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The Dream of Greater Municipal Autonomy: Should the Legislature or the Courts Modify Dillon's Rule, a Common Law Restraint on Municipal Power

Louis V. Csoka

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THE DREAM OF GREATER MUNICIPAL AUTONOMY: SHOULD THE LEGISLATURE OR THE COURTS MODIFY DILLON'S RULE, A COMMON LAW RESTRAINT ON MUNICIPAL POWER?

LOUIS V. CSOKA¹

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1. Louis V. Csoka is an associate with the law firm of Gordon & Silver, Ltd., Las Vegas, Nevada, where he is a member of the firm's Gaming and Administrative Law Department. Mr. Csoka has co-authored several articles in a variety of publications, including "*Net Success*": *Interactive Promotions in the Internet Age*, 6 GAMING L. REV. 295 (2002). Recently, Mr. Csoka was also a contributing author for two books on gaming, specifically: *THE INTERNET GAMBLING REPORT VI* (2003) and *CASINO CREDIT AND COLLECTIONS LAW* (2003). Mr. Csoka attended law school at Boston University where he was editor of the law school's *ANNUAL REVIEW OF BANKING LAW*. The author would like to thank Jeffrey A. Silver, Esq. for his guidance; Matthew C. Zirzow, Esq., Kenneth E. Hogan, Esq. and Carol Ingraham for their assistance.

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I. INTRODUCTION

To its critics, Dillon's Rule is a common law rule that places a straightjacket on municipal governments.² Specifically, Dillon's Rule is a rule dictating *strict construction* of municipal powers, by requiring that all local powers must be clearly traceable to some unequivocal and specific delegation from the state.³ For example, given such a strict construction standard under Dillon's Rule, one court reasoned that a city's requirement of hot water in dwellings was "*not necessarily related*" to a broader state legislative mandate for "sanitation" or to "health and welfare" in such dwellings.⁴

In Nevada, during the 2005 Session of the Nevada Legislature, a bill was introduced before the Senate Committee on Government Affairs that would have abolished Dillon's Rule.⁵ That enterprising bill was Senate Bill 427 (S.B. 427).⁶ In about two months, however, S.B. 427 died in that committee *without any hearings* pursuant to Joint Standing Rule No. 14.3.1, which allows further action to be taken on a bill only if it moves "on or before the 68th calendar day of the legislative session."⁷

Notwithstanding its procedural demise, S.B. 427 undoubtedly had some supporters among the ranks of local government officials, who desperately sought to put an end to Dillon's Rule.⁸ Moreover, these Nevadans are not alone, as Dillon's Rule tends to be unpopular with most municipalities across the nation, where local officials have also introduced similar bills attempting to overturn Dillon's Rule.⁹ Indeed, the growing opposition to Dillon's Rule is a national phenomenon.¹⁰ So, as a practical matter, what causes such bills to fail?

2. See, e.g., *Hearing on Assem. B. No. 9 Before the Assemb. Comm. on Gov't Affairs*, 1995 Leg., 68th Sess. (Nev. 1995) [hereinafter *Hearing*] (statement of Betsy Fretwell, pleading with the Nevada Legislature to repeal Dillon's Rule), available at <http://www.leg.state.nv.us/68th/minutes/AGA210.txt>; see also Michael A. Wood, *The Propriety of Local Government Protections of Gays and Lesbians from Discriminatory Employment Practices*, 52 EMORY L.J. 515 (2003).

3. See Richard Briffault, *Our Localism: Part I-The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8 (1990).

4. *Early Estates, Inc. v. Hous. Bd. of Review*, 174 A.2d 117, 119 (R.I. 1961) (emphasis added).

5. See S.B. 427, 73rd Leg. Sess. (Nev. 2005), available at <http://www.leg.state.nv.us/73rd/Reports/HistListBills.cfm?DoctypeID=2> (last visited Feb. 1, 2007).

6. See *id.* In its initial draft, S.B. 427 was designed to abolish Dillon's Rule only with regard to Nevada counties.

7. Nev. Leg. J. Standing Rule No. 14.3.1, available at http://www.leg.state.nv.us/72nd/Sr_Joint.cfm (last visited Feb. 16, 2007).

8. See, e.g., *Hearing*, *supra* note 2; see also Wood, *supra* note 2.

9. See, e.g., VA. ASS'N OF COUNTIES, SUMMER CONFERENCE: BLUEPRINT FOR TOMORROW (2005), available at www.vaco.org/sitefiles/pdfs/front%20page/summerconference-issues%20survey%20report.pdf.

10. See *id.*; see also Wood, *supra* note 2.

There are at least two reasons. First, in abolishing Dillon's Rule, municipal officials are, in fact, implicitly asking their state legislators to forfeit some of their legislative powers and hand over those forfeited powers to local officials.¹¹ Second, municipalities may lack the lobbying apparatus to overcome a natural legislative reluctance to self-imposed limits on state power and authority. As such, any bill seeking to limit Dillon's Rule could lead to difficult debates at best, lack of action or an impasse at worst.

Nevertheless, there have also been successes. In some cases, in attempting to grant greater authority to municipal governments, some state legislatures have abolished or limited the sweep of Dillon's Rule in their jurisdiction.¹² In other cases, courts have come to the conclusion that municipal powers should no longer be "strictly construed," as required by Dillon's Rule.¹³ Instead, these courts have overturned Dillon's Rule and, to empower local officials, have also avowed to "liberally construe" municipal powers in the future under a less restrictive model.¹⁴

In that context, the purpose of this article is to take a critical look at Dillon's Rule and to examine the background and implications of the debate on municipal power. Specifically, this article will examine and analyze the historical background, legal framework, and policy rationale for that policy debate and attempt to provide some recommendations to help address the obstacles and challenges associated with Dillon's Rule.

In particular, Part II of this article will briefly review the evolution of municipal governance from the days of the Roman Empire to early Colonial America. Part III will study the circumstances surrounding the birth of Dillon's Rule in nineteenth century America. Part IV will analyze the inner workings of Dillon's Rule and its most extreme applications. Part V will provide a case study on the municipal landscape in Nevada. Part VI will analyze Nevada case law under Dillon's Rule. Parts VII and VIII will analyze the national arguments for and against Dillon's Rule. Part IX will look at some of the practical effects of Dillon's Rule and its competing model of local governance. Lastly, Part X will attempt to provide a pragmatic synthesis of the

11. See *infra* Part IV.

12. See Michael Monroe Kellog Sebree, Comment, *One Century of Constitutional Home Rule: A Progress Report?*, 64 WASH. L. REV. 155, 156 (1989) (stating that the movement away from Dillon's Rule began in the United States in 1875 with a constitutional provision in the Missouri Constitution to allow home rule).

13. See G. Roth Kehoe II, *City of New Orleans v. Board of Commissioners: The Louisiana Supreme Court Frees New Orleans from the Shackles of Dillon's Rule*, 69 TUL. L. REV. 809 (1995).

14. See *id.*

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various countervailing policy arguments as a basis for updating the current framework in Nevada and elsewhere.

II. HISTORICAL BACKGROUND: FROM THE ROMAN EMPIRE TO COLONIAL AMERICA

The English word municipality comes from the Latin word *municipium*.¹⁵ To the ancient Romans, *municipium* meant a Roman city that could freely govern its own affairs subject only to the authority of Rome.¹⁶ Indeed, the city-state was the earliest form of modern government that was initially organized in places like Mesopotamia, Asia Minor, and around the Mediterranean.¹⁷ Rome itself also started out as a city-state, until through a series of mostly successful wars, it grew into a massive empire.¹⁸

Notwithstanding Roman desires for world domination, *municipia*, especially given the slow methods of transportation and communication of the time, were logical and natural seats of power.¹⁹ They allowed those who best knew local conditions to exercise power and control over local affairs.²⁰ Indeed, this form of government was so successful that it even survived the fall of the Roman Empire.²¹

In the fifth century, once the Western Roman Empire fell, many of her former *municipia* remained successfully functioning semi-autonomous political entities.²² In the early middle ages, some of them became incorporated into "fiefdoms," where typically a local nobleman exercised control over his fiefdom from his manor or stronghold.²³ He knew the local people, and understood the local threats and opportunities.²⁴

Similarly to those Roman emperors who came before him, however, some of these noblemen began to thirst for greater glory and power. Through a series of wars, larger kingdoms arose from smaller fiefdoms

15. See Diane Lang, *Dillon's Rule and the Birth of Home Rule*, THE MUN. REP. (N. M. Mun. League, Sante Fe, N. M.), Dec. 1991, at 1, available at <http://www.nmml.org/Dillon.pdf>.

