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"Home Rule" vs. "Dillon's Rule" for Washington Cities

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ABSTRACT

This Article focuses on the tension between the late-nineteenth-century "Dillon's Rule" limiting city powers, and the "home rule" approach that gained traction in the early and mid-twentieth century. Washington's constitution allows cities to exercise all the police powers possessed by the state government, so long as local regulations do not conflict with general laws. The constitution also vests charter cities with control over their form of government. But all city powers are subject to "general laws" adopted by the legislature. Further, judicial rulings on city powers to provide public services have fluctuated, ranging from decisions citing the "Dillon's Rule" doctrine that local governments have only those powers clearly granted to them by the legislature, to the "home rule" view that charter and optional code cities have broad unspecified powers. Despite actions by lawmakers to expand city home rule powers, recent court decisions have puzzled practitioners by alternately voicing these two approaches in a seemingly random fashion. This Article describes the origin of Dillon's Rule, places it in a national context, and explains its longevity in Washington despite the legislature's clear intent to eliminate the rule's application to most cities. The Article suggests that the zombie-like reappearance of Dillon's Rule is explained by (1) the vitality of the rule as a doctrine applicable to special purpose districts; (2) appellate judges' insistence on picking and choosing from doctrines (including ostensibly dead doctrines) to support a case's outcome; and (3) a combination of doctrinal forgetfulness and carelessness. The Article repeats a recommendation made five decades ago by former University of Washington law professor Philip Trautman that the Supreme Court of Washington should adopt a more consistent approach, one that

[*] Acting Professor of Law, University of Washington. The author thanks P. Stephen DiJulio, Pat Mason, and Will Patton for their insightful comments on earlier drafts and Nathan Barnes for his research assistance. Thanks also to the University of Washington Gallagher Law Library's reference staff for their always-extraordinary research and editing assistance.

follows the legislature's clear intent to make Dillon's Rule inapplicable to most cities.

I. INTRODUCTION

Home rule is a way of structuring the relationship between state governments and cities so that the cities are empowered "to administer [their] own affairs to the maximum degree" with "the right to determine the form of government" and "to define the nature and scope of municipal services involving matters of purely local concern."[1] Home rule is an approach to structuring government meant to push as much power down to the local level as is practicable, reducing interference by the legislature or other agencies of state government.[2] Home rule is also supported by a legal doctrine relating to the formal distribution of power between states and their local governments.[3] Former University of Washington professor Philip Trautman observed that home rule is often sustained by constitutional provisions designed to limit legislative control of certain municipalities so that they may "frame their own charters and thereby determine their own powers with respect to local or municipal affairs."[4]

Washington State adopted a trio of home rule constitutional provisions in 1889,[5] but commentators, including Trautman, have criticized the state's courts for applying a more restrictive approach to local governance than the constitution and statutes require[6]—sometimes following

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1. Ernest H. Campbell, *Municipal Home Rule* (Univ. of Wash. Bureau of Gov't Research & Serv., Research Memorandum No. 53, 1958).

2. Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 644 (1964).

3. *Id.* at 645.

4. Philip A. Trautman, *Legislative Control of Municipal Corporations in Washington*, 38 WASH. L. REV. 743, 765 (1963).

5. Article XI, section 10 of Washington's constitution provides, in part: "Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization and classification in proportion to population, of cities and towns, which laws may be altered, amended or repealed." WASH. CONST. art. XI, § 10. Article XI, section 10 provides a roadmap for citizens of medium-sized and large cities who desire to adopt a local charter governing the form of government. *Id.* Article XI, section 11 provides all cities and counties with strong local police (regulatory) powers: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." WASH. CONST. art. XI, § 11. In addition, article XI, section 12 states that the legislature must not impose taxes on local governments for local purposes, but instead may vest local authorities with the power to assess and collect taxes. WASH. CONST. art. XI, § 12.

6. *See, e.g.*, ROBERT F. HAUTH, THE MUNICIPAL RESEARCH & SERVS. CTR. OF WASH., THE EROSION OF HOME RULE—THE NEED TO STRENGTHEN POWERS OF MUNICIPAL SELF GOVERNMENT IN WASHINGTON (1990); JESSE J. RICHARDSON, JR. ET AL., IS HOME RULE THE ANSWER? CLARIFYING THE INFLUENCE OF DILLON'S RULE ON GROWTH MANAGEMENT 10 (2003), *available at* http://www.brookings.edu/~/media/research/files/reports/2003/1/01metropolitanpolicy%20richardso

the narrow Dillon's Rule, which limits local government powers to those expressly granted by statute or those necessarily implied.[7] This was first pointed out in 1916 by Columbia University professor Howard McBain, who published a detailed treatise on home rule in the several states (including Washington) that had adopted it in the late nineteenth and early twentieth centuries.[8] Despite legislative efforts to clarify and strengthen home rule powers, the Supreme Court of Washington has been notably inconsistent in its pronouncements on city authority, and this has been confusing both to municipal lawyers and to the city leaders who guide policies and programs.

Apart from McBain's treatise and a supplemental study by Columbia University's Joseph D. McGoldrick in 1933,[9] no account of Washington State's experience with home rule has analyzed its history within a national context. The concept and its inconsistent handling by the judiciary are better understood by reviewing populist and progressive reform politics in the late nineteenth and early twentieth centuries, as well as the next wave of home rule advocacy after World War II.

This Article, in Part II, reviews Dillon's Rule in relation to post-Civil War American jurisprudence that was heavily influenced by legal academics. It then discusses the municipal home rule provisions that were adopted across the country at the turn of the twentieth century. The Article shows how the framers of Washington's 1889 constitution—one of the earliest in the nation with a home rule provision[10]—intended to confer broad local powers on cities by enacting a local government provision that was very progressive for that point in history. But there were

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n/dillonsrule.pdf; Trautman, *supra* note 4, at 782–83; Robert F. Brachtenbach, Comment, *Home Rule in Washington—At the Whim of the Legislature*, 29 WASH. L. REV. 295, 298 (1954); Michael Monroe Kellogg Sebree, Comment, *One Century of Constitutional Home Rule: A Progress Report?*, 64 WASH. L. REV. 155 (1989).

7. *See, e.g.*, Port of Seattle v. Wash. Utils. & Transp. Comm'n, 597 P.2d 383, 386 (Wash. 1979) (a special purpose district case) ("The Port, as a municipal corporation, is limited in its powers to those necessarily or fairly implied in or incident to the powers expressly granted, and also those essential to the declared objects and purposes of the corporation. If there is a doubt as to whether the power is granted, it must be denied." (citations omitted)); City of Aberdeen v. Nat'l Sur. Co., 275 P. 62, 63 (Wash. 1929) ("[M]unicipal corporations have only the powers conferred by statute.").

8. HOWARD LEE MCBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE 455 (1916).

9. JOSEPH D. MCGOLDRICK, LAW AND PRACTICE OF MUNICIPAL HOME RULE, 1916–1930 (1933).

10. DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 11 (2001). Krane et al. list Washington as the second state with a home rule constitutional provision, but California probably should be viewed as the second. California's 1879 version was effective only as to one city: San Francisco; but Washington's was modeled in part on California's. *See infra* notes 46–47 and accompanying text.

a variety of understandings of what "home rule" meant, and the Supreme Court of Washington initially interpreted the constitution's municipal powers provision restrictively, particularly with respect to municipal authority outside of "police" (i.e., regulatory) powers. In the Progressive Era at the beginning of the twentieth century, the court shifted to a broader view of city powers. Later, after World War II, rapid urban and suburban growth and increasing demand for city services led the legislature to extend the robust local powers enjoyed by the larger charter cities to virtually all the cities in the state.

The net result, as described in Part III, was a hybrid type of home rule based both on the state constitution and on statutes. Under the constitution, Washington cities, as well as counties,[11] have substantial inherent police powers. By a combination of constitutional provisions and statutes, most cities have also gained a variety of options with respect to their form of government. Part IV then outlines how the legislature's expansion of city powers and the lawmakers' explicit rejection of Dillon's Rule still met some judicial resistance in the mid-twentieth century, particularly in the sphere of general municipal services and utility ("proprietary") activities, i.e., city activities outside the realm of police powers. Courts on occasion ignored rather clear statutory language in rendering decisions limiting local powers. The legislature responded with an explicit statutory expansion of city powers through enactment of the Optional Municipal Code in 1967.

Part V of this Article analyzes a number of Washington court opinions on home rule during the past five decades. It suggests three reasons for the sporadic, zombie-like resurrection of the narrow Dillon's Rule doctrine concerning city powers in Washington State. First, Dillon's Rule has consistently been applied to Washington's special purpose districts, although not consistently applied to cities. It is easy for lawyers

11. Since 1948, any Washington county has been authorized to "frame a 'Home Rule' charter for its own government" under Article XI, section 4 of Washington's constitution, and the Supreme Court of Washington appears to treat the powers of charter counties similarly to those of charter cities. King Cnty. Council v. Pub. Disclosure Comm'n, 611 P.2d 1227, 1229 (Wash. 1980). *See also* WASH. CONST. art. XI, § 4. Although many of the principles discussed in this Article are substantially applicable to counties, this Article focuses solely on cities because the home rule movement historically addressed only the organization and powers of cities, and because there are relatively few Washington cases concerning powers of home rule counties. Further, Washington counties historically fulfilled a dual function, serving both as local governments in unincorporated areas and as agents of the state to carry out its programs. And some county powers are exercised countywide, while others are exercised only in unincorporated areas. One commentator has observed, "No other type of local government in Washington State is characterized by either of these dual natures." STEVE LUNDIN, THE CLOSEST GOVERNMENTS TO THE PEOPLE: A COMPLETE REFERENCE GUIDE TO LOCAL GOVERNMENT IN WASHINGTON STATE 81 (2007).

and judges to misunderstand the difference between cities and special purpose municipalities and to ignore the doctrinal difference between the law relating to city powers and special purpose district powers. Second, when judges desire particular outcomes, they pick and choose among legal rationales suggested by the lawyers before them, occasionally reviving doctrines that ostensibly have been rendered obsolete by statutory enactments or previous court rulings. Third, American common law judges are so used to making law that they sometimes bend or altogether ignore statutory law.

This Article, in Part VI, concludes that the Supreme Court of Washington would do well to follow the rather clear legislative direction regarding charter city and code city powers, and as Professor Trautman recommended fifty years ago, to strengthen judicial interpretations recognizing the powers of cities.

II. THE ORIGINS OF "DILLON'S RULE" AND "HOME RULE"

A. "Dillon's Rule" and the Late-Nineteenth-Century Legal Academics

To understand the development of modern local government law in the United States, it is helpful to understand the origin and nature of "Dillon's Rule," named after John Forrest Dillon.[12] Dillon was elected to the Iowa Supreme Court in 1852, and was appointed by President Grant to the United States Circuit Court in 1869.[13] He resigned in 1879 and moved to New York to pursue a dual career as a law professor at Columbia and as a lead lawyer for the Union Pacific Railroad.[14] Dillon's influential view of local government powers was first announced in *City of Clinton v. The Cedar Rapids and the Missouri River Railroad Co.*,[15] a case in which the Iowa Supreme Court ruled that a city's powers were limited by the charter granted by the legislature and that the city could not block construction of a state-authorized railway on its streets. Dillon wrote: "The corporation of Clinton is a public municipal corporation, created for public purposes only, and can exercise no powers but such as are expressly granted by law, or such as are incidental to those expressly granted, and is always subject to legislative control."[16] This doctrine was repeated in Dillon's comprehensive and widely cited treatise, *Commen-*

12. CLYDE E. JACOBS, LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW 111–12 (1954).

13. *Id.*

14. *Id.*

15. City of Clinton v. Cedar Rapids & Mo. River R.R. Co., 24 Iowa 455, 475, 479 (1868).

16. *Id.* at 461.

taries on the Law of Municipal Corporations,[17] in which he emphasized the "supremacy of the legislative authority over municipal corporations" limited only by constitutional provisions.[18]

John F. Dillon was one of several influential jurists and academics who shaped American public law in the post-Civil War period, including professor and Michigan Supreme Court justice Thomas M. Cooley,[19] and law professor Christopher Tiedeman.[20] Dillon's 1872 treatise on municipal corporations,[21] Cooley's *Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (1868),[22] and Tiedeman's *Treatise on the Limitations of Police Power in the United States: Considered from Both a Civil and Criminal Standpoint* (1886)[23] were widely read and repeatedly cited.[24] For example, in *Territory of Washington v. Ah Lim*,[25] where Washington's first supreme court narrowly upheld the State's power to outlaw opium consumption, both Tiedeman and Cooley were cited by the defense in support of the limited power of government to regulate personal private activities.[26] One cannot understate the impact of Dillon, Cooley, and other key legal academics of the late nineteenth century. Lawyers and judges constantly read and applied the treatises by these eminent professors, some of whom were also jurists. Dillon's *Commentaries* were cited in 104 Supreme Court of Washington opinions between 1889 and 1929, and 56 times between 1930 and 2014; Thomas Cooley's works were cited at least 245 times between 1889 and 1929, and at least 174 times between 1930 and present; and Tiedeman was cited in 34 appellate opinions between 1889 and 1929, and 8 times since then.[27]

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17. JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS (1872).

