Minnesota and Washington followed suit. During the Progressive Era in the early 1900s, the number of Home Rule charters increased dramatically due to a focus on municipal reform. Presently, 44 states have adopted Home Rule charters in at least some capacity. Under Home Rule, local communities can exercise some authority with local autonomy without state interference. Many states that have Home Rule charters only apply Home Rule to certain municipalities. For example, Home Rule in Arizona only applies to cities with a population of at least 3,500 people. In cities with populations fewer than 3,500, or in any county or township, the Dillon Rule applies.

### States that provide for Home Rule in their state constitution:

*A (1) means the state requires enabling legislation, while a (2) means it is self-executing.*

- Alaska – (1) First class cities and boroughs
- Arizona – (2) Cities of 3,500+
- California – (2) Cities and San Francisco city-county
- Colorado – (2) Any municipality
- Connecticut – (1) Any city, town, or borough
- Hawaii – (2) All city subdivisions
- Illinois – (2) Cities of 25,000+
- Iowa – (1) Any municipality
- Kansas – (2) Any municipality
- Louisiana – (2) Any municipality
- Maine – (2) Any municipality
- Michigan – (1) Any city and village
- Minnesota – (1) Any city and village
- Missouri – (2) Cities of 5,000+
- Montana – (2) Municipalities+
- Nebraska – (2) Cities of 5,000+
- Nevada – (1) Any city or town
- New Mexico – (2) Municipalities
- North Dakota – (2) All cities
- Ohio – (2) Any municipality
- Oklahoma – (2) Cities of 2,000+
- Oregon – (2) Every city and town
- Pennsylvania – (1) Optional forms for all local governments
- South Carolina – (1) Municipalities
- South Dakota – (2) Any municipality
- Tennessee – (2) Any municipality
- Texas – (1) Cities of 5,000+
- Utah – (2) Any incorporated city or town
- Washington – (2) Cities of 10,000+
- West Virginia – (1) Cities of 2,000+
- Wisconsin – (1) Cities and villages
- Wyoming – (2) Municipalities

### States that provide for Home Rule through legislative statute

- Arkansas – Any municipality
- Delaware – Any municipality
- Florida – Any municipality
- Georgia – Any municipality
- Kentucky – Cities only
- New Hampshire – Cities and towns
- New Jersey – Optional charter system for municipalities
- North Carolina – Any municipality





cal control, many Home Rule advocates do so only when their issue falls on the wrong side of a state law.

As an example of inconsistency of those people in favor of local regulations, opponents of hydraulic fracturing, also known as fracking, praise state preemption laws banning the natural gas extraction practice. However, if the state prohibits local fracking bans, the same fracking opponents often demand local control (Home Rule). Similarly, proponents of plastic bag bans would welcome a statewide ban on the product, but decry a state ban on local bans.

In the same way, local officials who are seemingly supportive of Home Rule would not support getting rid of the federal or state minimum wage in exchange for local control of the issue. Clearly, many people do not seek local control across the board, but only support Home Rule in instances where they can increase government regulation in favor of their agenda. Thus, when groups argue in favor of local control on only specific issues, their arguments should be scrutinized for consistency.

Although Home Rule is presented as an alternative to the Dillon Rule, the two are not mutually exclusive. Local governments in Home Rule states still derive their powers from the state. Just as a state passes a Home Rule charter, a state can also revoke it if local government corruption forces its hand. In this way, Home Rule operates similar to the Dillon Rule. Regardless which rule is in place, local government is subject to the state.

Home Rule also has its own set of problems. States with Home Rule are more apt to lack uniformity beneficial to businesses and citizens alike. Unlike Dillon Rule states, Home Rule states present a limited framework of what local governments can or cannot do. To compensate, Home Rule states might pass a slew of laws that prohibit a wide-range of practices at the local level. As a result, local governments in Home Rule states frequently find more restrictions on their authority than those that operate under the Dillon Rule.

Rather than blame the technicalities of the system, local governments should focus on creating an optimal working relationship with the state regardless of which rule is in place.

## Conclusion

The Founders put much thought into creating a system of federalism. When each layer of government operates within its designated powers and limitations, the country runs like a well-oiled machine. With-in federalism, state sovereignty is the highest importance in contrast to the federal or local governments. Whether a local government is governed by Home Rule or the Dillon rule, the ultimate authority rests with the states. Local governments should appreciate the state's role and develop a relationship with it conducive to good local governance across the state. The states depend on local governments to dispense local services distributed through their budgets for public safety and infrastructure, and rightfully so they commend local governments to focus on what they do best. By establishing a healthy relationship, the state will be more likely to entrust local governments with greater authority with which to serve their respective jurisdictions.



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## [End Notes]

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