16. See *id.*

17. See RAFAEL SEALY, A HISTORY OF THE GREEK CITY STATES 700-338 B.C. (Univ. of California Press 1976).

18. See LEON HOMO, ROMAN POLITICAL INSTITUTIONS FROM CITY TO STATE (THE HISTORY OF CIVILIZATION) (KeGan Paul 1929).

19. See Lang, *supra* note 15.

20. See *id.*

21. See, e.g., Padova a Historical Outline and Growth of the City, available at <http://www.cbft.unipd.it/pdtour/history.html> (last visited March 23, 2007). See ROSAMOND MCKITTERICK, THE EARLY MIDDLE AGES: EUROPE 400-1000 (SHORT OXFORD HISTORY OF EUROPE) (Oxford Univ. Press 2001).

22. See *id.*

23. See *id.*

24. See Lang, *supra* note 15.

in France, Spain, and Britain, for example.²⁵ Notwithstanding such consolidation of power, however, smaller political entities such as boroughs or shires, as in England, continued to retain a great deal of local control.²⁶ It was not until nation-states arose in Europe beginning in the eighteenth century, often in the form of disastrous dictatorships, that dictators and national governing bodies either eliminated or significantly reduced the power of local authorities.²⁷

In sharp contrast, in colonial America, English municipal governments continued to serve as a model, as colonial governors granted or chartered various municipal corporations or boroughs.²⁸ These boroughs enjoyed some level of independence from colonial legislatures.

After the Revolutionary War, cities and towns were formed by act of the state legislature. Those that existed before the Revolution continued, for the most part, to operate under their existing charters. New municipalities were created by the state legislature adopting a special or local law establishing a separate charter for each municipality. Even though, in theory, the state legislature retained direct control over municipalities, by custom the actual control was lax, primarily due to the fact that the count[r]y was still largely rural. Prior to 1820, there were no cities with a population of over 50,000. These fledgling cities did not yet engage in large-scale activities that merited extensive concern by the state legislature. In fact, local laws often reflected the lack of municipal services and activity (e.g., there were laws against animals running at large but pigs were often exempted because they ate the garbage in the streets). With relatively few functions performed by cities, not much regulation was necessary by the state.²⁹

Thus, as a practical matter, the autonomy of municipalities was not a contentious issue in Colonial America nor in the early days of the Republic.

III. AMERICA IN THE NINETEENTH CENTURY AND THE BIRTH OF DILLON'S RULE

As the United States experienced an explosive population growth in the nineteenth century, primarily as a result of massive waves of immigration from Europe, the size of American cities also grew by leaps and bounds.³⁰ In particular, the industrial revolution not only made it

25. See Free University Online, <http://www.freeuniv.com/lect/rankin/Unit1A.htm> (last visited Jan. 30, 2007).

26. See Lang, *supra* note 15.

27. See D.G. WILLIAMSON, *THE AGE OF THE DICTATORS: A STUDY OF THE EUROPEAN DICTATORSHIPS, 1918-53* (Longman Pub. Group 2007).

28. See Lang, *supra* note 15.

29. *Id.* at 2.

30. See *THE READER'S COMPANION TO AMERICAN HISTORY 1101-02* (Eric Foner & John A. Garraty eds., 1991).

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possible for large population centers to form, it also created a huge demand for a concentrated workforce to work in the factories.³¹ As a result, the birth of the modern American city was virtually inevitable.³² By the middle of the nineteenth century, New York, Boston, and Philadelphia, for example, all became major population centers.³³

During this time, academics began to debate the best approach to city governance.³⁴ In particular, three academic viewpoints existed on municipal governance: Dillon's Rule, the Cooley Doctrine, and the Fordham Rule.³⁵

Dillon's Rule, as will be discussed in further detail below, mandated a *strict construction* of municipal powers, given that municipalities are deemed creatures of the state.³⁶ The Cooley Doctrine, on the other hand, held that localities are not creatures of the state but have inherent powers.³⁷ Lastly, the Fordham Rule, while mandating a more liberal construction of municipal powers, still held that such powers should be devolved from the state.³⁸

From the early twentieth century, the Cooley Doctrine was discredited.³⁹ The Fordham Rule also faded from name-specific use.⁴⁰ Dillon's Rule, on the other hand (notwithstanding its straightjacket approach to municipal power), gained wide popularity and acceptance throughout the state courts.⁴¹

Specifically, the reason for the wide acceptance of Dillon's Rule is that, during this era, cities and city governments were widely perceived as corrupt.⁴² As one author noted, "The municipal governments were . . . not well organized . . . and . . . public improvements did not function well. This made them easy victims for political machines and local bosses that led to a widespread and fundamental corruption in municipal government. *Cities came to be viewed as the core of all that was wrong with society.*"⁴³

31. *See id.*

32. *See id.*

33. *See id.*

34. *See* Jim Williams & Randolph Horn, *Local Self Government in Alabama*, 33 CUMB. L. REV. 245, 246-249 (2002-2003).

35. *See id.*

36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.*

42. *See* Lang, *supra* note 15.

43. *Id.* (emphasis added).

Against this backdrop, in 1868, Iowa Chief Justice John Forrest Dillon first pronounced his views on municipal governance in *Clinton v. Cedar Rapids*.⁴⁴ Specifically, he opined that:

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 they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, and the corporation could not prevent it . . . [Municipalities] are, so to phrase it, the mere *tenants at will* of the legislature.⁴⁵

Subsequently, Iowa Chief Justice Dillon further explained that, as a result of such political paradigm, municipal corporations should have the authority to

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 accomplishment of the declared objects and purposes of the corporation, — not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.⁴⁶

In short, Dillon's Rule, a judge-made doctrine,⁴⁷ stands for the rule of strict construction of municipal power, a presumption against the existence of independent authority, demanding that, to be valid, an exercise of a local power must clearly be traceable to some unequivocal and specific delegation from the state.⁴⁸

IV. THE EXTREMES OF DILLON'S RULE VERSUS THE AUTONOMY OF HOME RULE

Notwithstanding the emergence of Dillon's Rule as the traditional majority view, since its inception, Dillon's Rule also had a large num-

44. *Clinton v. Cedar Rapids*, 24 Iowa 455 (Iowa 1868).

45. *Id.* at 475. This state court decision was never appealed. *See id.* While the courts have quickly embraced Dillon's Rule, the first court case to speak of "Dillon's Rule," by using an explicit reference to Judge Dillon (i.e., Iowa Chief Justice Dillon), was a Florida Supreme Court case. *See Duval County v. Charleston Lumber & Mfg. Co.*, 33 So. 531, 536 (Fla. 1903) (Carter, J., dissenting); *see Pacific R. Co. v. City of Leavenworth*, 18 F. Cas. 953 (C.C.D. Kan. 1871) (No. 10,649) (discussing the power of the legislature over private and public or municipal corporations).

46. 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448-50 (5th ed. 1911); *see also* *Merriam v. Moody's Ex'r*, 25 Iowa 163, 170 (Iowa 1868).

47. This judge-made state court doctrine originated from those inferences that Iowa Chief Justice Dillon was able to make from the structure of state and local governments. *See Cedar Rapids*, 24 Iowa at 475.

48. *See* Briffault, *supra* note 3.

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ber of critics.⁴⁹ Recognizing such dissatisfaction, legislatures, and in some cases courts, have created a competing model of municipal governance known as “home rule.”⁵⁰ Home rule was an idea that appears, in part, to trace its origins to the Roman *municipium*, the English borough, and the Fordham Rule.⁵¹

To better understand the exacting strictness of Dillon’s Rule, it is helpful to begin with a comparative overview of home rule. Home rule refers to the concept of municipal autonomy or self-government and it has been adopted in some forms in a significant number of states.⁵² Specifically, the state grants such home rule powers to the citizens of a local area to structure, organize, and empower their own local government.⁵³ As explained by one commentator:

[In sharp contrast to Dillon’s Rule,] home rule has its underpinnings in notions of *popular sovereignty*. In other words, the theory is that government power should stem from the individual, and *local government officials are better suited to observe the individual’s judgments about how his interests ought to be served and to give them effect*. It has been said that “the ideal of home rule is defined as the ability of a local government to act and make policy in all areas that have not been designated to be of statewide interest through general law, state constitutional provisions, or initiatives and referenda.”⁵⁴

Home rule powers are generally exercised in four areas: “*structural* (form of local government); *functional* (powers of local government); *fiscal* (revenue sources, tax rates, borrowing, and related local functions); and *personnel* (employment, remuneration, collective bargaining, and related matters).”⁵⁵ Thus, home rule allows local governments to determine their own affairs, without having to rely upon a state statute to authorize the specific exercise of a particular power or action.⁵⁶ Home rule, in effect, reverses Dillon’s Rule because a local unit of government may exercise wide-ranging powers despite a lack of specific statutory authority.⁵⁷

49. See, e.g., Hearing *supra* note 2; see also Wood, *supra* note 2.

50. See Seabee, *supra* note 12, at 156 (stating that the movement away from Dillon’s Rule began in the United States in 1875 with an amendment to the Missouri Constitution to allow home rule); see also Kehoe II, *supra* note 13.