18. *Id.* § 38, at 81.

19. Thomas M. Cooley taught constitutional law at University of Michigan School of Law for decades, and for a number of years simultaneously served on the Michigan Supreme Court. JACOBS, *supra* note 14, at 28–29.

20. Tiedeman taught at the University of Missouri, and then at the University of the City of New York and the University of Buffalo. *Id.* at 58–59.

21. DILLON, *supra* note 17.

22. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868).

23. CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT (1886).

24. JACOBS, *supra* note 12, at 58–60, 64–65; Edwin A. Gere, Jr., *Dillon's Rule and the Cooley Doctrine*, 8 J. URB. HIST. 271, 271 (1982); David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman: A Study in the Failure of Laissez-Faire Constitutionalism*, 55 MO. L. REV. 93, 98 (1990).

25. Territory v. Ah Lim, 24 P. 588 (Wash. 1890).

26. *Id.* at 593–94.

27. Westlaw Searches, September 18, 2014, September 27, 2014, and October 15, 2014 (Grace Feldman, Marian Gould, Gallagher Law Library, University of Washington).

Dillon, Cooley, and Tiedeman by no means agreed on all matters. Cooley argued for a local right to self-government and for a less restrictive view of local government powers than did Dillon.[28] Cooley also had a more flexible and evolving view of laissez-faire doctrine than did Tiedeman, who was notable for "the relative purity of his laissez-faire principles."[29] But these theorists collectively provided the jurisprudential framework for judicial doctrines that emphasized the sanctity of private property, liberty of contract, minimal government regulation of the economy, and an aversion to "class legislation" favoring special interest groups.[30] They also believed that courts should play a strong role in upholding constitutionally protected liberties—particularly economic liberties.[31] This legal philosophy laid the groundwork for activist *"Lochner* Era" court decisions, which were later condemned as proindustrialist, antiworker, anticonsumer, and antiregulatory in character.[32] Dillon's doctrine of municipal powers was driven by a strong belief in private property rights, a distinct division between the public and private sectors, and skepticism of government in general.[33] Dillon's ideology is highlighted by an 1895 law review article in which he underscored his concern for property rights and substantive due process protections from governmental interference.[34] In that article, he expressed concern about the "socialistic attack . . . upon the rightfulness of private ownership of land,"[35] categorized the income tax as a socialist seizure of private property,[36] and

28. *See* Gere, *supra* note 24, at 279–81.

29. Mayer, *supra* note 24, at 160. In addition, Dillon, like Cooley, believed in the appropriateness of some modest regulations on trusts and monopolies. John F. Dillon, *Property—Its Rights and Duties in Our Legal and Social Systems*, 29 AM. L. REV. 161, 175–76 (1895).

30. *See generally* JACOBS, *supra* note 12, at 26–27.

31. COOLEY, *supra* note 22, at 159–62. *See also* JACOBS, *supra* note 12, at 64–65; Louise A. Halper, *Christopher G. Tiedeman, "Laissez-Faire Constitutionalism" and the Dilemmas of Small-Scale Property in the Gilded Age*, 51 OHIO ST. L.J. 1349, 1350 (1990).

32. Well-known critics of the ostensibly neutral character of laissez-faire jurisprudence included Roscoe Pound, Oliver Wendell Holmes, Jr., and Benjamin Cardozo. *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Roscoe Pound, *The Theory of Judicial Decision II: Nineteenth-Century Theories of Judicial Finding of Law*, 36 HARV. L. REV. 802 (1923). For an excellent overview of the late-nineteenth-century academic disputes on these issues between economists and legal theorists, see NANCY COHEN, THE RECONSTRUCTION OF AMERICAN LIBERALISM, 1865–1914 (2002). For a modern defense of laissez-faire legal theorists, see DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

33. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1110 (1980).

34. *See* Dillon, *supra* note 29. This understanding of the limited character of the police power was shared by Cooley and by Tiedeman. *See* COOLEY, *supra* note 22, at 706–08; TIEDEMAN, *supra* note 23, §§ 2–8.

35. Dillon, *supra* note 29, at 167.

36. *Id.* at 172.

argued for only the most cautious government regulation of the massive trusts that were dominating the nation's economy by the end of the nineteenth century.[37] Dillon was suspicious of the exercise of governmental regulatory power over property and viewed that power as appropriate only as necessary to ensure that property is "used as not to injure others" or does not "prove pernicious to . . . neighbors or the citizens generally."[38] Dillon also took a narrow view of the police power, rejecting the idea that it included a broad array of governmental actions for securing or promoting the general public welfare. This was consistent with his view that governmental power should be limited, and that municipal action "is always subject to legislative control."[39] With respect to local government, Dillon's Rule asserted:

> It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in *express words*; second, those *necessarily or fairly implied* in, or *incident* to, the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied . . . . These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations.[40]

B. Progressivism and the Home Rule Movement

Although Dillon firmly asserted that his rule was "general and undisputed," other jurists and legal academics had distinctly different views on the subject. For example, despite their agreement on many legal topics, Justice Cooley took a very different position in *The People ex rel. LeRoy v. Hurlbut.*[41] There, he wrote that the State of Michigan could not by statute undertake the administration of a city and the appointment of municipal officers, ruling that the "state may mould [sic] local institutions according to its views of policy or expediency; but local government is matter of absolute right; and the state cannot take it away."[42] This more liberal "Cooley Doctrine" on municipal powers had its support-

37. *Id.* at 176.
38. DILLON, *supra* note 17, § 93, at 136.
39. *See supra* note 16 and accompanying text.
40. DILLON, *supra* note 17, § 55, at 101–02.
41. People *ex rel.* Le Roy v. Hurlbut, 24 Mich. 44 (1871).
42. *Id.* at 108.

ers,[43] but it did not gain as much traction as Dillon's Rule, perhaps because Dillon's municipal law treatise was comprehensive and accessible, and because many judges agreed with him about the supremacy of the legislatures as the sole source of legitimate authority within the states.[44] But as the nineteenth century drew to a close, other forces were attacking the political legitimacy of state legislatures and urging that greater powers and flexibility be accorded to local governments.

In 1875, Missouri adopted a new constitution that included a provision allowing the people of St. Louis to frame their own "charter for the governance of the city," subject to the ultimate supervision of the legislature.[45] At their constitutional convention, "[c]orruption and favoritism by the state legislature in the management of the affairs of the city of St. Louis was [a] pervasive . . . theme in the debates" and directly led to what was the first of many "home rule" provisions inserted into state constitutions during the following decades.[46] California was next, in 1879, with a provision in its new constitution[47] meant to "liberate at least the metropolitan city of the [s]tate—San Francisco—from the thraldom [sic] of legislative 'interference' in its affairs."[48] The concept of locally generated charters, rather than charters dictated for each new city by the legislature, was an important component of proposals by progressive municipal reformers who were steadily gaining support and influence. When Washington's constitutional convention met on July 4, 1889, a complete draft constitution, written by former Oregon judge and statute codifier W. Lair Hill, was on each delegate's desk on the first day.[49] Hill's draft included a commentary on his proposed requirement that cities and towns be incorporated by the electors rather than by special laws.[50] Hill wrote:

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43. *See, e.g.*, EUGENE MCQUILLIN, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 246, at 558 (1911); Amasa M. Eaton, *The Right to Local Self-Government (pts. 1–3)*, 13 HARV. L. REV. 441, 570, 638 (1900); Amasa M. Eaton, *The Right to Local Self-Government (pts. 4–5)*, 14 HARV. L. REV. 20, 116 (1900).

44. Frug, *supra* note 33, at 1114–15; Gere, *supra* note 24, at 294–95. *See also infra* notes 164–165 and accompanying text.

45. MO. CONST. of 1875, art. IX, §§ 20–25.

46. Michael Libonati, *Home Rule: An Essay on Pluralism*, 64 WASH. L. REV. 51, 65, 67 (1989).

47. CAL. CONST. of 1879, art. XI, §§ 6–8.

48. MCBAIN, *supra* note 8, at 200.

49. HISTORY OF SEATTLE, WASHINGTON: WITH ILLUSTRATIONS AND BIOGRAPHICAL SKETCHES OF SOME OF ITS PROMINENT MEN AND PIONEERS 507–11 (Frederic James Grant ed., 1891).

50. The following language of Hill's proposed article XI, section 4 is found almost verbatim in article XI, section 10, as ultimately adopted: "Cities and towns shall not be incorporated by special laws; but the legislature, by general laws, shall provide for the incorporation, organization and clas-

> No one need be informed that the incorporation of cities and towns by special act of the legislature is an exhaustless fountain of evil in a state where it prevails. There is no branch of government more completely and perfectly adapted to the purposes of those who make the filthiest politics a trade, than the manipulating of city charters when this can be done by special laws. These charters are the footballs of all the skilled labor lobbyists, who are sure to besiege the legislature when there is opportunity for plunder.[51]

Hill's concern about special interests dominating the legislature reflected "populist" views prevalent in many parts of the country, including the new state of Washington.[52]

As America moved into the Progressive Era of the early twentieth century, proposals for locally generated charters and city home rule increased, along with calls for the professionalization of local government, nonpartisan municipal elections, the initiative, referendum, and recall, and other measures with the intent of "removing corrupt, special influence from government; modifying the structure of government so as to make it easier for the people to control; and using the government so restored to the people to relieve social and economic distress."[53] One "good government" municipal reform was to amend state constitutions to forbid special legislation applicable to specific cities or towns. In the words of Columbia Law School professor Richard Briffault, this was intended "to protect the structural integrity of municipalities by barring the transfer of municipal services or activities to agencies not a part of the local government, [and] . . . to prevent the singling out of specific localities for state interference."[54] Briffault suggests that at its core, "[t]he home rule movement had two goals: to undo Dillon's Rule by giving localities broad lawmaking authority and to provide local govern-

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sification, in proportion to populations of cities and towns, which laws may be altered, amended or repealed by general laws." W. Lair Hill, *A Constitution Adapted to the Coming State: Suggestions by Hon. W. Lair Hill Main Features Considered in Light of Modern Experience. Outline and Comment Together*, MORNING OREGONIAN, July 4, 1889, *available at* http://lib.law.washington.edu/waconst Sources/Hill%20Constitution.pdf.

51. *Id.* at 72.

52. *See generally* Hugh Spitzer, *Washington: The Past and Present Populist State*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES 771 (George E. Connor & Christopher W. Hammons eds., 2008).

53. BENJAMIN PARKE DE WITT, THE PROGRESSIVE MOVEMENT: A NON-PARTISAN, COMPREHENSIVE DISCUSSION OF CURRENT TENDENCIES IN AMERICAN POLITICS 278 (1915). *See also* Melvin G. Holli, *Urban Reform in the Progressive Era*, *in* THE PROGRESSIVE ERA 133–51 (Lewis L. Gould ed., 1974); KRANE ET AL., *supra* note 10, at 11; Samuel P. Hays, *The Politics of Reform in Municipal Government in the Progressive Era*, 55 PAC. NORTHWEST Q. 157, 159 (1964).

54. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 9–10 (1990).

ments freedom from state interference in areas of local concern."[55] Besides advocating professionalization of city government and an increase in local control,[56] progressive legal scholars, such as the University of Chicago's Ernst Freund, argued for a more expansive understanding of basic municipal authority, including the police power.[57] Freund believed police power was more than a narrow concept aimed at protecting public safety, order, and morals.[58] Instead, he said that the police power "aims directly to secure and promote the public welfare" and that "the police power is not as a fixed quantity, but as the expression of social, economic and political conditions . . . [it] must continue to be elastic, i.e., capable of development."[59] Freund's broad view of police power gained widespread acceptance during and after the Progressive Era, and he was "probably the most influential author of the twentieth century in the field of the police power."[60] Freund's approach was shared by other well-known judges and scholars, including Roscoe Pound, Learned Hand, Felix Frankfurter, and Louis Brandeis.[61] Views of municipal police power evolved, and the home rule movement gained popularity. Rights to locally drafted city charters found their way into the constitutions of state after state.[62] But in practice, home rule turned out to be something different from what some of its early advocates envisioned, in part because of lack

55. *Id.* at 10.

56. A good example of contemporary advocacy for professional city management and local control of local affairs is found in FRANK J. GOODNOW, MUNICIPAL GOVERNMENT 380–84 (1910).

57. *See* ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS (1904).

58. *See id.* § 10.

59. *Id.* § 3.

60. Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 757 n.70 (2007). For a description of the evolution of police power jurisprudence in Washington State and its evolution during the Progressive Era, see Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 WASH. L. REV. 495, 503–05 (2000).