51. See *supra* Parts II and III.

52. See LEGIS. COUNSEL BUREAU, Bulletin No. 03-3, *Incorporation of Towns*, at 11 (Nev. 2003) [hereinafter *Incorporation of Towns*], available at <http://www.leg.state.nv.us/lcb/research/03InterimReports/Bulletin03-03.pdf>.

53. See *id.*

54. Wood, *supra* note 2, at 518 (citing HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 1-2 (Dale Krane et al. eds., 2001)) (emphasis added).

55. See *Incorporation of Towns*, *supra* note 52, at 11. (emphasis added).

56. *Id.*

57. *Id.*

In direct contrast, Dillon's Rule places a straightjacket on municipal governments as it requires that local power must be clearly traceable to some unequivocal and specific delegation from the state.⁵⁸ Courts, applying Dillon's Rule, will thus place the *strictest limits* on the exercise of municipal power, even if such exercise may concern such mundane decisions as matters related to upgraded health and safety codes⁵⁹ or some added benefits to families of municipal personnel.⁶⁰

In particular, *Early Estates, Inc. v. Hous. Bd. of Review* and *Arlington County v. White*, illustrate some of the more extreme applications of Dillon's Rule. In *Early Estates, Inc.*, the Rhode Island Supreme Court, implicitly applying the strict construction of Dillon's Rule, invalidated an ordinance mandating installation of hot water in all kitchens and bathrooms.⁶¹

More specifically, in that case, the Rhode Island Legislature vested the city council with authority to establish certain minimum standards for dwellings.⁶² In particular, the state enabling act provided that cities had the authority to provide "minimum standards governing the conditions, maintenance, use and occupancy of dwellings and dwelling premises deemed necessary to make said dwellings and dwelling premises safe, sanitary and fit for human habitation."⁶³

Notwithstanding such broad grant of authority by the Rhode Island Legislature, the Rhode Island Supreme Court held that the city's requirement for dwellings to connect its kitchen sinks, lavatory basins, and bathing facilities to hot water lines exceeded the city's authority under that enabling act.⁶⁴ Specifically, the court reasoned that, as a matter of strict construction, hot water was "not necessarily related to sanitation or public health and welfare . . . [in such dwellings]."⁶⁵

Similarly, in *Arlington County*, the Virginia Supreme Court, applying the strict construction of Dillon's Rule, also arrived at a decision that demonstrates a great level of discomfort with unbridled municipal action. Specifically, the court invalidated a city's action extending coverage under its self-funded health insurance plan to unmarried domestic partners of employees.⁶⁶ Perhaps more surprisingly, the court reached that decision, despite a fairly-broad authorization by the Vir-

58. See, e.g., Hearing, *supra* note 2; see also Wood, *supra* note 2.

59. See *Estates, Inc. v. Hous. Bd. of Review*, 174 A.2d 117, 119 (R.I. 1961).

60. See *Arlington County v. White*, 528 S.E.2d 706, 712-13 (Va. 2000).

61. See *Early Estates, Inc.*, 174 A.2d at 119.

62. See *id.* at 120.

63. *Id.*

64. See *id.* at 119.

65. *Id.*

66. See *Arlington County v. White*, 528 S.E.2d 706, 712-13 (Va. 2000).

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ginia Legislature for a local government to provide such health benefit programs for municipal employees and their “dependants.”⁶⁷

Specifically, the Virginia Legislature authorized “a local government to provide self-funded health benefit programs for its employees and their dependants.”⁶⁸ Notwithstanding that authorization, the Virginia Supreme Court reasoned that, as a matter of strict construction, an “unmarried domestic partner” was, *in most cases*, merely “financially interdependent” and, as such, should not be covered by the city’s self-funded health insurance plan as a “dependant.”⁶⁹

In short, Dillon’s Rule appears to allow judges to second-guess the policy decisions of local officials. By way of contrast, in a home rule city, courts would be reluctant to second-guess a city’s authority to provide appropriate health and safety codes, such as the requirement of hot water, or grant benefits to the families of municipal employees, regardless of marital status.⁷⁰

V. A TRADITIONAL STATE: THE NEVADA MUNICIPAL LANDSCAPE

According to the authors of *Nevada Politics and Government: Conservatism in an Open Society*, because of the apparently contradictory provisions of Nevada’s constitution and laws, the charter cities in Nevada really could not be described as home rule cities.⁷¹ On the one hand, the Constitution of the State of Nevada grants limited home rule powers to local governments.⁷² Specifically, the Constitution of the State of Nevada provides:

The legislature shall provide for the organization of cities and towns by general laws and shall restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, except for procuring supplies of water, *provided, however*, that the legislature may, by general laws, in the manner and to the extent therein provided, permit and authorize the electors of any city or town to frame, adopt, and amend a charter for its own government, or to amend a charter for its own government, or to amend any existing charter of such city or town.⁷³

67. *See id.*

68. *Id.* at 708.

69. *See id.* at 709.

70. *See* Kehoe II, *supra* note 13.

71. *See* DON W. DRIGGS & LEONARD E. GOODALL, *NEVADA POLITICS AND GOVERNMENT: CONSERVATISM IN AN OPEN SOCIETY* 176 (1996); *see also* LEGIS. COUNSEL BUREAU, Bulletin No. 15, *Home Rule in Nevada*, at 8 (Nev. 1952), <http://www.leg.state.nv.us/lcb/research/1953InterimReports/Bulletin015.pdf> (stating that “new modern, streamlined, general statutes may be necessary in order to provide real home rule”); Hearing, *supra* note 2.

72. NEV. CONST. art. VIII, § 8.

73. *Id.*

Thus, the seeds of home rule power, subject to legislative imprimatur, have been sown. On the other hand, the Nevada Legislature has only enacted very limited home rule powers, and legal authorities have consistently applied Dillon's Rule to all cities and counties in Nevada, as will be discussed further below.⁷⁴

By way of background, Sections 266, 267, and 268 of the Nevada Revised Statutes allow local citizens to establish three distinct forms of municipal city governments.⁷⁵ Each of these sections incorporates some very limited features of home rule governance.⁷⁶

For example, Section 267 permits voters of an incorporated city to change to a commission form of city government without legislative approval.⁷⁷ This is a limited, structural form of home rule power that the legislature granted pursuant to the Nevada Constitution.⁷⁸ Section 268 establishes a procedure for the voters of an incorporated city to amend the city's charter without legislative approval.⁷⁹ This is also a very limited home rule power.⁸⁰ Something more closely resembling real home rule power, however, is only granted in Section 266.⁸¹ Nevertheless, this power is also limited under the statute, constitution, and case law.⁸²

At present, six of Nevada's smaller cities, including Mesquite, operate under Section 266.⁸³ The remaining incorporated cities, including several larger Nevada cities, operate under special charter enacted by the Nevada legislature.⁸⁴ In all cases, however, based on existing case law and Attorney General Opinions, all Nevada cities appear to be operating under and subject to Dillon's Rule.⁸⁵

For Nevada counties, Nevada Revised Statutes Sections 243, 244, 244A, and 245 provide the basic political and legal framework.⁸⁶ Similarly to Nevada cities, Nevada counties also cannot be called home rule jurisdictions.⁸⁷ Instead, counties such as Clark County, the

74. See *infra* Part VI.

75. See NEV. REV. STAT. §§ 266-68 (2006).

76. *Id.*

77. See NEV. REV. STAT. § 267.020 (2006).

78. See *id.*

79. See NEV. REV. STAT. § 268.010 (2006) (describing the petition powers).

80. See *id.*

81. See NEV. REV. STAT. § 266.010 (2006) (subjecting home rule-power to state legislative oversight).

82. See *infra* Part VI.

83. See LEGIS. COUNSEL BUREAU, Bulletin No. 99-18, *Legislative Commission's Study of City Charters*, at 1-3 (Nev. 1999), available at <http://www.leg.state.nv.us/lcb/research/InterimReports/99-18.html>.

84. See *id.*

85. See *infra* Part VI.

86. See NEV. REV. STAT. chs. 243, 244, 244A & 245 (2006).

87. See, Hearing, *supra* note 2.

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county in which the Las Vegas metropolitan area is located, is also subject to Dillon's Rule.⁸⁸

Nevada, however, is by no means atypical. As Dillon's Rule states, Nevada's municipal political paradigm is certainly closely aligned with that of thirty-nine other states.⁸⁹ Nevertheless, as more and more courts and legislatures begin to follow a home rule model for some or all of their municipalities, Nevada, *as a pure Dillon's Rule state*, may become part of a shrinking minority.⁹⁰

VI. NEVADA AND THE AMBIGUITIES OF DILLON'S RULE

As set forth in the footnotes, Nevada legal authorities, often without explicit reference to the name of the rule, have repeatedly applied Dillon's Rule to *all* cities and counties.⁹¹ The leading case in Nevada on municipal power is *Ronnow v. City of Las Vegas*.⁹² In that case, the Nevada Supreme Court explained:

[M]unicipal corporations have no powers but those which are delegated to them by the charter or law creating them . . . [P]owers expressly given and the necessary means of employing those powers constitute the limits of their authority. It is conceded that beyond this they have no existence, and can do no act which the law can recognize as valid and obligatory upon them [Because] a municipal corporation . . . is but the creature of the legislature, and derives all its powers, rights and franchises from legislative enactment or statutory implication . . . , the only power a municipal corporation possesses and can exercise are: (1) [t]hose granted in express terms; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the declared objects and purposes of the municipality, not merely convenient, but indispensable Any fair, reasonable, substantial doubt concerning the existence of power is resolved

88. See *infra* Part VI.

89. See Jesse J. Richardson, Jr., Meghan Zimmerman Gough & Robert Puentes, *Is Home Rule the Answer? Clarifying the Influence of Dillon's Rule on Growth Management* (2003), <http://www.brookings.edu/es/urban/publications/dillonsrule.pdf>.

90. See *Kehoe II*, *supra* note 13.

91. See, e.g., Nev. Op. Att'y Gen. 2000-10 (March 8, 2000) (opining that a county "can exercise only those powers that are expressly granted to it by law, or by such implication as are reasonably necessary to carry out the express powers"); see also Nev. Op. Att'y Gen. 2001-26 (Sept. 25, 2001) (opining that all state and local officials are limited to the exercise of powers which are expressly delegated by the Legislature or which are necessarily implied in order to permit the exercise of expressly delegated authority); Nev. Op. Att'y Gen. 2001-02 (Feb. 1, 2001) (applying Dillon's rule to Mesquite, a Section 266 city); Nev. Op. Att'y Gen. 99-31 (Sept. 8, 1999) (applying Dillon's Rule to Mesquite); Nev. Op. Att'y Gen. 99-24 (July 20, 1999) (holding similarly with respect to Lander County); Nev. Op. Att'y Gen. 92-1 (Feb. 3, 1992); see generally *State ex rel. Joseph Rosenstock v. S.T. Swift*, 11 Nev. 128 (1876) (stating that a "municipal corporation . . . is but the creature of the legislature, and derives all its powers, rights and franchises from legislative enactment or statutory implication"); *City of Reno v. Sam Saibini*, 83 Nev. 315 (1967) (holding similarly).

92. *Ronnow v. City of Las Vegas*, 65 P.2d 133 (Nev. 1937).

by the courts against the corporation, and the power is denied Thus, [n]either the . . . [municipal] corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void.⁹³

In some cases, however, Nevada's application of Dillon's Rule has been more flexible or amorphous than the foregoing discussion would suggest. For example, in a gaming matter, a Nevada Supreme Court found that broader powers existed in the municipality by implication, notwithstanding the strict requirements of Dillon's Rule.⁹⁴ As the *Ronnow* court also hinted:

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 a charter is a matter of reasonable construction.⁹⁵

Therefore, powers "reasonably inferable" from the powers expressly granted would likely be permissible to be exercised by the municipal government.⁹⁶ Stated differently, while the Nevada Supreme

93. *Id.* at 136 (quoting *Rosenstock v. Swift*, 11 Nev. 128, 140 (1876); citing 1 EUGENE MCQUILLIN, *MUNICIPAL CORPORATIONS* §§ 367, 365 (2nd ed. 1928) and 1 JOHN FORREST DILLON, *THE LAW OF MUNICIPAL CORPORATIONS* § 237 (5th ed. 1911)).

94. *See, e.g., Nevada v. Bd. of Comm'rs of Las Vegas*, 1 P.2d 570, 572 (Nev. 1931) (stating that "[t]he power to restrict the number of [gaming] licenses in the city is . . . a very necessary implication from the power to license and regulate gambling").

95. *Ronnow*, 65 P.2d at 136. (emphasis added). With respect to the general state of municipal law, the leading treatise stated the following on implied powers:

In addition to powers conferred on municipal corporations by express enumeration in the constitution, statutes or charter, it is beyond dispute that municipal corporations possess certain implied . . . powers Such implied powers include, and are generally held to be limited to the following: 1. Powers necessarily arising from those expressly granted, and also those reasonably inferred from the powers expressly granted. 2. Powers essential to give effect to the powers expressly granted [For example, the] municipal corporation may adopt or employ devices, agencies, instrumentalities, or other means for the purpose of carrying out powers expressly conferred on it, although the particular means adopted is not expressly authorized. The corporation cannot, however, under this rule enlarge or extend the powers expressly granted. 3. Powers recognized as indispensable to local civil government to enable the municipality to fulfill the objects and purposes for which it was organized and brought into existence [Such] power must be indispensable as distinguished from merely useful or convenient [Furthermore, the] necessary implication of the municipal power must be so clear and strong as to render highly improbable that the legislature could have entertained an intention contrary to that implication [Lastly,] there can be no implied powers independent of express powers, or in conflict with express powers.

2A EUGENE MCQUILLIN, *MUNICIPAL CORPORATIONS* § 10.13 (3rd ed. 1996).

96. In Nevada, legal authorities have implied certain powers to municipal corporations. For example, in one case the Nevada Supreme Court held that "[t]he power to restrict the number of [gaming] licenses in the city is . . . a very necessary implication from the power to license and regulate gambling." *Bd. of Comm'rs of Las Vegas*, 1 P.2d at 572; *see also* Nev. Op. Att'y Gen. 2001-02 (Feb. 1, 2001) (opining that, under the general principles discussed above, the City of Mesquite may form a non-profit corporation to facilitate the development of a proposed power

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Court has paid homage to the central tenants of Dillon's Rule, it appears to have created a "sensible construction" or "reasonable construction" standard for municipalities at least in the *Ronnow* case.⁹⁷ Subsequently, the application of Dillon's Rule also appeared to be somewhat context specific, as the above-referenced gaming decision illustrates.⁹⁸ Nevertheless, Dillon's Rule still allows a judge to second-guess a municipality's policy choices and actions, using his or her "sensibilities" to determine what may "reasonably" be implied under a given set of circumstances.⁹⁹

Additionally, in Nevada, as elsewhere, it is not completely clear what precise value custom may have for interpreting implied powers or to what extent judges may take into consideration the changing reality of the twenty-first century city. With regard to the value of municipal customs in interpreting implied powers, one leading treatise stated as follows:

Ordinarily, custom or usage cannot of itself confer power on a municipal corporation. For instance, unlawful expenditures of money cannot be rendered valid by long-continued usage *However, general and long-continued usage may be resorted to in aid of a proper construction of the charter or statute, if the uniform practice has continued for a considerable period of time* [Specifically,] [p]ractical construction of a doubtful charter provision will be followed where such construction by the municipality has been acquiesced in generally and acted on by third persons in good faith, so as to preclude the municipality from denying such construction. This rule is limited to the irregular exercise of corporate power, and *cannot be extended to an enlargement of municipal powers* so as to include authority that the city did not legally possess.¹⁰⁰

generating plant authorized by state law, even without expressing any reliance on a home-rule power).

97. See *Ronnow*, 65 P.2d at 136.

98. See *Board of Comm'rs of Las Vegas*, 1 P.2d at 572 (stating that "[t]he power to restrict the number of [gaming] licenses in the city is . . . a very necessary implication from the power to license and regulate gambling").

99. See, McQUILLIN, *supra* note 95, at § 10.13.

100. *Id.* at § 10.17 (emphasis added). In a somewhat different context, a Nevada court has opined as follows:

Where property rights have been built up in reliance upon an erroneous construction of a statute by public officers, or where overturning such a construction would unsettle many important laws, . . . [such] considerations sometimes press quite heavily upon the courts, especially if the true construction was really doubtful. But where such is not the case, and where the statute is clear . . . [such construction must not continue] . . . no matter how long . . . [it has been in existence].

Nevada v. La Grave, 42 P. 797, 797 (Nev. 1895).

Finally, in the twentieth century, government has undergone a revolutionary change at the federal, state and local levels.¹⁰¹ While courts, in general, continue to rely on nineteenth century ideals to interpret government powers, the scope and power of government at all levels have grown exponentially.¹⁰²

For example, cities in Nevada are providing services today that were inconceivable a few generations ago.¹⁰³ As early as 1952, a government publication recognized that “[i]n Nevada, it appears that cities and counties have gradually expanded their functions in varying degrees, but roughly in accordance with the national trend. As an example, the City of Reno carried on nineteen activities in 1909; by 1950 this number had grown to sixty-six activities, an increase of more than 247 percent.”¹⁰⁴

It remains to be seen whether courts will be willing to acknowledge that reality by adjusting those doctrines that are used to interpret local government powers. In a 1980 study, Nevada ranked near the bottom of all fifty states in municipal discretionary authority.¹⁰⁵ Thus, an argument can be made Nevada has outgrown Dillon’s Rule or, at least, that it has outgrown its most conservative formulation.¹⁰⁶ At the same time, notwithstanding a leaning toward strict construction in at least some areas, as the foregoing discussion demonstrates, uncertainties remain. Unfortunately, there are no recent Nevada court decisions that exhaustively address this issue, and, therefore, a somewhat amorphous version¹⁰⁷ of the majority strict Dillon’s Rule remains the

101. LEGIS. COUNSEL BUREAU, Bulletin No. 15, *Home Rule in Nevada*, at 1 (Nev. 1952), <http://www.leg.state.nv.us/lcb/research/1953InterimReports/Bulletin015.pdf> (noting the explosion of growth in government services at the local level).