61. University of Chicago law professor Richard A. Epstein observed: "Ernst Freund, Roscoe Pound, Learned Hand, Felix Frankfurter, and Louis Brandeis all condemned the rigid and dogmatic view of the police power nourished by oft-discredited dictates of laissez-faire jurisprudence." Richard A. Epstein, *Lest We Forget:* Buchanan v. Warley *and Constitutional Jurisprudence of the "Progressive Era"*, 51 VAND. L. REV. 787, 790 (1998). Those progressive critics were by and large successful. For example, Justice Holmes was able to declare for the Court in 1915 that "the police power extends to all the great public needs." Noble State Bank v. Haskell, 219 U.S. 104, 111 (1915). *See also* Day-Brite v. Missouri, 342 U.S. 421, 424 (1952) ("[T]he police power is not confined to a narrow category."). On the influence and success of Freund's approach to police power jurisprudence, see OSCAR KRAINES, THE WORLD AND IDEAS OF ERNST FREUND: THE SEARCH FOR GENERAL PRINCIPLES OF LEGISLATION AND ADMINISTRATIVE LAW 15–22 (1974).

62. Progressive Era home rule provisions included Minnesota (1896), Colorado (1902), Virginia (1902), Oregon (1906), Oklahoma (1907), Michigan (1908), Arizona (1912), Ohio (1912), Nebraska (1912), and Texas (1912). RICHARDSON ET AL., *supra* note 6, at 10.

of clarity of what "home rule" really meant, and in part because of judicial resistance and the long arm of Dillon's Rule.

C. What Exactly is Home Rule?

A 1954 report of the Chicago Home Rule Commission stated that "[t]here is perhaps no term in the literature of political science or law which is more susceptible to misconception and a variety of meaning than 'home rule.'"[63] As stated at the beginning of this Article, home rule is both a *political* concept and a *legal* concept. As a political concept, it focuses on the allocation to local residents of policy choices about any combination of (1) the structure of local government; (2) what regulatory activities the local government engages in or what public services it provides; and (3) strong local control over carrying out the allocated functions.[64] But the legal frameworks establishing home rule vary tremendously from state to state. In some instances home rule is wholly or partially prescribed by constitutional provisions ("constitutional home rule"), while in others home rule is established primarily or entirely by statute ("statutory home rule").[65] In addition, some constitutional provisions have been interpreted as being self-executing in character, while others have been understood to require the enactment of enabling legislation.[66]

The underlying legal theory of home rule varies between jurisdictions. A few states have been characterized as *imperium in imperio* jurisdictions,[67] meaning that their constitutions create a type of internal "federal" system, with the state concerning itself with statewide affairs, and with local matters being constitutionally delegated to local authorities.[68]

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63. CHICAGO HOME RULE COMM'N, MODERNIZING A CITY GOVERNMENT 193 (1954). *See also* R. Andersen, *The Current Meaning of Home Rule in Washington*, 8 WASH. PUB. POL'Y NOTES No. 2 (1980) ("Anyone who thought (as some did) that home rule was a move in the direction of simplicity in the definition of local government powers . . . was surely mistaken.").

64. Looking at home rule in terms of these political or organizational choices is similar to what some observers view as an "operational categorization" of what constitutes home rule. *See* RICHARDSON ET AL., *supra* note 6, at 11.

65. McBain in 1916 observed the wide variation among states regarding whether the details of a home rule system was driven primarily by constitutional provisions or by statutes. MCBAIN, *supra* note 8, at 114–17, 658–61.

66. *Id.* at 259, 413–14. *See also* Brachtenbach, *supra* note 6, at 299–300.

67. RICHARDSON ET AL., *supra* note 6, at 11.

68. For example, Alaska's constitution at article X, section 1 states that the purpose of Alaska's local government article is "to provide for maximum local self-government with a minimum of local government units," and article X, section 11 states: "A home rule borough or city may exercise all legislative powers not prohibited by law or by charter." ALASKA CONST. art. X, §§ 1, 11. California's constitution art. XI, section 5 provides that cities "may make and enforce all ordinances and regulations in respect to municipal affairs . . . subject to general laws." CAL. CONST. art. XI, § 5.

But the courts tend to defer to state legislatures when it comes to determining what are "statewide matters" versus "local affairs."[69] This means that state legislatures or courts can limit local powers by cordoning off certain policy areas as "statewide" in character.[70] A few states have adopted home rule provisions based on a model suggested by the National League of Cities, which grants municipal corporations all powers not expressly denied to them by statute.[71] The model's language essentially mirrors the Washington constitution's treatment of police power, but extends it to all city powers, blocking the operation of Dillon's Rule across the board.[72] On the other hand, some state constitutional provisions on local government tilt the other direction and make legislative control much more explicit.[73] Although home rule provisions have gradually spread to most states—including many after World War II that cover county government[74]—constitutional language continues to be varied and often idiosyncratic.

One reason for the different approaches to and understandings of home rule is that the late nineteenth century and Progressive Era home rule movement was a coalition of people with quite divergent political philosophies and purposes who united only through a shared interest in replacing Dillon's Rule and promoting distinct approaches under the common title of "home rule." In an insightful 2003 article,[75] Harvard law professor David J. Barron identified three distinct groups of home rule advocates during the Progressive Era:

1. The "Old Conservative City" advocates who agreed with Dillon that government should not promote special interests and that high taxes and expanded state or local services smacked of socialism, but who believed that state governments were corrupt and exploitative and therefore should have less control over cities.[76] Their answer was to prevent states from directly taxing

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Colorado's constitution provides cities with "all . . . powers necessary, requisite or proper for the government and administration of its local and municipal matters," as well as authority over certain specified topics. COLO. CONST. art. XX, § 6 (2013).

69. Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 290–93 (1968).

70. *Id.*

71. *Id.* at 290.

72. *Id. See also, e.g.*, S.D. CONST. art. IX, § 2 (providing that a governmental unit whose voters have adopted a home rule charter "may exercise any legislative power or perform any function not denied by its charter, the Constitution or the general laws of the state").

73. Vanlandingham, *supra* note 69, at 293–94.

74. KRANE ET AL., *supra* note 10, at 11.

75. David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003).

76. *Id.* at 2292–300.

localities,[77] and to move powers from the state to the cities subject to limits, including limits on taxes, debt, and regulatory powers beyond the "traditional" police powers.[78]

2. "Administrative City" reformers who concluded that the rapid growth of urban areas demanded more active local governance. Like the conservatives, they thought that local government powers should be limited, but they focused primarily on encouraging apolitical, professional, "businesslike" city administration. This wing of the reform movement gave rise to the city manager form of government that is widespread today.[79]
3. "Social City" advocates who saw "city power as public and political, rather than as quasi-private or administrative,"[80] who wanted to expand city planning, city services and taxes, and whose efforts fostered municipal ownership of utilities.[81] The Social City activists were regularly charged with having socialistic tendencies.[82]

The different goals and perspectives within this coalition of "home rule reformers" is important because it suggests that the public at-large (and judges) had very different ideas about what these constitutional and statutory home rule provisions were meant to achieve or should be permitted to achieve. To the extent that judges remained tied to Dillon's Rule, either by belief or by habit, those jurists might reject the "Social City" approach and instead interpret constitutional home rule provisions conservatively, often consistent with Dillon's Rule.

In addition to the differences in the goals of home rule advocates, the language of home rule provisions varied from state to state. As early as 1916, Columbia University professor Howard McBain's extensive treatise, *The Law and the Practice of Municipal Home Rule*, detailed the remarkable variation in a dozen state constitutional provisions that either

77. The goal of preventing state governments from levying taxes at the local level is reflected in constitutional prohibitions on state imposition of taxes for local purposes. One example is found in the Washington constitution at article XI, section 12, which provides: "The legislature shall have no power to impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes." WASH. CONST. art. XI, § 12. Nor may a state tax commission assess or reassess property for local tax purposes. *See* State *ex rel.* Tax Comm'n v. Redd, 6 P.2d 619 (Wash. 1932).

78. Barron, *supra* note 75, at 2292–300.

79. *Id.* at 2300–09.

80. *Id.* at 2309.

81. *Id.* at 2311–21.

82. *Id.* at 2310.

explicitly or implicitly allowed for home rule charters. [83] McBain observed:

> In the drafting of a constitutional provision granting home rule to cities perhaps the most difficult problem is that of establishing a clear line of demarcation between those subjects-matter which cities may regulate and control in a manner that may be contrary to the provisions of state laws and those in respect to which state laws will supersede the provisions of a home rule charter.[84]

McBain also concluded that no state's home rule provision was "entirely clear and unmistakable in this regard."[85] McBain's observations about the differences among states' constitutional and statutory home rule provisions, and his detailed analysis of the consequent differences in judicial approaches, were supplemented by McGoldrick in 1933[86] and by a team led by the University of Nebraska's Dale Krane in 2001.[87]

Both McBain's treatise and the later studies also demonstrated that the difficulty of drafting or enacting clear constitutional provisions on the local–state relationship meant that legislatures, supported by the courts, would continue to exercise significant control over cities, with the degree of control and the details being worked out differently from state to state.[88] In a 1949 booklet urging action to strengthen home rule, the American Municipal Association observed:

> It is evident that [the courts] are in a position to make the path of the city smooth or rocky. Unfortunately judges in a number of states have taken a dim view of municipal self-government . . . . Unless this attitude can be changed, home rule is likely to be but partially successful at best.[89]

In their comprehensive fifty-state review of home rule provisions in theory and in practice, Krane and his co-authors similarly concluded:

> Despite the enlargement of local government discretion by state legislatures during the last half of the twentieth century, the actions of state legislatures have often been negated by state courts that have

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83. *See* MCBAIN, *supra* note 8. The states included in McBain's study were Missouri, California, Washington, Minnesota, Colorado, Oklahoma, Arizona, Oregon, Michigan, Ohio, Nebraska, and Texas.

84. *Id.* at 673.

85. *Id.* at 682.

86. MCGOLDRICK, *supra* note 9.

87. *See* KRANE ET AL., *supra* note 10.

88. *See, e.g.*, CHICAGO HOME RULE COMM'N, *supra* note 63, at 199–200; RICHARDSON ET. AL., *supra* note 6, at 12–13, 18; Vandlandingham, *supra* note 69, at 310–14.

89. RODNEY L. MOTT, AM. MUNICIPAL ASS'N, HOME RULE FOR AMERICA'S CITIES 51 (1949).

> been reluctant to drop the catechism of Dillon's Rule. Crabbed judicial interpretations have continued to construe local government power very narrowly, even when the legislature has indicated that it has a contrary intent.[90]

With that background, we turn to Washington State, one of the early home rule jurisdictions, to see how the tug-of-war between city independence and legislative constraints has gone back and forth during the past 125 years, with the courts playing an active, though inconsistent, role in the process. In the instance of Washington State, this Article discusses whether Krane's conclusions are accurate, and also whether Barron's insights about different Progressive Era understandings about the divergent political purposes for "home rule" in the first place, can shed light on what subsequently occurred in Washington.

III. WASHINGTON'S CONSTITUTIONAL FRAMEWORK: TWO "EASY" ISSUES: POLICE POWERS AND FLEXIBLE FORM OF CHARTER GOVERNMENT

A. Strong City Police Powers Under Article XI, §11

Two constitutional provisions drive the character of home rule in Washington: article XI, section 10 concerning city formation and charters, and article XI, section 11 relating to police power. The first provision, article XI, section 10, has resulted in significant flexibility in how cities structure their governments, without providing clear guidance on substantive city authority. The second provision, article XI, section 11, provides strong substantive police powers but does not provide guidance on the scope of nonregulatory activities such as the authority to operate municipal utilities or to deliver other public services.[91]

As noted above, article XI, section 10 prohibits the legislature from creating cities by granting charters through case-by-case "special laws."[92] After statehood, the incorporation, organization, and classification of cities and towns were required to be addressed only through general laws. Any city with a population of 20,000[93] or more would thereafter "be permitted to frame a charter for its own government, *consistent with*

90. KRANE ET AL., *supra* note 10, at 13.

91. For a discussion of the scope of police powers in Washington State and the difference between police powers and other powers exercised by cities, see Spitzer, *supra* note 60.

92. Prior to statehood, Washington cities were granted charters individually by the legislature. *See, e.g.*, An Act to Incorporate the City of Seattle, 1869 Wash. Sess. Laws 437; An Act to Incorporate the City of Tacoma, 1875 Wash. Sess. Laws 166.

93. The population threshold was reduced to 10,000 in 1964. WASH. CONST. amend. XL (amended 1963).

and subject to the Constitution and laws of this state."[94] New charters would be drafted by elected freeholders and then submitted to the voters for approval or rejection.[95] Charter amendments would also require voter approval.[96] Article XI, section 10 says nothing about the *content* of charters and nothing about the substantive powers of cities and towns, other than that the charters must be consistent with the constitution and general laws. As we will see below, the extent and scope of substantive powers of charter cities and other cities was left to articulation by the legislature and interpretation by the state supreme court.

Article XI, section 11 directly addresses substantive city powers in just one very important area: regulatory activity. It states:

> *Police and Sanitary Regulations.* Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.[97]

This is a strong home rule provision, with a direct, self-executing constitutional delegation of all regulatory powers to counties, cities, and towns, except to the extent those regulations conflict with preempting state law. It constitutes a clear constitutional allocation of authority either from a Dillon's Rule viewpoint (a power "granted in express words") or from any one of the three home rule concepts that Barron identifies as having existed in the early twentieth century.