102. *See id.*

103. *See id.*

104. *See id.*

105. Richardson, *supra* note 89, at 27.

106. *See infra* Part VII.

107. *See, e.g., Nevada v. Bd. of Comm’rs of Las Vegas*, 1 P.2d 570, 572 (Nev. 1931) (allowing greater discretion in gaming matters). Moreover, the Nevada Legislature has granted broader powers to certain municipalities in some areas, in a direct attempt to counter the negative effects of Dillon’s Rule. For example, it was not always clear that a municipality can use its licensing provisions to raise revenue. In particular, municipalities did not previously have the power to impose a tax on real estate developers in the guise of licensing fees. *See, e.g., Nev. Op. Att’y Gen. No. 85-26* (1985) (opining that, if a town collects licensing fees “for purposes other than the recoupment of regulatory expenses, the charge imposed may actually be a tax, which would be outside the town’s authority;” emphasis added); *see also Clark County v. City of Los Angeles*, 265 P.2d 216 (Nev. 1954) (holding that county did not have the power to collect excessive license fees for revenue purposes). More recently, however, the Nevada Legislature appears to have expanded the revenue collection powers of Nevada counties. *See NEV. REV. STAT. § 244.335* (2006) (setting forth that “Except as otherwise provided in . . . [sections not relevant to the Developer Tax, Nevada counties shall have the power to] fix, impose and collect a license tax for revenue or for regulation, or for both revenue and regulation, on . . . trades, callings, industries, occupations, professions and business”) (emphasis added).

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law of Nevada.¹⁰⁸

VII. POLICY ARGUMENTS AGAINST DILLON'S RULE

Commentators have fashioned a long list of arguments against Dillon's Rule and in favor of home rule, i.e., greater municipal autonomy. These arguments can be briefly summarized into six groups.

First, Dillon's Rule creates uncertainty.¹⁰⁹ In particular, every time local officials adopt a new ordinance, they have to speculate whether courts will strike them down as an infringement of Dillon's Rule.¹¹⁰ Thus, a removal of Dillon's Rule would mean reduced judicial interference in local policymaking and administration.¹¹¹

Second, Dillon's Rule could prevent municipal officials from quickly reacting to unique local problems with specifically tailored local solutions.¹¹² Thus, Dillon's Rule may stifle local responsiveness, experimentation, and innovation.¹¹³

Third, on a closely-related note, state legislatures are often not fully informed on unique local conditions.¹¹⁴ Thus, a state legislature's "one size fits all solution" may be inappropriate for a specific locality.¹¹⁵ In sharp contrast, home rule allows local citizens to address their own problems in their own unique way.¹¹⁶ For example, with a removal of Dillon's Rule and adoption of home rule, the local electorate could more freely decide what shape their local government should take and its necessary administrative arms and powers.¹¹⁷ Thus, in a home rule state, state officials would be less likely to dictate an artificial structure of local governance.¹¹⁸

Fourth, also on a related note, Dillon's Rule may prevent municipalities from providing higher quality services than permitted by the state legislature.¹¹⁹ As such, Dillon's Rule forces uniform mediocrity.¹²⁰

Fifth, when state legislatures impose unfunded mandates on municipalities, given Dillon's Rule, municipalities may be unable to find a

108. See, e.g., Hearing, *supra* note 2.

109. See Richardson, *supra* note 89, at 14-15.

110. See *id.*

111. See *id.*

112. See *id.*

113. See *id.*

114. See *id.*

115. See *id.*

116. See *id.*

117. See *id.*

118. See *id.*

119. See *id.*

120. See *id.*

revenue source to fund those mandates.¹²¹ In sharp contrast, home rule allows greater control of finances at the local level, thereby placing greater responsibility on local elected officials whose spending mistakes may be more detectable by the local electorate.¹²²

Lastly, Dillon's Rule may also be a source of government waste.¹²³ For example, "local bills [could] constitute as much as 20 to 25 percent of the legislature's workload."¹²⁴ Thus, instead of spending more time on statewide issues, the legislative focus may be squandered on smaller issues, when such local issues would more efficiently and appropriately be addressed at the local level.¹²⁵ At the same time, every time there is a new issue that must be addressed, Dillon's Rule forces municipalities to hire lobbyists to beseech their state legislators for added local powers to address those issues.¹²⁶

VIII. POLICY ARGUMENTS FOR MAINTAINING DILLON'S RULE

Dillon's Rule also has a number of persuasive supporting arguments. These arguments can also be grouped into six categories.

First, Dillon's Rule may lead to greater uniformity.¹²⁷ Specifically, by having state legislatures, instead of local authorities, control the larger framework, localities are more likely to enact uniform, or near uniform, laws.¹²⁸ Such uniformity ensures economic growth by allowing corporations to spread their sphere of influence more readily throughout the state, without having to fear inconsistent legal obligations.¹²⁹ The uniformity afforded by Dillon's Rule also helps to ensure that the provision and delivery of public services remains consistent throughout the state.¹³⁰

Second, state agencies often have greater budgets and technical expertise than local agencies.¹³¹ If local units make their own policy, they might be deprived of greater expertise and resources available at the state level and could also lose the cost savings associated with a statewide agency.¹³²

121. *See id.*

122. *See id.*

123. *See id.*

124. *See id.*

125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.*

132. *See id.*

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Third, Dillon's Rule leaves most of the financial decision making powers at the state level.¹³³ Home rule, on the other hand, allows municipalities to undercut the revenue base of state governments.¹³⁴ If each municipality is responsible for using its own finances to solve its own problems, disparate income distribution patterns may also leave some poorer municipalities unable to address some of their problems.¹³⁵

Fourth, state oversight, through the judicial application of Dillon's Rule, may prevent exclusionary and provincial actions by local governments.¹³⁶ For example, home rule may allow local officials to act in an arbitrary and capricious fashion.¹³⁷ Stated differently, as local officials, with their increased powers, may favor political friends and disfavor political enemies, violations of due process and equal treatment under the law may increase.¹³⁸

Fifth, dissatisfied citizens of a municipality may increasingly appeal to the state legislature to address their problems.¹³⁹ This may force state legislatures to ultimately spend just as much time on local affairs under the home rule model as under the Dillon's Rule model.¹⁴⁰

Lastly, if one were to do away with the "strict construction" standard of Dillon's rule and replace it with a "liberal construction" standard, such standard could still afford the opportunity for legal challenges and the concomitant uncertainty that comes with such challenges.¹⁴¹

IX. EXAMPLES OF THE MODELS AT WORK

Before briefly examining the persuasive merits of the academic arguments cited above, it is important to make three basic observations about the realities of municipal governance. First, reality is often more complex than the academic arguments for or against Dillon's Rule are willing to acknowledge.¹⁴² Second, the quality of leadership probably may have a much greater practical effect on effective municipal governance than any of the legal frameworks discussed above.¹⁴³ Lastly, if the past is any indication of future results, greater government pow-

133. *See id.*

134. *See id.*

135. *See id.*

136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.*

140. *See id.*

141. *See id.*

142. *See* Richardson, *supra* note 89, at 34.

143. *See* John Leo, *Ray Nagin, the error-prone mayor*, USNEWS.COM, Sept 21, 2005, <http://www.usnews.com/usnews/opinion/articles/050921/21leo.htm>.

ers and services almost invariably have resulted in greater taxation on the citizenry.¹⁴⁴

With regard to the first observation, a scholarly article reached the following conclusion about municipal management and the role of Dillon's Rule and home rule in managing urban growth, one of the most critical issues that municipalities face today:

[A] careful review of the evidence suggests that attributions of growth management failure to Dillon's Rule (or a lack of home rule) reflect an overly simplistic understanding of Dillon's Rule, home rule, and growth management. Such a view relies on the faulty assumption that more local government autonomy leads to more effective growth management. Both theory and practice suggest the opposite. Ultimately, each state legislature bears responsibility for the allocation of authority between state and local governments—and in large part determines land use outcomes. More importantly, effective growth management requires adherence to a set of broad principles designed to accommodate growth rather than limit or ration it—as is often the case in the name of growth management on the local level. *Dillon's Rule neither prohibits nor hinders adherence to each of these growth management principles. Dillon's Rule, in a word, probably has almost no affect on growth management activity.*¹⁴⁵

With regard to the second observation, the recent tragic events in New Orleans also appear to provide some evidence that the quality of leadership probably has a much greater practical effect on effective municipal governance than Dillon's Rule or home rule.¹⁴⁶ As one article noted about the events in New Orleans, a home rule city:¹⁴⁷

New Orleans Mayor Ray Nagin made every conceivable mistake during the crisis. With plenty of warning, he delayed the evacuation order, had no drivers ready to operate the school buses that stood idle, failed to stock the Superdome with food and water, and let the looters rampage without any interference from police. The excuse given for the failure to get buses moving was that the mayor . . . [was not] able to round up enough drivers. One report said most drivers were women and afraid to make the trip. But a competent mayor would have ordered the drivers to report and provided an armed on-board protector for each bus.¹⁴⁸

With regard to the final observation that greater government powers almost invariably have resulted in *greater taxation* on the citizenry, there is ample evidence to support that view. As one publication

144. George Nastas and Stephen Moore, *A Consumer Guide to Taxes: How Much Do You Really Pay in Taxes?*, Cato Institute Briefing Paper (April 15, 1992), available at <http://www.cato.org/pubs/briefs/bp-015.html>.

145. Richardson, *supra* note 89, at 34 (emphasis added).

146. See Leo, *supra* note 143.

147. See Kehoe II, *supra* note 13.

148. Leo, *supra* note 143.

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noted: "In 1960 middle-income Americans paid less than 30 percent of their earnings in local, state, and federal taxes; today that figure is up to 40 percent. Furthermore, many middle- and upper-income families living in the states that have the highest taxes, such as New York and California, pay nearly half their incomes in taxes."¹⁴⁹

X. A SUGGESTED SYNTHESIS

As the foregoing discussion illustrates, despite strong academic arguments against Dillon's Rule, strong justifications can also be found for its continued existence.¹⁵⁰ Moreover, the theoretical proposition that all municipal powers are derived from the state also appears to have wide support and acceptance.¹⁵¹ In sharp contrast, as noted above, about a dozen states have utilized home rule models, models that have eviscerated the principle that all local powers must be clearly traceable to the state and permitted "liberal construction" of municipal powers in most areas of local governance.¹⁵²

Similarly to these "all-or-nothing" practical approaches, most of the existing scholarship on the Dillon's Rule debate also takes a one-sided view. On the one hand, a large number of authors and commentators take the view that Dillon's Rule is tragically misguided and must immediately come to an end.¹⁵³ On the other hand, there are also several authors that have vehemently argued for the continued use of Dillon's Rule or have argued that Dillon's Rule, in the final analysis, makes no difference.¹⁵⁴

In light of the revolutionary changes to the reality of the twenty-first century city and that cities are no longer the nests of extreme corruption as they once may have been during Chief Justice Dillon's time, *some changes are warranted*.¹⁵⁵ Unlike most opponents of Dillon's Rule, however, this article will merely argue that only modest changes are necessary and that all powers should still be devolved from the state. As will be discussed below, the all-or-nothing ap-

149. George Nastas and Stephen Moore, *A Consumer Guide to Taxes: How Much Do You Really Pay in Taxes?*, Cato Institute Briefing Paper (April 15, 1992) available at <http://www.cato.org/pubs/briefs/bp-015.html>; see also David Keating, *A Taxing Trend: The Rise in Complexity, Forms, and Paperwork Burdens*, National Taxpayers Union Policy Paper (Apr. 17, 2006) available at http://www.ntu.org/main/press_papers.php?PressID=829&org_name=NTU (lamenting that the increase in the tax law's complexity alone had added roughly 1 billion hours in annual paperwork burdens over the last 10 years).

150. See *supra* Parts VII, VIII, and IX.

151. See, e.g., *Clinton v. Cedar Rapids*, 24 Iowa 455, 475 (Iowa 1868) (emphasis in original); see also Richardson, *supra* note 89.

152. See Richardson, *supra* note 89.

153. See, e.g., Hearing, *supra* note 2; see also Wood, *supra* note 2.

154. See, e.g., Richardson, *supra* note 89.

155. See *supra* Part VI.

proaches could each present their own potential set of problems in certain areas of municipal action.

Specifically, this article argues that the across-the-board “strict construction” Dillon’s Rule standard should only be modified so that (A) municipal structural and personnel powers should be construed under a “liberal construction” standard; (B) municipal functional powers should be construed under a “reasonable construction” standard that also strongly considers custom; (C) only municipal fiscal powers should be construed under a “strict construction” standard; and (D) state legislatures should also consider granting broader emergency powers to municipalities, as such may be required for municipalities as first responders to any crisis.

As a note of reference, by “strict construction,” it is meant that a power must either be “expressly stated or *necessarily and strictly* related” to those powers expressly stated. By “reasonable construction,” it is meant that a power must be “expressly stated or *reasonably* related” to those powers expressly stated and its reasonableness would also be evaluated based on the customary nature of such power. And, by “liberal construction,” it is meant that a power must be “expressly stated or *fairly and possibly* related” to those powers expressly stated.

A. Structural and Personnel Powers –Liberal Construction Recommended

As noted above, “structural powers” are those powers that allow municipal corporations to decide on the best form of local government.¹⁵⁶ For example, pursuant to a municipality’s structural powers, the local electorate may decide that they would prefer a commission form of government.¹⁵⁷ “Personnel powers” are those powers that allow municipal corporations to make decisions regarding employment of, remuneration for, and collective bargaining with city employees.¹⁵⁸

As a matter of policy, a *liberal construction* of structural and personnel powers is the best approach for the reasons discussed below. First, the local electorate should have significant freedom in deciding on the specific structure of their local government that best responds to their needs. Such freedom is consistent with, as well as dictated by, the principles of a more democratic government.¹⁵⁹ Second, liberal con-

156. See *Incorporation of Towns*, *supra* note 52, at 5.

157. See *id.*

158. See *id.*

159. Wood, *supra* note 2, at 518 (citing HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 1-2 (Dale Krane et al. eds., 2001)) (emphasis added). Proponents of this principle often also argue that the disconnect between decision makers and the electorate should be reduced by

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struction of structural and personnel powers would also significantly lower, albeit not completely eliminate, the risk (and, thus, the frequency) of a legal challenge of such powers in court, as potential litigants would be less likely to believe that they could prevail against the municipality in these areas.¹⁶⁰

At the same time, and perhaps most significantly, municipal corporations must compete with private corporations in two important ways.¹⁶¹ First, they compete for the same pool of qualified employees.¹⁶² Second, in an ideal world, they should also perform nearly as efficiently as the private sector.

Unlike private corporations, however, municipal corporations do not currently enjoy the same sweeping freedoms in amending their "charters and bylaws" or making employment decisions.¹⁶³ In particular, as the *Arlington County* case illustrates, unlike a private corporation, a municipal corporation, in some cases, will be second-guessed by a court regarding its ability to offer a competitive benefit package to all prospective employees.¹⁶⁴

Thus, when it comes to structural and personnel powers, the strict construction standard of *Dillon's Rule* actually undermines a municipal government's ability to function more responsively, more efficiently, and more competitively.¹⁶⁵

In response to some of those arguments that proponents of Dillon's Rule typically raise, it should also be noted that, with regard to structural and personnel powers, such pro-Dillon's Rule policy arguments are not very persuasive.¹⁶⁶ For example, with regard to structural and personnel powers, neither state expertise nor state-wide uniformity is a concern.¹⁶⁷ Instead, for the reasons already noted above, location-specific structural and personnel solutions based on local needs is the more desirable outcome, as local officials are in a better position to

transferring decision making authority to governmental bodies that are closest to the electorate. See *id.*

160. See Richardson, *supra* note 89, at 14-15.

161. See generally Wash. Op. Att'y Gen. No. 093 (July 15, 1953) (explaining that, in contracting for a certain highly specialized labor, strict construction does not make sense, as we are not dealing with a very general grant of powers to a municipal corporation "created to govern in any such sense as in the case of a county or a city, but [one that is created] to engage in purely proprietary undertakings in direct competition with private corporations or individuals engaged in the same business").