The exercise of police powers was the earliest and strongest of municipal powers.[98] In 1889, prior to the shift in doctrine associated with Freund,[99] municipal police power was understood to mean the protection of public health and safety, the regulation of public order, and the requirement that people comport themselves so as not to harm others or their property.[100] Therefore, in drafting article XI, section 10, the delegates to Washington's constitutional convention were not doing anything radical; they were simply authorizing counties and cities to act within

94. WASH. CONST. art. XI, § 10 (emphasis added).

95. *Id.*

96. *Id.*

97. *Id.* at art. XI, § 11.

98. See, for example, the fire safety and public health regulations in Table VII of ancient Rome's first written code from 451 B.C. The Twelve Tables, *reprinted in* ANCIENT ROMAN STATUTES 11 (Johnson et al. eds., 1961). *See also* Spitzer, *supra* note 60, at 497.

99. *See supra* notes 57–59 and accompanying text.

100. *See supra* notes 38–39 and accompanying text.

traditional roles.[101] The early Washington Supreme Court was unwilling to second guess a city council's reasons for making it illegal to solicit for taxi services as passengers disembarked from trains. The justices held that the facially legitimate purpose of protecting the public from annoyance and confusion was sufficient.[102] The court also upheld a city's six-mile-per-hour speed limit for cars,[103] anti-gaming ordinances,[104] and the regulation of jitney busses,[105] notwithstanding arguments that the state had preempted the respective fields of regulation. However, reflecting late nineteenth century laissez-faire doctrines that were skeptical of state or local police power when used to intervene in the economy, in the twentieth century's first decade the court overturned statutes requiring the licensing of horseshoers[106] and plumbers,[107] and regulating the management of dental offices.[108] Shortly after progressives swept the 1910 elections and the legislature enacted new consumer protection and workplace safety regulations,[109] the court reversed its stance on the exercise of police power to regulate economic activity.[110] The justices upheld new utility regulations,[111] the workers' compensation system,[112] and limits on women's work hours.[113] The court's more expansive view of the police power was reflected in Justice Stephen Chadwick's opinion in *State v. Mountain Timber*, where he wrote:

> The scope of the police power is to be measured by the legislative will of the people upon questions of public concern, not in acts passed in response to sporadic impulses or exuberant displays of emotion, but in those enacted in affirmance of established usage or of such standards of morality and expediency as have by gradual processes and accepted reason become so fixed as to fairly indicate

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101. Article XI, section 10 was modeled on CAL. CONST. of 1879, art. XI, § 6 and on MO. CONST. of 1875, art. IX, § 16. Arthur S. Beardsley, Sources of the Washington State Constitution (1939), *in* STATE OF WASHINGTON, 2011–2012 LEGISLATIVE MANUAL 414 (2011).

102. City of Seattle v. Hurst, 97 P. 454, 457 (Wash. 1908).

103. City of Bellingham v. Cissna, 87 P. 481 (Wash. 1906).

104. State v. Hagimori, 107 P. 855 (Wash. 1910); City of Seattle v. MacDonald, 91 P. 952 (Wash. 1907).

105. Allen v. City of Bellingham, 163 P. 18 (Wash. 1917).

106. *In re* Aubrey, 78 P. 900 (Wash. 1904).

107. State *ex rel.* Richey v. Smith, 84 P. 851 (Wash. 1906).

108. State v. Brown, 79 P. 635 (Wash. 1905).

109. *See generally* Hugh Spitzer, *Pivoting to Progressivism: Justice Stephen J. Chadwick, the Washington Supreme Court, and Change in Early 20th-Century Judicial Reasoning and Rhetoric*, 104 PAC. NORTHWEST Q. 107 (2013).

110. *Id.* at 113–15.

111. State *ex rel.* Webster v. Superior Court, 120 P. 861 (Wash. 1912).

112. State v. Mountain Timber Co., 135 P. 645 (Wash. 1913).

113. State v. Somerville, 122 P. 324 (Wash. 1912).

> the better will of the people in their social, industrial and political development.[114]

The Washington Supreme Court's robust view of state police power was translated to city police power as well. In *Detamore v. Hindley*,[115] upholding Spokane's authority to require the grade separation of railroads, the court in 1915 ruled that article XI, section 11 provided "a direct delegation of the police power as ample within its limits as that possessed by the Legislature itself. It requires no legislative sanction for its exercise so long as the subject-matter is local, the regulation reasonable and consistent with the general laws."[116] This strong constitutional delegation of the police power initially seems to have been recognized as applying to first class (charter) cities. For example, in *Smith v. City of Spokane*,[117] the court upheld Spokane's complete control over solid waste handling and disposal, ruling: "In all matters pertaining to the public health nearly if not the entire police power of the state is vested in municipal corporations of the first class."[118] In *Brennan v. City of Seattle*,[119] the court in 1929 succinctly stated: "[T]he local police power of the cities of the first class . . . is, by Constitution and general statutory grant, the same as the police power of the state, except as restricted by legislative enactment."[120] This principle regarding the self-executing nature of article XI, section 11 was later expressly recognized with respect to other classes of cities as well.[121]

Detamore v. Hindley noted that the subject matter of city regulations was restricted to "local" matters, but Washington's supreme court

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114. *Mountain Timber*, 135 P. at 648–49.

115. Detamore v. Hindley, 145 P. 462 (Wash. 1915).

116. *Id.* at 463.

117. Smith v. City of Spokane, 104 P. 249 (Wash. 1909).

118. *Id.* at 250. *See also*, Shepard v. Seattle, 109 P. 1067, 1069 (Wash. 1910).

119. Brennan v. City of Seattle, 276 P. 886 (Wash. 1929).

120. *Id.* at 887. An even stronger statement on the vibrancy of city police powers appeared in *Malette v. Spokane*: "As to matters of local concern, wider powers than those conferred upon cities of the first class by the Constitution and laws of this state can hardly be conceived. It seems plain, therefore that, unless the ordinance in question is contrary to some public policy of the state either expressed by statute or implied therefrom, it must be held valid." 137 P. 496, 504 (Wash. 1913).

121. *See, e.g.*, Hass v. City of Kirkland, 481 P.2d 9, 11 (Wash. 1971). Kirkland was a third class city whose fire code was challenged by a developer. The Supreme Court of Washington upheld the city ordinance with an opinion that included broad language about the constitutional grant of police powers to Washington cities. At the same time, the opinion noted that the third class city statute also granted sufficient authority for the fire code provisions involved, so arguably the city's powers in that instance were dependent on the legislature. In an earlier case, *Lauterbach v. City of Centralia*, 304 P.2d 656, 659–60 (Wash. 1956), the court emphasized that even if a city acts pursuant to a constitutional grant of police power, the terms of a relevant statute may circumscribe the exercise of that power.

has held that cities may exercise police power in areas where the state has enacted regulatory statutes, even though the local ordinances are broader and more inclusive than statutes upon the same general subjects.[122] If the legislature is silent on its intent to occupy a given field, the court, in ruling on preemption of a city ordinance, considers the purposes of the statute and the circumstances upon which the statute was intended to operate. In *State v. Kirwin*,[123] the court recently upheld a city's anti-littering ordinance that was tougher than corresponding state law, noting that a city regulatory ordinance conflicts with state law only if an ordinance directly conflicts with a state statute or "the legislature has manifested its intent to preempt the field."[124] A conflict arises when the two provisions are "contradictory and cannot coexist."[125] However, "the court will not interpret a statute to deprive a municipality of the power to legislate on a particular subject unless that clearly is the legislative intent."[126] Even if portions of an ordinance are held void because of a conflict with state law, the other sections can remain effective.[127]

B. Flexibility in the Form of Charter City Government

In addition to city police power, the other area where Washington's constitution has provided strong home rule relates to the form of government in charter cities. Although some delegates to the 1889 convention argued against a constitutional right to a locally generated charter for the state's larger municipalities, the urban delegates maintained that big cities needed to be able to frame their charters immediately and could not afford to wait for the new legislature to draft a statute on city formation and governance.[128] Delegate and Seattle lawyer Trusten P. Dyer came from Missouri, whose 1875 constitution was the first of its kind with a home rule provision.[129] According to one newspaper report, he told the

122. Soc'y Theatre v. City of Seattle, 203 P. 21 (Wash. 1922).

123. State v. Kirwin, 203 P.3d 1044 (Wash. 2009).

124. *Id.* at 1047. A helpful discussion of statutory "field preemption" of a regulatory topic versus "conflict preemption" when a specific city ordinance directly and irreconcilably conflicts with a statute appears at *Lawson v. Pasco*, 230 P.3d 1038, 1040–43 (Wash. 2010).

125. *Kirwin*, 203 P.3d at 1048.

126. *Id.* at 1049.

127. City of Seattle v. Hewetson, 164 P. 234, 235 (Wash. 1917).

128. JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, at 723–28 (Rosenow ed., 1962). Delegate E. H. Sullivan of Colfax complained that under its legislatively granted charter, his city only had the power "to abate a nuisance, and then only if in the middle of the street." *To Decide at Olympia*, TACOMA LEDGER, July 25, 1889, at 4. He also declared, perhaps tongue-in-cheek, that "legislators from Lincoln and Whitman counties know nothing of the needs of large and prosperous cities. Many of them never saw a large city." *Id.*

129. *The Conventions*, SPOKANE FALLS REV., July 25, 1889, at 1.

convention that he "had lived all his life in St. Louis until he came to this territory, and this system worked well there," and that "[t]here were many things, such as police and sanitary regulations, which cities should have, but which the remainder of the county did not have."[130] Discussion of this section of the constitution was lively, with delegates voting once to retain the home rule charter provision in article XI, voting once to delete it, and then finally reinstating the language.[131] The size of a city permitted to frame its own charter was also hotly contested, with proposals ranging from 5,000 inhabitants to 50,000.[132] The convention settled on a 20,000 threshold in the final version.[133]

Early Washington cases voiced the principle that unless a direct conflict with state law is apparent, the residents of first class cities should be free to structure their governance in any way they see fit. For example, early twentieth-century state supreme courts rejected challenges to charter provisions providing for recall of city officers,[134] the initiative and referendum,[135] residency requirements for planning commissioners,[136] a commission form of government,[137] the process for amending charters,[138] and qualifications for city office.[139] Later cases recognized charter provisions mandating that certain council actions be taken by ordinance,[140] and upheld a charter section establishing a local civil service system.[141]

At the same time, Washington's supreme court made it clear that "where the Legislature has enacted laws relating to [charter] cities, or to the powers and duties of their officers, such laws supersede charter provisions in conflict therewith."[142] For example, Washington courts have held that express statutory provisions supersede charter language relating

130. *Id.*

131. Rosenow, *supra* note 128, at 723–28.

132. *Id.* at 727–28; *To Decide at Olympia*, TACOMA LEDGER, July 25, 1889, at 4.

133. Rosenow, *supra* note 128, at 727–28.

134. *See* Hilzinger v. Gillman, 105 P. 471 (Wash. 1909).

135. *See* Hartig v. City of Seattle, 102 P. 408 (Wash. 1909).

136. *See* Bussell v. Gill, 108 P. 1080 (Wash. 1910).

137. *See* Walker v. City of Spokane, 113 P. 775 (Wash. 1911). Progressive support of the commission form of government as a "businesslike" administrative reform is reflected in contemporary newspaper accounts. *See, e.g.*, *Commission Debate Attracts Crowd*, PULLMAN HERALD, Sept. 22, 1911, at 1; *Commission Plan for Cities*, ABERDEEN HERALD, Mar. 13, 1911, at 1.

138. *See* Hindman v. Boyd, 84 P. 609, 612 (Wash. 1906).

139. *See* State *ex rel.* Griffiths v. Superior Court, 33 P.2d 94 (Wash. 1934).

140. *See* State *ex rel.* Mattice v. Seattle, 21 P.2d 288 (Wash. 1933).

141. *See* City of Yakima v. Yakima Police & Fire Civil Serv. Comm'n, 631 P.2d 400 (Wash. 1981).

142. Ewing v. City of Seattle, 104 P. 259, 262 (Wash. 1909).

to annexations.[143] Additionally, the state supreme court has on several occasions held that clear statutory delegation of decisionmaking authority to the "legislative authority" of a city means direct delegation to the city council itself, notwithstanding contrary charter provisions allowing for referenda. Direct delegation cases have arisen in the context of charter provisions on labor contract dispute resolution,[144] the granting of street franchises,[145] and the purchase and acquisition of a public utility after initial voter approval.[146] But the residents of cities of sufficient size may opt for a local charter and there "is no qualification or reservation of this right."[147] Absent a clear conflict with state law, article XI, section 10 provides for substantial home rule powers over a charter city's *form* of government.[148]

IV. CITY AUTHORITY TO PROVIDE PUBLIC SERVICES: AT THE WHIM OF THE LEGISLATURE, OR PERHAPS THE COURT?

Although Washington's 1889 constitution provides clarity about inherent city police powers and about charter city control of governmental form, home rule powers with respect to city authority to provide public services, and the tools to carry out city powers, have been dependent on both statutory grants and court interpretation. The elected lawmakers' ability to wield ultimate control over the exercise of city powers by enacting "general laws" is what led Robert Brachtenbach, in 1954, to label home rule as being "at the whim of the legislature."[149] But as described below, it is the court rulings that have been more whimsical, with doctrine fluctuating over time and with some recent opinions appearing inconsistent with each other and sometimes altogether contradictory. Even after the 1967 legislature adopted the Optional Municipal Code statute and extended to most cities the same authority as first class charter cities, i.e., "the broadest powers of local self-government consistent with the Constitution of this state,"[150] the Supreme Court of Washington has spo-

143. *See* State *ex rel.* Bowen v. Kruegel, 409 P.2d 458 (Wash. 1965); State *ex rel.* Snell v. Warner, 331 P. 25 (Wash. 1892).

144. *See* State *ex rel.* Everett Fire Fighters Local No. 350 v. Johnson, 278 P.2d 662 (Wash. 1955).

145. *See* Neils v. City of Seattle, 53 P.2d 848 (Wash. 1936).

146. *See* State *ex rel.* Guthrie v. Richland, 494 P.2d 990 (Wash. 1972).

147. State *ex rel.* Billington v. Sinclair, 183 P.2d 813, 817 (Wash. 1947).

148. Under article XI, section 4 of the Washington State Constitution, charter counties have been accorded similar broad flexibility in framing their own organic law. State *ex rel.* Carroll v. King Cnty., 474 P.2d 877, 879 (Wash. 1970).

149. *See* Brachtenbach, *supra* note 6.

150. WASH. REV. CODE § 35A.01.010 (2012). *See infra* notes 230–247 and accompanying text.

radically voiced Dillon's Rule precepts in cases rejecting city actions as lacking authority or conflicting with state authority.

A. Early Approaches to Public Service Powers

The judiciary's inconsistent approach to city substantive power began immediately after statehood. Things got off to a rocky start, from the perspective of Washington's early home rule advocates, in terms of authority beyond the police power. Although article XI, section 10 of the 1889 constitution had been cast as the basis for home rule in 1891 the newly-installed Supreme Court of Washington held that Tacoma's creation of a police court in its new city charter was outside the constitutional home rule grant.[151] In *In re Cloherty*,[152] Justice Theodore Stiles, who had firmly supported home rule charters in the constitutional convention but who was fundamentally suspicious of governmental power,[153] cited Dillon and stated:

> [I]t must be remembered that, although the power to frame a charter is conferred by the constitution, no greater intendments are inferred from that fact than if it were conferred by a mere act of the legislature, since, by the same sections, these favored cities are to be at all times subject to the general laws of the state. They are not in any sense erected into independent governments; their existence as municipal governments depends upon the legislative will . . . . A charter framed under the constitutional provision is of no more or larger force than a legislative charter, and can lawfully treat only of matters relating to the internal management and control of municipal affairs, subject to constitutional and legislative regulations. It provides officers, ways and means, police, and other *minutiae* of local administration . . . .[154]

In his 1916 analysis, McBain commented: "[I]t is plain to see that the court in this early case was prepared to take a very narrow view of the scope of power embraced within the authority to frame a charter . . . ."[155] Several other early cases repeated this "very narrow view." For example,

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151. *See In re* Cloherty, 27 P. 1064 (Wash. 1891).

152. *See id.*

153. Rosenow, *supra* note 128. In an 1899 speech to the Annual Convention of the Washington State Bar Association, Justice Stiles remarked: "Municipal corporations, with their stores of delegated powers, are the natural propagating grounds for laws that hedge in a pinch the free-born American until he sometimes wonders if he were not better off to live under the benign sway of Turkish Pasha or Algerian Day." PROCEEDINGS OF THE WASHINGTON STATE BAR ASSOCIATION ELEVENTH ANNUAL SESSION 59, 69 (1899).

154. *Cloherty*, 27 P. at 1066 (emphasis in original).

155. MCBAIN, *supra* note 8, at 401.

in 1896, the court held in *Tacoma Gas & Electric v. City of Tacoma*[156] that it "is a well-settled rule of construction that a delegation of powers will not be presumed in favor of a municipal corporation unless they be such as are necessary to its corporate existence, but that the same must be clearly conferred by express statutory enactment." Again, in 1906, the court cited Dillon in *Farwell v. City of Seattle*, holding that a city could not sell water outside of its geographical limits unless "some statute . . . expressly or impliedly permits it."[157]

In addition, the first state legislature contributed to the early judicial reluctance to sustain many city powers absent a statutory grant. In its inaugural session, lawmakers passed a comprehensive act providing for "the organization, classification, incorporation and government of municipal corporations."[158] The new law included a section on first class cities,[159] which included, at section 5,[160] a laundry list of charter city powers that, in large part, still remain current Washington law.[161] That statute was (and is) a mish-mash of corporate powers such as levying taxes, borrowing money, and acquiring property; public service powers such as providing for parks, libraries, hospitals, streets and sidewalks; and at least a dozen other general subsections giving express authority to charter cities to, among other things, restrain and punish vagrants and prostitutes, regulate disorderly conduct and activities endangering public health and safety, and to declare and abate nuisances.[162] It is unclear why the first legislature deemed it necessary to expressly grant these police powers, given that the constitution had already directly conferred them on counties, cities, and towns. Some home rule advocates soon criticized the legislature for expressly awarding first class cities with specific public service powers, which, they argued, had also been constitutionally conferred on charter cities unless they were explicitly *denied* by the leg-

156. Tacoma Gas & Elec. Light Co. v. City of Tacoma, 44 P. 655, 656 (Wash. 1896). That case involved the City of Tacoma's attempt to control rates charged to the public for natural gas. The above quote was repeated in *Benton v. Seattle Electric Co.*, 96 P. 1033, 1035 (Wash. 1908), a case involving whether a city council's grant of a street car franchise was subject to referendum.

157. Farwell v. City of Seattle, 86 P. 217, 218 (Wash. 1906).

158. 1889–90 Wash. Sess. Laws 215.

159. *Id.*

160. *Id.* at 218.

161. WASH. REV. CODE § 35.22.280 (2012). Thirty-seven of the original thirty-eight subsections of that statute remain in effect today, with only minor amendments. The deleted subsection relates to juvenile detention facilities, which are now a county and state function. *See generally* WASH. REV. CODE § 13.40.

162. *See, e.g.*, WASH. REV. CODE § 35.22.280(20)–(35) (2012).

islature.[163] Members of the Supreme Court of Washington, however, looked quite favorably on "Judge Dillon's valuable work,"[164] written by a "learned author."[165] The fact that lawmakers saw fit to expressly grant three dozen specific powers to first class cities may have encouraged the state's first justices to apply the traditional Dillon's Rule assumption that cities lacked many powers unless they were clearly granted by statute. For example, in 1896 the court ruled that because the first legislature's "enabling act" for charter cities had expressly given first class cities authority to regulate private water rates, the legislature must have meant to deny other rate regulation, such as gas and electricity prices.[166]

B. The Progressive Era and a New Judicial Outlook

Things noticeably changed around the end of the twentieth century's first decade, when the progressive movement swiftly altered the public's attitude about the proper role of government,[167] and the court's rhetoric about city powers shifted radically. Cases now began to contain language to the effect that "growing cities should be empowered to determine for themselves . . . the many important and complex questions of local policy";[168] "the constitution grants cities complete local self-government in municipal affairs";[169] and "the spirit of the Constitution . . . is to grant the fullest measure of self-government to cities of the first class, subject to the general law."[170] Although these cases generally focused on the form of city government rather than on substantive powers, for the first time in recent history, restrictive language about city powers disappeared from judicial discourse. In *Ennis v. Superior Court of Spokane County*,[171] upholding the Spokane City Council's removal of a civil service commissioner, the Supreme Court of Washington in 1929 reiterated: "[I]n Washington[,] cities of the first class are vested with very extensive powers . . . ."[172] The opinion then went on to note:

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163. *See, e.g.*, LEO JONES, UNIV. OF WASH. BUREAU OF DEBATE AND DISCUSSION, MUNICIPAL HOME RULE IN WASHINGTON 4–5 (1915).

164. City of Tacoma v. Lillis, 31 P. 321, 323 (Wash. 1892); *see also* State v. City of Pullman, 63 P. 265, 267 (Wash. 1900).

165. Williams v. Shoudy, 41 P. 169, 171 (Wash. 1895).

166. Tacoma Gas & Elec. Light Co. v. City of Tacoma, 44 P. 655, 656 (Wash. 1896).

167. *See* Spitzer, *supra* note 109 and accompanying text. The Supreme Court of Washington's decisions on home rule issues during this period are analyzed in MCGOLDRICK, *supra* note 9, at 70–72.

168. Hilzinger v. Gillman, 105 P. 471, 474 (Wash. 1909).

169. Bussell v. Gill, 108 P. 1080, 1083 (Wash. 1910).

170. State *ex rel.* Hindley v. Superior Court, 126 P. 920, 923 (Wash. 1912).

171. Ennis v. Superior Court, 279 P. 601 (Wash. 1929).

172. *Id.* at 605.

> The rule, quoted by this court, laid down in Dillon on Municipal Corporations, § 89, to the effect that 'any fair or reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied,' should not be followed in determining a question involving the powers of a city of the first class, under its charter, as subject to and controlled by general laws.[173]

The court reaffirmed this principle a decade later in *Ayers v. City of Tacoma*,[174] a case that challenged a first class city's establishment of a pension system with no express statutory authorization. The court noted a statute granting charter cities "all such powers as are usually exercised by municipal corporations of like character and degree, whether the same shall be specifically enumerated in this act or not," and replaced a strict construction standard with a liberal construction approach.[175]

But in Washington, as in other parts of the country, the push for constitutional home rule provisions lost political momentum in the course of the 1920s. Reflecting on this, Columbia University law professor Joseph McGoldrick suggested in 1933 that this was in part due to the conflicting concepts of what home rule was meant to achieve, i.e., restoration of power to the "self-called good citizens" versus increased popular self-government versus a broader philosophy of government service delivery.[176] McGoldrick noted: "Popular self-government may be disappointingly different from 'good government.' . . . The appreciation of this helps us realize why the home rule movement appears to be fading like all fads. To some adherents it was never more than a slogan."[177]

Notwithstanding McGoldrick's 1933 view of home rule as something of a passing fad, in Washington home rule had by that time become well entrenched as far as the police power and charter city government were concerned. In several areas of municipal law doctrine, however, Dillon's views on limited city powers continued to have a profound influence on Washington municipal law, down to the present. For example, even charter cities have continued to be restricted in their ability to impose taxes,[178] borrow money,[179] or exercise eminent domain[180] without

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173. *Id.*

174. Ayers v. City of Tacoma, 108 P.2d 348 (Wash. 1940).

175. *Id.* at 351–52. The statutes quoted in *Ayers* are now codified at WASH. REV. CODE §§ 35.22.195 and 35.22.900 (2012).

176. MCGOLDRICK, *supra* note 9, at 2–3.

177. *Id.* at 3.

178. *See* State *ex. rel.* Sch. Dist. No. 37 v. Clark Cnty., 31 P.2d 897 (Wash. 1934) (county authorities must have express authority, either under the constitution or an act of the legislature, to levy taxes); Great N. Ry. Co. v. Stevens Cnty., 183 P. 65 (Wash. 1919) (a county case holding that

clear statutory authority. With respect to taxes and eminent domain, this probably has its roots in the philosophy, strongly voiced by Dillon, that, as intrusions on private property, these governmental powers must be limited.[181]

Dillon's Rule also stayed in place for special purpose districts, which, in contrast with general purpose cities and counties, are created to focus on specific services or facilities assigned to them by statute.[182] In 1917, the state supreme court unanimously ruled that, absent express statutory authority, a port district lacked authority to build a belt line railway.[183] The court quoted Dillon extensively, as well as its own 1896 opinion in which it had reiterated "a well-settled rule of construction that a delegation of powers will not be presumed in favor of a municipal corporation, unless they be such as are necessary to its corporate existence, but that the same must be clearly conferred by express statutory enactment."[184] Two years later the court blocked a port's attempt to build an ice manufacturing plant, noting that "any doubt as to the power of a municipal corporation must be resolved against the municipality," and that "the policy of the law has always been to limit rather than to extend the proprietary functions of a municipal corporation."[185] Later cases have

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the state constitution does not provide a direct grant of taxing authority to municipal corporations). Although Washington cases do not refer to Dillon in connection with this principle, it was emphasized strongly by Dillon in his treatise. DILLON, *supra* note 17, §§ 604–05, at 575–78.

179. *See* Edwards v. City of Renton, 409 P.2d 153 (Wash. 1965) (municipal corporations do not possess an inherent power to borrow money, so authority must be found in appropriate legislative provisions). Interestingly, in his 1872 first edition, Dillon took the position that borrowing money was an implied power of municipal corporations and did not require express statutory authorization. DILLON, *supra* note 17, § 81, at 126. By the fourth edition in 1890, he acknowledged some controversy on the question. 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS §117, at 182 (4th ed. 1890). By the fifth edition in 1911, he noted, "[T]he author is strongly inclined *to deny the existence of a general implied or general incidental power* to borrow money." 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 278, at 522 (5th ed. 1911) (emphasis in original). The need for express constitutional or statutory authority to borrow is now widely accepted in municipal law. *See, e.g.*, 15 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 39.11, at 17–22 (3d ed. 2005).