162. See *id.*

163. See *supra* Part IV.

164. See *See Arlington County v. White*, 528 S.E.2d 706, 712-13 (Va. 2000).

165. See Richardson, *supra* note 89, at 14-15.

166. See *id.*

167. See *id.*

understand and respond to the local administrative and employment environment.¹⁶⁸

As a legal matter, the legal framework in Nevada is already in place that either the Nevada Supreme Court or the Nevada Legislature could change course and permit a “liberal construction” of structural and personnel powers of municipal corporations. First, the Nevada Constitution does not prohibit such construction.¹⁶⁹ Second, as noted above, Nevada Revised Statutes Sections 266, 267, 268 all contain structural powers that already appear to exceed the strictest limits of Dillon’s Rule.¹⁷⁰ Lastly, Dillon’s Rule, as any other judicial common law creation, may also be subject to modification with the changing times.¹⁷¹

B. Functional Powers –Reasonable Construction Recommended

As noted above, “functional powers” are the general powers of local government.¹⁷² In contrast to structural and personnel powers that are exercised *internally* by the municipal entity, functional powers are exercised *externally* to that entity.¹⁷³ Specifically, functional powers may include such public works projects as contracting with the lowest bidder for the building of a sewer system in a new subdivision or such community safety functions as maintaining a police department.¹⁷⁴ In addition to such core functional powers, a municipality may, for example, also maintain a park or a library.¹⁷⁵

Nevada courts, most likely unintentionally, have already begun to modify the strictest formulation of Dillon’s Rule by adopting a more pragmatic approach.¹⁷⁶ Specifically, the classical, *strictest formulation* of Dillon’s Rule required that municipal corporations 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 accomplishment of the declared objects and purposes of the corporation, -not simply convenient, but indispensable.

168. *See id.*

169. NEV. CONST. art. VIII, § 8.

170. *See supra* Part V.

171. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897) (stating that “It is revolting to have no better reason for a [construction] of law than that [it was so] laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and [that construction] simply persists from blind imitation of the past”).

172. *See Incorporation of Towns, supra* note 52, at 5.

173. *See id.*

174. *See* Lower Paxton Township Supervisors, <http://www.lowerpaxton-pa.gov/government/supervisors/supervisors.htm> (last visited Feb. 3, 2007).

175. *See id.*

176. *See supra* Part VI.

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*Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.*¹⁷⁷

Under this strict formulation, as noted above, the Rhode Island Supreme Court went on to hold that the city's requirement for dwellings to connect its kitchen sinks, lavatory basins, and bathing facilities to hot water lines exceeded the city's authority under that state's enabling act.¹⁷⁸ Notwithstanding a vigorous dissent, the court reasoned that, *as a matter of strict construction*, hot water was "not necessarily related to sanitation or public health and welfare . . . [in such dwellings]." ¹⁷⁹

In sharp contrast, Nevada courts, while still vowing to follow Dillon's Rule, have adopted a more moderate and sensible approach to applying that rule, by explaining that they would use a "sensible" or "reasonable" approach to construing implied municipal powers.¹⁸⁰ This trend can be demonstrated in three distinct areas: (1) the language of some court opinions; (2) practical applications; and (3) certain interpretations provided by other state officials.

First, as noted above, the Nevada Supreme Court pronounced its view on Dillon's Rule as follows: "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 a charter *is a matter of reasonable construction*" ¹⁸¹

Second, unlike the inflexibility shown by the Rhode Island Supreme Court, the Nevada Supreme Court reasoned that: "[t]he power to restrict the number of . . . [gaming] licenses in the city is . . . a very necessary implication from the power to license and regulate gambling."¹⁸² It is unlikely that the Rhode Island Supreme Court would have reached the same generous conclusion.¹⁸³ For example, that Court may have found that the municipality merely had the power to grant or deny licensing applications, but not to engage in economic legislation by creating a less-competitive environment by limiting the number of licensees in that locality.

Lastly, other official interpretations similarly demonstrate a more moderate, *laissez-faire* approach to construing municipal powers. For example, as one Nevada Attorney General Opinion reasoned: a mu-

177. DILLON, *supra* note 46, at 449-50; *see also* Merriam v. Moody's Ex'rs., 25 Iowa 163, 170 (Iowa 1868).

178. Early Estates, Inc. v. Hous. Bd. of Review, 174 A.2d 117, 119 (R.I. 1961).

179. *See id.*

180. *See supra* Part VI.

181. *Ronnow*, 65 P.2d at 133 (emphasis added).

182. *Bd. of Comm'rs of City of Las Vegas*, 1 P.2d at 572.

183. *Cf. Early Estates, Inc.*, 174 A.2d at 119.

municipality “[can also exercise those powers that] by . . . implication . . . are *reasonably necessary* to carry out the express powers”¹⁸⁴

Building on such subtle signs of moderation in Nevada precedent (which also exist in other jurisdictions),¹⁸⁵ this article will argue further below that, with regard to functional powers, courts and legislatures should further depart from a “strict construction” standard of Dillon’s Rule to a “reasonable construction” standard. At the same time, this article will argue that, with regard to functional powers, a “liberal construction” standard of home rule is also not warranted, as it may prove to be an excessive grant of authority with regard to powers that are exercised *externally* to the municipal entity.

First, “strict construction” is not warranted as it will likely lead to absurd results, such as the decision pronounced by the Rhode Island Supreme Court.¹⁸⁶ In particular, the extreme limits established by the *Early Estates, Inc.* case seem inappropriate for any twenty-first century city. Given the vast number of functional roles assumed by municipal entities, they cannot afford to have all of their community-related decisions strictly scrutinized in the courts.¹⁸⁷

Most importantly, with regard to its functional powers, municipalities can be analogized to administrative agencies.¹⁸⁸ For example, in those instances where a legislature perceives a new general problem and grants certain powers to its municipal governments to more specifically address that problem, then the individualized and localized functional solutions that are implemented by the municipalities are in fact administrative solutions. Specifically, in acting upon those general functional powers that the legislature bestowed upon it, the municipality is acting as a political body analogous administrative agency and should be entitled to similar deference.¹⁸⁹

At the same time, a “liberal construction” of functional powers is also not warranted for two reasons. First, functional powers, unlike structural and personnel powers, are exercised externally to the municipal entity and, as a result, could have greater impact on the com-

184. Op. Nev. Att’y Gen. No. 2000-10 (May 1, 2000) (emphasis added).

185. See *supra* Part IV; see also Richardson, *supra* note 89.

186. Cf. *Early Estates, Inc.*, 174 A.2d at 119.

187. LEGIS. COUNSEL BUREAU, Bulletin. No. 15, *Home Rule in Nevada* at 1 (Dec. 1952) <http://www.leg.state.nv.us/lcb/research/1953InterimReports/Bulletin015.pdf> (noting the explosion of growth in government services at the local level); see also Richardson, *supra* note 89, at 14-15.

188. See Guide to Government Home page, <http://www.guidetogov.org/ca/state/overview/municipal.html> (last visited March 28, 2007).

189. See *generally* *Chevron, U.S.A., Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837 (1984) (setting forth the classical formulation of broad administrative discretion by holding that, unless the Legislature has directly spoken to the precise issue in question, courts should defer to agencies on pure questions of statutory interpretation, as long as the agency arrived at a reasonable or permissible construction of the statute).

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munity.¹⁹⁰ For example, such unchecked external powers could lead to significant state-wide variations in the delivery of public services.¹⁹¹ In these instances, only the state legislature is able to keep such harmful variances in check by setting certain minimum thresholds and providing a uniform system of regulation.¹⁹² With “liberal construction,” however, such legislative control becomes more difficult or impossible.¹⁹³ Second, a “liberal construction” standard could also lead to potentially unchecked activities that in the realm of administrative law are called “arbitrary or capricious.”¹⁹⁴

Accordingly, given that both the “liberal construction” and the “strict construction” standards present their own set of concerns, courts and legislatures should insist upon a middle-of-the-road “reasonable construction” standard. Specifically, on the one hand, such standard should not insist on the strictest relationship and the tightest fit between an implied power and those powers expressly granted, and, on the other hand, such standard also should not give free reign to potential excesses.

Fortunately, unlike Rhode Island courts, Nevada legal authorities have already begun to move in the direction of “reasonable construction” by seizing upon the “fairly implied” language in Dillon’s Rule.¹⁹⁵ This article argues that they may want to directly acknowledge this direction and their willingness to hold the functional powers of municipalities to a less exacting review. It is difficult, of course, in some circumstances to say what is “reasonable.” For example, is it reasonable, pursuant to a more general power for “public welfare” in the municipality’s charter, to operate a park?

In this analysis, custom should provide greater guidance to a court. Custom, i.e., “long-continued usage,” after all is often evidence of what worked successfully in the political laboratories of local governance and what the expectations of the state and of the local electorate are *vis-à-vis* the municipality. As such, custom is eminently valuable in evaluating “reasonableness,” and powers customarily exercised should receive great deference.

C. Fiscal Powers –Strict Construction Recommended

As noted above, “fiscal powers” are those powers that allow municipal corporations to determine their revenue sources, tax rates, and

190. Richardson, *supra* note 89, at 14-15.

191. *See id.*

192. *See id.*

193. *See id.*

194. *See id.*

195. *See supra* Part VI.

borrowing.¹⁹⁶ Stated differently, fiscal powers are all related to how a municipality funds itself.¹⁹⁷ For instance, pursuant to its fiscal powers, a municipality may decide to raise additional revenue by increasing a certain tax.¹⁹⁸

In sharp contrast, spending powers, i.e., how a municipality *spends* its resources, should, of course, be analyzed in the context of the other powers discussed in this article. For example, when the municipality spends money on remuneration for city employees, such spending is a “personnel power” or when the municipality spends money on a new sewer system for a subdivision, such spending is a “functional power.”¹⁹⁹

As a policy matter, however, it is advisable to continue with a *strict construction* of fiscal powers, i.e., municipal funding. Specifically, for the three basic reasons noted below, there is a strong public policy interest in making certain that a municipality only raises its revenue, either through increased taxes or borrowing, in *strictly monitored ways*.