180. *See* City of Seattle v. State, 338 P.2d 126 (Wash. 1959) (the state, by statute, may delegate the power of eminent domain to a political subdivision, but such statutes are strictly construed and the power must be given in express terms or by necessary implication). This doctrine is discussed in DILLON, *supra* note 17, §§ 467–70, at 451–53.

181. *See infra* notes 33–37 and accompanying text.

182. LUNDIN, *supra* note 11, at 242; 1 MCQUILLIN, *supra* note 179, § 2:33, at 232–38.

183. State *ex rel.* Huggins v. Bridges, 166 P. 780, 783 (Wash. 1917).

184. *Id.* at 781 (quoting from Tacoma Gas & Elec. Light Co. v. City of Tacoma, 44 P. 655 (Wash. 1896)).

185. State *ex rel.* Hill v. Port of Seattle, 177 P. 671, 673 (Wash. 1919).

used similar restrictive language with respect to ports[186] and other special purpose districts, including school districts,[187] community college districts,[188] public utility districts,[189] drainage districts,[190] irrigation districts,[191] metropolitan municipal corporations,[192] and library capital facility areas.[193] In most of those opinions, the court mentioned Dillon's Rule with respect to "municipal corporations" generally, and rarely distinguished special purpose districts from cities in general or from charter cities in particular. Indeed, in a few instances the Supreme Court of Washington continued to apply Dillon's Rule to noncharter cities[194] and to towns.[195] The court should not necessarily have raised the distinction in cases that did not involve first class charter cities. But the special purpose district and noncharter city cases kept the language of Dillon's Rule alive in judicial rhetoric and rationales in municipal law cases, and that language had a way of later bleeding over into cases involving charter cities and, still later, optional code cities.

Although the early twentieth century saw home rule gain traction with regard to cities, particularly charter cities of the first class, courts continued to rely on the concepts of Dillon's Rule in cases regarding specific substantive areas, special purpose districts, and noncharter cities.

C. Post-World War II: The "Second Wave of Home Rule Reform"

The continued Dillon's Rule references in Washington municipal case law, and the more restrictive judicial approach to noncharter city powers, led to both academic and political criticism. In his 1954 law review comment,[196] future Washington Supreme Court Justice Robert F. Brachtenbach expressed concern about the legislature's ultimate control over cities. He criticized a then-recent state supreme court opinion that

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186. *See, e.g.*, Port of Seattle v. Wash. Utils. & Transp. Comm'n, 597 P.2d 383, 386 (Wash. 1979).

187. Union High Sch. Dist. No. 1 v. Taxpayers of Union High Sch. Dist. No. 1, 172 P.2d 591, 596 (Wash. 1946); McGilvra v. Seattle Sch. Dist. No. 1, 194 P. 817, 818–19 (Wash. 1921).

188. Moses Lake Sch. Dist. No. 161 v. Big Bend Cmty. Coll., 503 P.2d 86, 90 (Wash. 1972).

189. Sundquist Homes, Inc. v. Snohomish Cnty. Pub. Util. Dist., 997 P.2d 915, 918 (Wash. 2000). *See also* Kightlinger v. Pub. Util. Dist. No. 1, 81 P.3d 876, 881 (Wash. App. 2003).

190. Misich v. McGuire, 167 P.2d 462, 464 (Wash. 1946).

191. Cowden v. Kennewick Irrigation Dist., 888 P.2d 1225 (Wash. App. 1995).

192. Municipality of Metro. Seattle v. Amalgamated Transit Union, 826 P.2d 167 (Wash. 1992).

193. Granite Falls Library Capital Facility Area v. Taxpayers of Granite Falls, 953 P.2d 1150 (Wash. 1998).

194. Lauterbach v. City of Centralia, 304 P.2d 656, 659 (Wash. 1956).

195. Town of Othello v. Harder, 284 P.2d 1099, 1102 (Wash. 1955).

196. Brachtenbach, *supra* note 6.

appeared to restrict a charter city's range of actions and that emphasized the legislature's "right to determine what shall be the law of the state, both inside and outside of municipalities."[197] Justice Brachtenbach conceded that Washington cities enjoyed constitutional police powers and substantial statutorily granted authority, but he wrote that "the real issue is not whether they presently enjoy a particular power, but rather whether they are assured of the continuation of such power without interference . . . there is no such assurance in Washington."[198] He went on to list functions, such as zoning, that he viewed as purely local in character and therefore appropriate for local control without the legislature's involvement.[199] Brachtenbach's recommended solution was a rewrite of article XI, section 10 to remove the legislature's ability to interfere with city functions that "are strictly local or municipal in character."[200] Nine years later, University of Washington law professor Philip A. Trautman wrote an influential article in which he carefully documented the continuing legislative oversight and ultimate legislative control over Washington municipal corporations, including cities.[201] Trautman noted the many statutory powers provided to Washington cities, but concluded, as had Brachtenbach, that because both city police powers[202] and ultimately all municipal powers[203] were subject to general laws, the state's "home rule provision, which in some states serves as a limitation on legislative action, is of no real strength" in Washington.[204] He urged that the Supreme Court of Washington should "strengthen its interpretations in favor of the powers of first class cities when doubt exists and in favor of all municipal corporations when an issue of potential conflict with state statutes arises."[205]

Brachtenbach's and Trautman's critiques reflected a broader concern with the ability of municipalities to address the rapid post-World War II expansion of cities and suburbs in many parts of the country. That explosion of growth had led to increased demands on city and county

197. Mosebar v. Moore, 248 P.2d 385, 388 (Wash. 1952). Mosebar was discussed in Brachtenbach, *supra* note 6, at 297.

198. Brachtenbach, *supra* note 6, at 301–02.

199. *Id.* at 302–04.

200. *Id.* at 305.

201. *See* Trautman, *supra* note 4. Professor Trautman and Justice Brachtenbach had been high school friends and the former encouraged the latter to go into law. CHARLES H. SHELDON, THE WASHINGTON HIGH BENCH: A BIOGRAPHICAL HISTORY OF THE STATE SUPREME COURT 1889–1991 (1992).

202. WASH. CONST. art. XI, § 11.

203. *Id.* at § 10.

204. Trautman, *supra* note 4, at 782–83.

205. *Id.*

governments—demands for roads, water, sewer service, solid waste disposal, and improved land use and environmental planning.[206] New cities sprang up, and many existing small cities faced planning and infrastructure responsibilities that they had not handled before.[207] This post-World War II expansion led to a national "second wave of home rule reform" that focused on providing new and growing communities with the governance tools necessary to address larger suburban populations and a perceived need to provide regional governance, planning, and infrastructure solutions.[208]

In Washington State, the continued legal constraints on smaller, noncharter cities in cases like *Mosebar v. Moore*[209] and *Lauterbach v. City of Centralia*,[210] together with the interest in regional solutions, spurred a number of significant constitutional and statutory changes. In 1943, the legislature granted cities of all classes the option to convert to a city manager form of government.[211] In 1948, two constitutional amendments were approved: one providing for county home rule charters[212] and the other allowing the consolidation of a county and one or more cities into a single municipal corporation.[213] In 1957, the legislature authorized the creation of metropolitan municipal corporations comprised of cities, counties, and special purpose districts.[214] These new metropolitan municipal corporations were legally capable of providing transportation, water supply, pollution control, solid waste disposal, parks, and comprehensive planning, all on a regional basis.[215] Later that year, the Subcommittee on Cities, Towns, and Counties of the Washington State Legislative Council[216] issued a report entitled *Municipal Home Rule in Washington*,[217]

206. *See* Barron, *supra* note 75, at 2325; *see also* 1 WASH. STATE LOCAL GOVERNANCE STUDY COMM'N, A HISTORY OF WASHINGTON'S LOCAL GOVERNMENTS 29–34 (1988), *available at* http://mrsc.org/getmedia/776D508D-95F1-46DF-8635-938D2D858308/W3LGSC1.aspx; CHARLES N. GLAABAND & A. THEODORE BROWN, A HISTORY OF URBAN AMERICA 246–48, 291–99 (2d ed. 1976).

207. MEL SCOTT, AMERICAN CITY PLANNING SINCE 1890, at 483, 503–08 (1969).

208. Barron, *supra* note 75, at 2325–28; SCOTT, *supra* note 207, at 513.

209. Mosebar v. Moore, 248 P.2d 385, 388 (Wash. 1952).

210. Lauterbach v. City of Centralia, 304 P.2d 656, 659–60 (Wash. 1956).

211. 1943 Wash. Sess. Laws 841 (codified at WASH. REV. CODE § 35.18 (2012)).

212. WASH. CONST. art. XI, § 5, *amended by* WASH. CONST. amend. 21.

213. WASH. CONST. art. XI, § 16, *amended by* WASH. CONST. amend. 23.

214. 1957 Wash. Sess. Laws 804 (codified at WASH. REV. CODE § 35.58 (2012)).

215. *Id.*

216. The Washington State Legislative Council was created by 1957 Wash. Sess. Laws 36, and continued intermittently for several years, exercising research and certain other functions for the Washington legislature. *See* State *ex rel.* Hodde v. Superior Court, 244 P.2d 668 (Wash. 1952).

217. SUBCOMM. OF CITIES, TOWNS, & CNTYS. OF THE WASH. STATE LEGISLATIVE COUNCIL, MUNICIPAL HOME RULE IN WASHINGTON: PRELIMINARY REPORT (1957).

which criticized the state supreme court's cautious approach to local government powers[218] and recommended that the state constitution be amended to bar the legislature from enacting laws on municipal corporations on subjects that were not "general in terms and effect."[219] The report also proposed a constitutional provision providing noncharter cities with the choice of several "optional plans of government"[220] and expressly providing charter cities with any and all of the powers conferred by general law upon other municipal corporations of the same population class.[221] The Subcommittee's suggestions were not immediately acted upon, but a number of its recommendations reappeared in legislation adopted a decade later. In 1961, "recognizing the rapid population growth and increasing problems of the urban areas of the state," the legislature established another committee, the Joint Committee on Urban Area Government, to recommend changes in law that would help meet the challenges faced by urban governments.[222] The report of a blue-ribbon advisory committee to the Joint Committee[223] included a wide range of recommendations on regional and local government, including suggestions "to improve the powers and finances of adequately sized cities" and to increase the home rule powers of medium-sized cities.[224] The advisory committee's report,[225] and continuing pressure from local government advocates,[226] led to action in the legislature. In 1963, the legislature unanimously proposed a constitutional amendment, adopted the following year, which lowered the number of residents required to become a charter city from 20,000 to 10,000.[227] In 1965, a group of legislators, including later-Justice Brachtenbach and later-Attorney General Slade Gorton, proposed a further constitutional amendment that would substantially strengthen all city powers.[228] That proposal did not go forward,[229] but the 1965 legislature reorganized and codified existing city

218. *Id.* at 10.

219. *Id.* at 12.

220. *Id.* at 12–13.

221. *Id.* at 13–14.

222. 1961 Wash. Sess. Laws 2511.

223. CITIZENS ADVISORY COMM. TO THE JOINT COMM. ON URBAN AREA GOV'T, CITY AND SUBURB—COMMUNITY OR CHAOS? (1962) [hereinafter CITIZENS ADVISORY COMM.]. The members of the Advisory Committee are listed at p. 35 of that report and included "many leading citizens of the metropolitan areas." LUNDIN, *supra* note 11, at 147 n.g.

224. CITIZENS ADVISORY COMM., *supra* note 223, at 13.

225. LUNDIN, *supra* note 11, at 39.

226. *See, e.g.*, Doug Willix, *Council Group Urges Study of "Home Rule"*, SEATTLE TIMES, Oct. 28, 1965, at 59.

227. WASH. CONST. art. XI, § 10, *amended by* WASH. CONST. amend. 40.

228. H.R.J. Res. 23, 39th Leg. (Wash. 1965); S.J. Res. 16, 39th Leg. (Wash. 1965).

229. 10 Leg. Rec., 39th Sess. & 1st Ex. Sess. 132, 192 (Wash. 1965).

laws,[230] expressly broadened the powers of first class charter cities,[231] and formed a special Municipal Code Committee charged with developing legislation providing "a form of statutory home rule" for cities, including those cities too small to qualify for a charter under the constitution.[232] The following year, that same committee, chaired by Senator Martin Durkan, issued a progress report to the legislature. That report declared that Chapter 35A.11 of the draft legislation on city powers "expresses the state legislature's intent to confer the greatest power of local self-government consistent with the State Constitution, upon the cities and directs that the laws be liberally construed in favor of the city *as a clear mandate to abandon the so-called 'Dillon's Rule' of construction.*"[233] The Municipal Code Committee's recommendations led to enactment of the sweeping Optional Municipal Code in 1967.[234]

Echoing the recommendations of the 1957 Legislative Council report,[235] the Optional Municipal Code enabled existing cities or new cities to become "non-charter code cities"[236] with the option of using a mayor–council[237] (strong mayor) or council–manager[238] (professional city manager) form of government.[239] Cities with more than 10,000 residents could become "charter code cities" with the further option of shaping the structure of government to their own liking.[240] To draft the new optional municipal code statute, the Municipal Code Committee engaged a lawyer from the staff of the Association of Washington Cities—the primary ad-

230. 1965 Wash. Sess. Laws 1670. The new code provision covering city statutes was part of an overall recodification of all Washington state laws.

231. 1965 Wash. Sess. Laws 1798 (providing that any charter city would have all the powers conferred on cities and towns under the new municipal code provisions, "and all such powers as are usually exercised by municipal corporations of like character and degree").

232. 1965 Wash. Sess. Laws 2060.

233. MUNICIPAL CODE COMM., A REVIEW OF THE OBJECTIVES OF THE MUNICIPAL CODE COMMITTEE (1966) (emphasis added).

234. 1967 Wash. Sess. Laws ch. 200 (codified at WASH. REV. CODE § 35A (2012)). Former Washington State Representative Daniel G. Marsh, who served on the Municipal Code Committee, stated that the Optional Municipal Code legislation "was bi-partisan" and that "there wasn't a lot of controversy" about the bill. He said, "I remember that we got everything we wanted and we had no trouble passing it at all." Telephone Interview with Daniel G. Marsh, former Washington State Representative (Feb. 3, 2015).

235. Granite Falls Library Capital Facility Area v. Taxpayers of Granite Falls Library Capital Facility Area, 953 P.2d 1150 (1998). *See supra* text accompanying note 193.

236. 1967 Wash. Sess. Laws 1950 (codified at WASH. REV. CODE § 35A.02 and § 35A.03 (2012)).

237. 1967 Wash. Sess. Laws 1950 (codified at WASH. REV. CODE § 35A.12 (2012)).

238. 1967 Wash. Sess. Laws 1950 (codified at WASH. REV. CODE § 35A.13 (2012)).

239. Existing cities using another form of government, such as the city commission system, were permitted to retain that form when they converted to code city status. 1967 Wash. Sess. Laws 1950 (codified at WASH. REV. CODE § 35A.02.030 (2012)).

240. 1967 Wash. Sess. Laws 1950 (codified at WASH. REV. CODE § 35A.08 (2012)).

vocacy group for cities.[241] The citizens' advisory committee included representatives of the same organization, city finance officers, city attorneys, and the city managers association.[242] When enacted, the lengthy statute was described as "one of the least-discussed and least-understood bills" of the legislative session, but one that was "drafted in answer to the plea of cities for more authority to run their affairs and impose taxes to meet their financial burdens."[243] The legislation clearly did answer the cities' plea, because it materially increased the substantive powers of code cities, placing them on par with first class charter cities.[244] The statute provided:

> The legislative body of each code city shall have power to organize and regulate its internal affairs within the provisions of this title and its charter, if any; and to define the functions, powers, and duties of its officers and employees . . . .
>
> . . . .
>
> The legislative body of each code city shall have all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law. By way of illustration and not in limitation, such powers may be exercised in regard to the acquisition, sale, ownership, improvement, maintenance, protection, restoration, regulation, use, leasing, disposition, vacation, abandonment or beautification of public ways, real property of all kinds, waterways, structures, or any other improvement or use of real or personal property, in regard to all aspects of collective bargaining . . . and in the rendering of local social, cultural, recreational, educational, governmental, or corporate services, including operating and supplying of utilities and municipal services commonly or conveniently rendered by cities or towns.
>
> In addition and not in limitation, the legislative body of each code city shall have any authority ever given to any class of municipality or to all municipalities of this state before or after the enactment of this title, such authority to be exercised in the manner provided, if any, by the granting statute, when not in conflict with this title.

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241. *Expert Hired to Draft Code*, SEATTLE TIMES, Oct. 29, 1965, at 4.

242. *Code Committee Seeks Advisers*, SEATTLE TIMES, May 21, 1966, at 8.

243. Lyle Burt, *Little-Understood Bill Called 'Most Important' for Cities*, SEATTLE TIMES, Apr. 2, 1967, at 4.

244. The first quoted paragraph duplicates the "omnibus grant of powers" to first class cities first provided in 1889–90 Wash. Sess. Laws 224, and in 1965, codified at WASH. REV. CODE § 35.22.570: "Any city adopting a charter under the provisions of this chapter shall have all the powers which are conferred upon incorporated cities and towns by this title or other laws of the state, and all such powers as are usually exercised by municipal corporations of like character and degree."

> Within constitutional limitations, legislative bodies of code cities shall have within their territorial limits all powers of taxation for local purposes except those which are expressly preempted by the state . . . .[245]

While less than a constitutional amendment to bolster and entrench home rule powers, the Optional Municipal Code gave sweeping powers to small and medium-sized cities, almost all of which have since converted to code city status.[246] To emphasize the legislature's intent to remove code cities from the reach of Dillon's Rule, the new law expressly stated:

> The purpose and policy of this title is to confer upon two optional classes of cities . . . the broadest powers of local self-government consistent with the Constitution of this state. Any specific enumeration of municipal powers contained in this title or in any other general law shall not be construed in any way to limit the general description of power contained in this title, and any such specifically enumerated powers shall be construed as in addition and supplementary to the powers conferred in general terms by this title. All grants of municipal power to municipalities electing to be governed under the provisions of this title, whether the grant is in specific terms or in general terms, shall be liberally construed in favor of the municipality.[247]

V. RECENT HOME RULE CASES: SHIFTING DOCTRINAL RHETORIC

Since the adoption of the Optional Municipal Code in 1967, the Supreme Court of Washington has been markedly inconsistent in its rhetoric and decisions on city powers. This Article next examines eighteen Washington supreme court and court of appeals opinions of the past five decades that recite municipal powers doctrines in support of decisions on city authority. In eight of those cases the opinion emphasized the "strong home rule" powers of Washington charter cities and code cities, and in nine, the opinion employed language suggesting that Dillon's Rule is alive and well. In one case with multiple opinions, justices landed on both sides. This Article first reviews, in chronological order, the home rule-oriented cases. It then describes the opinions that included language echoing Dillon's Rule—again in chronological order. Outlining the two

245. 1967 Wash. Sess. Laws 1950 (codified at WASH. REV. CODE § 35A.11.020 (2012)).

246. Currently, 192 former noncharter Washington cities have converted to code city status, leaving only nine still operating as second class cities. There are ten first class charter cities. *Washington City and Town Profiles*, MUN. RESEARCH & SERVICES CENTER, http://www.mrsc.org/cityprofiles/citylist.aspx (last visited Oct. 15, 2014).

247. 1967 Wash. Sess. Laws 1950 (codified at WASH. REV. CODE § 35A.01.010).

sets of opinions separately is meant to help determine whether there is internal consistency within each doctrinal line of opinions. As often happens, in many of the cases discussed, other legal issues were the main drivers in the outcomes and the judicial rationales. But they all included judicial rhetoric purporting to state the general rule about the scope of city powers. What is remarkable is that there has not been a consistent chronological pattern overall. Instead, court opinions have moved back and forth between reciting home rule doctrines and repeating Dillon's Rule, depending on which approach best assisted the opinion's drafter in developing an effective rationale for the desired outcome. In each case, it is helpful to understand the subject matter of the case, the influence of other doctrines relevant to the case's outcome, and in some instances, the orientation of the judge drafting the majority opinion. Viewed in chronological order and listed separately as "Home Rule Opinions" and "Dillon's Rule Opinions," the cases analyzed below are:

Home Rule Opinions	**Dillon's Rule Opinions**
Winkenwerder v. Yakima (1958)	
	Bowen v. Kruegel (1965)
	Lutz v. City of Longview (1974)
	Massie v. Brown (1974)
	Spokane v. J-R Distributors (1978)
Issaquah v. Teleprompter (1980)	
U. S. v. Bonneville (1980)	
Citizens v. Spokane (1983)	*Chemical Bank v. WPPSS* (1983)
	Tacoma v. Taxpayers (1987)
City of Bellevue v. Painter (1990)	
	Employco Inc. v. Seattle (1991)
Heinsma v. Vancouver (2001)	
	Arborwood v. Kennewick (2004)
	Okeson v. City of Seattle (2007)
Biggers v. Bainbridge Island (2007)*	*Biggers v. Bainbridge Island* (2007)*
Port Angeles v. Our Water (2010)	
Rohrbach v. Edmonds (2011)	

**Biggers v. Bainbridge Island intentionally appears in both columns*

After reviewing the municipal powers approaches of each of these cases, this Article will suggest why the Supreme Court of Washington has failed to apply a consistent doctrinal approach, at least in its rhetoric. It will also become clear that the line of home rule-oriented cases are more internally consistent and reflect a more coherent, sustainable doctrine.

A. Recent Cases Relying on "Home Rule" Provisions and Doctrine

Winkenwerder v. City of Yakima[248] was a 1958 opinion of the Supreme Court of Washington and was published earlier than the others discussed.[249] In *Winkenwerder*, the City of Yakima had contracted for small advertising signs to be mounted on parking meters.[250] Roy Winkenwerder, a hardware store owner, challenged the signage as beyond the city's authority.[251] The court relied on *Ennis*,[252] noting that "the only limitation on the power of cities of the first class is that their action cannot contravene any constitutional provision or any legislative enactment."[253] The *Winkenwerder* opinion, written by Justice Robert Finley, went on to observe that the "principles adhered to in [earlier] cases clearly indicate that a city of the first class has as broad legislative powers as the state, except when restricted by enactments of the state legislature."[254] The opinion veered back and forth between reliance on a city's police power over the streets and traffic control and on city property management and contracting powers. But the opinion's bottom line was that as a first class city, Yakima had the authority to do what it did, and there was nothing in its charter or statutes to prevent it.[255] This conclusion was consistent with Justice Finley's experience as a government lawyer, his practical approach, and his belief in deciding cases in order to further what he perceived to be the general public interest.[256]

City of Issaquah v. Teleprompter[257] was decided in 1980, well after enactment of the Optional Municipal Code. The City of Issaquah—a code city—had passed an ordinance establishing a municipal television cable system and terminating the franchise of an existing cable system owned by Teleprompter.[258] That company promptly challenged the city's action, asserting that Issaquah was without legal authority to operate a

248. Winkenwerder v. City of Yakima, 328 P.2d 873 (Wash. 1958).

249. *Winkenwerder* is included in this analysis because, together with *Ennis*, municipal attorneys and judges regularly cite it as the foundation of a strong home rule approach to analyzing city powers.

250. *Winkenwerder*, 328 P.2d at 875.

251. *Id.* at 876.

252. *See* Ennis v. Superior Court, 279 P. 601 (Wash. 1929).

253. *Winkenwerder*, 328 P.2d at 878.

254. *Id.* The earlier cases relied upon by the court in *Winkenwerder* included *Brennan v. City of Seattle*, 276 P. 886 (Wash. 1929); *Ennis*, 279 P. 601; and *Walker v. City of Spokane*, 113 P. 775 (Wash. 1911), among others.

255. *Winkenwerder*, 328 P.2d at 883.

256. SHELDON, *supra* note 201, at 147–48.

257. City of Issaquah v. Teleprompter Corp., 611 P.2d 741 (Wash. 1980).

258. *Id.* at 743.

cable television service.[259] Notwithstanding Teleprompter's arguments, the court's unanimous opinion, written by moderate jurist Justice William H. Williams,[260] held that there was no legislative intent "to prevent autonomous municipal activity in the area of cable television systems."[261] *Teleprompter* stands as a strong example of "statutory home rule" jurisprudence based on the broad powers granted by the Optional Municipal Code, including a city's authority to operate a public service not expressly granted by any statute.

United States v. Town of North Bonneville[262] was another unanimous decision issued the same year as *Teleprompter*. *Town of North Bonneville* focused primarily on whether a small town being flooded by a new dam on the Columbia River could purchase uplands and resell those properties to individuals and businesses without violating the state constitution's prohibition against gifts, loans, or lending credit to the private sector.[263] The decision did not include any explicit home rule language, but it is notable that Justice Charles Horowitz's opinion held that the proposed land acquisition was "sought for the public purpose of insuring the continued viability of North Bonneville as a governmental entity."[264] Echoing the earlier Progressive Era opinions, Horowitz noted that what "is a public municipal purpose is not susceptible of precise definition, since it changes to meet new developments and conditions of times."[265] The case has subsequently been relied upon as an example of the authority of cities to exercise their powers for a broad array of purposes.[266]

Citizens for Financially Responsible Government v. City of Spokane[267] held in 1983 that no statute preempted a Spokane charter provision that made a city council-approved tax subject to referendum. The decision, by now-Justice Robert Brachtenbach, reaffirmed that "[c]ities of the first class are also granted all of the powers that are granted by RCW Title 35 and those that are usually exercised by municipal corpora-

259. *Id.* at 744.

260. SHELDON, *supra* note 201, at 353.

261. *Teleprompter*, 611 P.2d at 745.

262. United States v. Town of N. Bonneville, 621 P.2d 127 (Wash. 1980).

263. *Id.* at 129. The constitutional prohibition against municipal gifts, loans, or lending credit is at WASH. CONST. art. VIII, § 7.