First, the unfortunate reality is that, year after year, the average taxpayer pays more and more money in taxes.²⁰⁰ By continuing the strict construction tradition of Dillon’s Rule, this trend is kept in check to a large extent. Second, strict construction also helps to ensure that municipalities do not significantly undercut either the state or the federal tax base.²⁰¹

Finally, and perhaps most significantly, as this article argues for “liberal construction” of structural and personnel powers and “reasonable construction” for functional powers for enhancing the autonomy and effectiveness of municipal corporations, a strict construction of fiscal powers *will remain a vital check* on municipal spending that may otherwise spiral out of control without such “counterbalance” in place.

Thus, when it comes to fiscal powers, the continued use of a strict construction standard that was developed under Dillon’s Rule will help to ensure better monitoring, controlling, and limiting of potentially excessive revenue collection efforts by municipalities.

196. See *Incorporation of Towns*, *supra* note 52, at 5.

197. See *id.*

198. See *id.*

199. Cf. *supra* Part X. A-B.

200. George Nastas and Stephen Moore, *A Consumer Guide to Taxes: How Much Do You Really Pay in Taxes?*, Cato Institute Briefing Paper (April 15, 1992), available at <http://www.cato.org/pubs/briefs/bp-015.html> (last visited March 27, 2007).

201. See Richardson, *supra* note 89, at 14-15.

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In response to some of the arguments that the opponents of Dillon's Rule typically raise in this regard,²⁰² it should also be noted that, with regard to fiscal powers, most of those arguments are not very persuasive. For example, with regard to fiscal powers, a greater legal uncertainty of "strict construction" *is actually healthy*, as it helps to keep municipal revenue raising efforts in greater check. In particular, such fear and uncertainty will probably create somewhat of a bottleneck in municipal revenue raising, thereby contributing to reduced government waste.

At the same time, pursuant to more liberally contoured spending powers as outlined above, in the areas of personnel or functional powers, such spending powers will still allow municipalities to exercise a considerable amount of discretion. Thus, to the extent that municipalities wish to provide greater services in some areas or lesser services in others, municipalities are not tethered to the lowest common denominator of the state. Furthermore, municipalities could still, of course, raise additional revenues under state authorized schemes. Most importantly, however, the strict construction standard will leave the ultimate revenue raising powers of any municipality *in the hands of the state*.

As a legal matter, Nevada, for example, is well positioned to continue with a strict construction of fiscal powers. First, the Nevada Constitution appears to directly endorse such an approach. In particular, the Nevada Constitution specifically provides, "*The legislature shall . . . restrict . . . [municipal]*"²⁰³ power of taxation, assessment, borrowing money, contracting debts and loaning their credit, except for procuring supplies of water . . ."²⁰⁴ In sharp contrast, there are no other strict directives in the Nevada Constitution with regard to any of the other municipal powers discussed in this article.²⁰⁵ Second, case law in most jurisdictions, as in Nevada, generally indicates that courts are not in favor of broadly read or applied tax schemes.²⁰⁶ Lastly, even S.B. 427, which would have terminated the application of Dil-

202. *See id.*

203. NEV. CONST. art. VIII, § 8 (The text of the Nevada Constitution in this section only expressly references cities and towns).

204. *See id.*

205. *See id.*

206. *See, e.g., Fair Lanes Inc. v. Comptroller of Treasury*, 210 A.2d 821, 823 (Md. 1965) (holding that, if a tax statute is doubtful in its scope, it should be construed most strongly in favor of the citizen and against the state); *see also State v. Pioneer Citizens Bank of Nevada*, 456 P.2d 422, 423-424 (Nev. 1969) (holding that tax statutes will not be extended by implication); *see generally Lagandaon v. Ashcroft*, 383 F.3d 983, 990 (9th Cir. 2004) (holding that an administrative agency's litigating positions regarding the meaning of a statute are not entitled to deference).

lon's Rule in Nevada,²⁰⁷ expressly provided that "This section *does not authorize a [local government] to impose or increase a tax unless the tax or increase is otherwise authorized by specific [state] statute.*"²⁰⁸

D. Emergency Powers –Broad Powers Recommended

The final important role assumed by municipalities is as "first responders." In this role, municipalities exercise certain important functions that may be termed "emergency powers."²⁰⁹ Such emergency powers may include the obvious immediate disaster relief.²¹⁰ For example, should a disaster occur in the Las Vegas Valley, Clark County officials, with other municipal first responders, would coordinate emergency relief efforts from the Clark County Government Center.²¹¹

In addition to such obvious immediate steps in both dealing with an aftermath and preparing for a disaster, there are larger emergency powers that may need to be exercised by a municipality. Given the unique challenges facing local governments as "first responders" during a large scale disaster, governments should also be *creative in both their pre- and post- disaster approaches.*²¹²

In this unique realm, municipalities should exercise broad discretionary emergency powers to tackle large disasters.²¹³ As a result, all state legislatures applying Dillon's Rule should study: (1) whether municipalities have sufficiently broad powers to address larger concerns that require creativity; and (2) whether Dillon's Rule may contribute to any problems in the areas related to disaster relief. Nevertheless, the issues and problems associated with disaster relief are multifarious, extremely complex and require solutions at various levels of the government that are simply beyond the scope of this article and, thus, will necessitate further analysis.²¹⁴

207. In its initial draft, S.B. 427 was designed to abolish Dillon's Rule only with regard to Nevada Counties. See S.B. 427, 73rd Sess (Nev. 2005), available at <http://www.leg.state.nv.us/73rd/Reports/history.cfm?ID=2293>.

208. *Id.*

209. *Officials gear up for major terrorism exercise in Nevada*, RENO GAZETTE-JOURNAL ONLINE July 11, 2003, available at <http://www.rgj.com/news/printstory.php?id=46725> (last visited Feb 11, 2007).

210. *See id.*

211. *See id.*

212. See Abdul Malik Mujahid, *Out of Box Thinking Needed to Save Lives in Kashmir Earthquake*, <http://soundvision.com/info/poor/quakeideas.asp> (last visited Feb. 8, 2007).

213. *See id.*

214. As one article noted:

The Las Vegas Valley's readiness for a major emergency could be hampered by inadequate funding and misplaced resources [In particular,] Nevada received \$28.4 million from the federal government, of which Clark County received a little more than half during the current fiscal year. Those dollars are just not enough to meet the security needs of Southern Nevada, said Tim McAndrew, emergency management coordinator for the city of Las

XI. CONCLUSION

Despite strong academic arguments to the contrary, home rule is not the ultimate panacea for all the ills of municipal governance, as strong justifications can still be found for the continued existence of Dillon's Rule. Specifically, as this article argued, "liberal construction" of all municipal powers goes too far. At the same time, in light of the revolutionary changes to the reality of the twenty-first century city, a series of modest changes to Dillon's Rule are needed and appropriate. For the reasons noted above, a limited overhaul of the Dillon's Rule framework appears to be the best solution for Nevada and elsewhere.

Specifically, with regard to their structural and personnel powers, municipal corporations should enjoy freedoms similar to those enjoyed by private corporations. With regard to their functional powers, municipal corporations should enjoy freedoms similar to those enjoyed by administrative agencies. With regard to their fiscal powers, however, municipal corporations should expect an exacting review from the courts, similar to a review that any untested and expansive tax interpretation may receive.

Vegas. "In fiscal year '05, regionally, we identified in excess of \$79 million, just shy of \$80 million in projects, and we were funded with \$17 million," he said. "These things we needed were respirator suits in the field for firefighters all the way up to vital infrastructure." That underfunding has left the various agencies and municipalities in Clark County working together to meet needs on an installment basis, McAndrew added. In one case, an order for emergency vehicles specially equipped to respond to nuclear, chemical, biological and radiological disasters was cut in half. Local fire departments will now make do with six of the trucks for shared use instead of the dozen requested. Las Vegas is facing the same problem gripping many other major cities around the country. The Department of Homeland Security's allocation formula is based on population instead of actual risk. Las Vegas, which is full of high-profile potential targets, operates under the same per-capita funding formula as rural Elko. The nearly 40 million tourists visiting Las Vegas this year are not factored into the equation.

Valerie Miller, *Use of Homeland Security dollars questioned* (Oct. 3, 2005), available at <http://www.lvbusinesspress.com/articles/2005/10/04/news/news04.txt> (last visited Feb. 8, 2007).