264. *N. Bonneville*, 621 P.2d at 133.

265. *Id.* at 130 (quoting EUGENE MCQUILLIN, 15 MUNICIPAL CORPORATIONS § 39.19, at 32 (3d ed. 1970)).

266. *See, e.g.*, Chem. Bank v. Wash. Pub. Power Supply Sys., 691 P.2d 524, 547 (Wash. 1984) (Utter, J., dissenting); Rohrbach v. City of Edmonds, 256 P.3d 1242, 1249 (Wash. Ct. App. 2011); City of Bellevue v. Painter, 795 P.2d 174, 176 (Wash. Ct. App. 1990).

267. Citizens for Financially Responsible Gov't v. City of Spokane, 662 P.2d 845 (Wash. 1983).

tions of like character and degree," and he reiterated that those "grants of power to first class cities are to be liberally construed."[268] The opinion is unremarkable, but it is included here because the home rule recitation in this case contrasts so starkly with the Dillon's Rule approach that Justice Brachtenbach took two months later in *Chemical Bank v. Washington Public Power Supply System*.[269]

City of Bellevue v. Painter[270] was a 1990 Washington State Court of Appeals decision upholding the authority of a code city to condemn property outside its boundaries for utility purposes. The opinion pointed out that the Optional Municipal Code provided Bellevue with "'all powers possible for a city or town to have under the Constitution of this state, and not specifically denied'" and that code cities have "'any authority ever given to any class of municipality or to all municipalities of this state.'"[271] The decision then stated:

> The purpose of Title 35A RCW is to give code cities "the broadest powers of local self-government consistent with the Constitution of this state." RCW 35A.01.010. Further, this statute frees code cities from the limiting doctrine of *ejusdem generis*, which requires that general words following specific words in a statute must be construed to include things of the general kind or class as the specific words.[272]

Painter expressly relied on *Issaquah v. Teleprompter* and *United States v. Town of Bonneville* for its strong home rule analysis and conclusions.[273]

Heinsma v. City of Vancouver[274] was a taxpayer challenge to a charter city's extension of insurance benefits to domestic partners. In upholding the city's action by an eight-to-one vote, the opinion by Justice Susan Owens noted that first class cities may "exercise broad legislative powers"[275] and may legislate regarding any local subject matter unless it is on a subject preempted by the state's paramount interest or meant to be handled jointly, in which event express legislative authority must be provided.[276] After concluding that the state had not preempted the subject mat-

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268. *Id.* at 848.

269. *See infra* notes 315–321 and accompanying text.

270. *Painter*, 795 P.2d 174.

271. *Id.* at 175 (quoting WASH. REV. CODE § 35A.11.020).

272. *Id.* (emphasis in original).

273. *See id.* at 176.

274. Heinsma v. City of Vancouver, 29 P.3d 709 (Wash. 2001).

275. *Id.* at 711.

276. *Id.* In discussing the legislature's preemption of matters in which the state has a paramount or joint interest, Justice Owens cited *Lenci v. City of Seattle*, 388 P.2d 926 (Wash. 1964), and

ter and that there was no conflict with any specific state law or the state constitution, Justice Owens recited the home rule precepts that "grants of municipal power are to be construed liberally in favor of constitutionality" and, citing *Winkenwerder*, that Vancouver was "a first class city with broad legislative powers."[277]

Biggers v. Bainbridge Island,[278] decided in 2007, is listed both as a home rule-oriented opinion and as a Dillon's Rule opinion because of the doctrinal split in the court in that case. The case, which rejected a code city's moratorium on shoreline development, is discussed in the Dillon's Rule category below because the lead opinion of a minority of the Supreme Court of Washington followed a restrictive approach to city powers.[279] However, a majority of the court's members, in separate concurring and dissenting opinions, based their rationales on a broad view of city powers.

City of Port Angeles v. Our Water–Our Choice![280] centered on whether a code city council's action to contract with a nonprofit corporation to add a water fluoridation facility was within the scope of the local initiative power. The decision was based on the somewhat arcane issue of whether the council's vote was a new policy choice subject to initiative, or an "administrative decision" carrying out earlier decisions made by the city, the state, or federal agencies.[281] The court held that the contract was made pursuant to state and local decisions taken long before the initiative was filed, and therefore the vote was not subject to initiative.[282] But in a lengthy footnote in the majority opinion, Justice Tom Chambers observed that the Optional Municipal Code "grants code cities broad, though specific, powers notwithstanding 'Dillon's Rule' (which limits municipal powers to those specifically granted or necessarily implied)."[283] Although this language was not at all essential to the majority's decision, it provides another example of judicial recognition that the 1967 code city law was meant to supersede Dillon's Rule.

Rohrbach v. City of Edmonds,[284] decided by the Washington State Court of Appeals in 2011, is the most recent case to rely on the broad

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Massie v. Brown, 527 P.2d 476 (Wash. 1974), which is discussed *infra* at notes 303–309 and accompanying text.

277. *Heinsma*, 29 P.3d at 714.

278. Biggers v. City of Bainbridge Island, 169 P.3d 14 (Wash. 2007).

279. *See infra* notes 340–345 and accompanying text.

280. City of Port Angeles v. Our Water–Our Choice!, 239 P.3d 589 (Wash. 2010).

281. *See id.* at 591.

282. *Id.* at 595–96.

283. *Id.* at 596 n.7.

284. Rohrbach v. City of Edmonds, 256 P.3d 1242 (Wash. Ct. App. 2011). The case is also known as *In re Limited Tax General Obligation Bonds of the City of Edmonds*. See also *Wong v.*

powers language of the Optional Municipal Code and on home rule doctrine generally. *Rohrbach* was a declaratory judgment action to determine the legality of bonds that the City of Edmonds planned to issue to finance an expansion of its fiber optic system.[285] The legal issue relevant to this inquiry was whether a code city could provide broadband internet services to private sector users absent express statutory authority.[286] The court's opinion referred to *Winkenwerder* and *Heinsma*, and recited that, as an Optional Municipal Code city, Edmonds was "vested with broad legislative powers limited only by the restriction that an enactment cannot contravene the constitution or directly conflict with a statute."[287] The opinion also cited *Issaquah v. Teleprompter*, and noted that the petitioner had cited "no authority expressly prohibiting the City from operating a fiber optic network and allowing access to its network."[288] *Rohrbach v. City of Edmonds* is a classic example of appellate cases voicing the strong home rule doctrine, relying on first class city or code city powers granted by the constitution or statute and on previous cases within the line of decisions (e.g., *Winkenwerder*, *Teleprompter*, and *Heinsma*) favorable to broad city powers. But as described next, another line of cases evolved parallel with the strong home rule opinions, a line that was skeptical of city authority and continued to use Dillon's Rule language to support judicial holdings.

B. Recent Cases Harkening Back to Dillon's Rule

In *Bowen v. Kruegel*,[289] decided just seven years after *Winkenwerder*, the Supreme Court of Washington took a different tack in the municipal law rationale it used to explain an outcome that could be viewed as restrictive of charter city powers. In *Bowen*, opponents of an annexation by the City of Richland attempted to cause a referendum on a city council ordinance annexing a neighborhood adjacent to the city.[290] Richland's charter permitted referenda.[291] But the state supreme court held that because the charter city statute did not confer the power of an-

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City of Long Beach, 82 P.3d 259, 263 (Wash. Ct. App. 2007), another opinion in which the Washington State Court of Appeals cited WASH. REV. CODE § 35A.01.010 and observed, "[W]e are mindful of the legislature's mandate that courts 'liberally construe' grants of power 'in favor of the municipality.'"

285. *Rohrbach*, 256 P.3d at 1243.

286. *Id.* at 1248.

287. *Id.*

288. *Id.*

289. Bowen v. Kruegel, 409 P.2d 458 (Wash. 1965).

290. *Id.* at 459–60.

291. *Id.* at 459.

nexation on those cities, the general annexation statute applied.[292] That general statute expressly delegated annexation decisions on the legislative body of a city and not on the city as a whole.[293] Accordingly, only the city council itself could exercise an annexation decision, and such a decision was not subject to referendum because the process was essentially preempted by the terms of the relevant statute.[294] The court in *Bowen v. Kruegel* cited Dillon for the proposition that, in "the absence of specific constitutional inhibition, the legislature has plenary power over municipal corporations," and that the legislature had full control over the annexation process.[295] However, the somewhat restrictive reference to Dillon was unnecessary because *Bowen v. Kruegel* can be readily understood as one in a line of Washington cases to the effect that when a statute vests specific powers in the legislative body of a municipality, the legislature meant to allocate certain difficult decisions to the elected body and not allow that decision to be referable to the voters.[296]

Lutz v. City of Longview[297] was decided nine years after *Bowen v. Kruegel* and held that because a city planning statute vested zoning power in the city council, the council could not delegate that authority to the planning commission.[298] The court relied on *Bowen v. Kruegel*[299] and could have stopped there. But the opinion, by the sometime home rule advocate Justice Brachtenbach, recited that it was "elementary that a municipal corporation, being solely a creature of and subordinate to the state, possesses only those powers given to it by the state and it must exercise those powers in the manner prescribed."[300] Brachtenbach referenced *Town of Othello v. Harder*[301] for that principle, notwithstanding the fact that Othello had been a fourth class municipality and not a city, that the *Town of Othello* case was decided a dozen years before the code city statute was enacted and three years before *Winkenwerder*, and that the earlier *Town of Othello* case in any event had involved eminent domain, a field in which cities and towns traditionally had been treated as

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292. *Id.* at 462.

293. *Id.*

294. *Id.* at 460.

295. *Id.* at 462.

296. *See, e.g.*, State *ex. rel.* Haas v. Pomeroy, 308 P.2d 684 (Wash. 1957) (statute expressly vested water utility rate-setting power in a city's legislative authority, therefore rate ordinance not subject to referendum); Neils v. City of Seattle, 53 P.2d 848 (Wash. 1936) (decision to grant franchises vested in city council alone).

297. Lutz v. City of Longview, 520 P.2d 1374 (Wash. 1974).

298. *Id.* at 1377.

299. *Id.*

300. *Id.* at 1376.

301. Town of Othello v. Harder, 284 P.2d 1099, 1102 (Wash. 1955).

subject to strict statutory dictates.[302] The outcome in *Lutz v. Longview* may have been correct, but with respect to the general question of city powers, the opinion included reasoning and citations that were neither on point nor necessary.

Massie v. Brown,[303] decided soon after *Lutz v. Longview*, involved the City of Seattle's decision to bring municipal court warrant servers into its civil service system. *Massie* looked back to *In re Cloherty*, the 1891 case where the court held that just because Seattle had a charter did not mean that the city had authority to create a police court.[304] The *Massie* opinion was written by Justice Finley, the author of *Winkenwerder* and someone comfortable with the principles of home rule.[305] Finley simply could have relied on *In re Cloherty* or on other decisions that focused on the independence of the courts.[306] But it was two more years before the Washington court would fully articulate a separation of powers doctrine on judicial independence,[307] so Finley searched for a rationale in municipal law. He referenced *Neils v. Seattle* and *Bowen v. Kruegel*, and applied the concept that "at least when the interest of the state is paramount to or joint with that of the municipal corporation, the municipal corporation has no power to act absent a delegation from the legislature."[308] Finley reasoned that because courts can be created only by the legislature, they were under the state's paramount or joint control, and therefore the municipal courts could be regulated by cities only when and to the extent the legislature has delegated that power to them.[309]

City of Spokane v. J-R Distributors[310] was the next Supreme Court of Washington case that took a constrained view of city powers—but again in the context of a potential incursion into the judicial branch. A Spokane ordinance had established a detailed procedure for abating "moral nuisances" such as those perceived to exist at J-R Distributors' adult bookstores.[311] In a unanimous opinion authored by Justice Floyd Hicks, the court said that while "within its sphere, a city's power to enact police power regulations is extensive[,] . . . it is generally agreed that the

302. *See* Ennis v. Superior Court, 279 P. 601 (Wash. 1929).

303. Massie v. Brown, 527 P.2d 476 (Wash. 1974).

304. *See id.*; *see also In re* Cloherty, 27 P. 1064 (Wash. 1891).

305. *See supra* notes 248–256 and accompanying text.

306. State *ex rel.* Foster-Wyman v. Superior Court, 267 P. 770 (Wash. 1928) (Washington courts, not the legislature, have inherent power to control court rulemaking).

307. Matter of Salary of Juvenile Dir., 552 P.2d 163 (Wash. 1976) (courts have inherent authority to order adequate funding if necessary to ensure the proper operation of the courts).

308. *Massie*, 527 P.2d at 477.

309. *Id.*

310. City of Spokane v. J-R Distribs., Inc., 585 P.2d 784 (Wash. 1978).

311. *Id.* at 785.

power does not extend to matters of judicial practice and procedure."[312] As in *Massie v. Brown*, the opinion could have simply based its reasoning on separation of powers and judicial independence, or on its conclusion that court jurisdiction and procedure is a clear matter of statewide concern and therefore any city regulation of that must be expressly authorized by the legislature.[313] But Justice Hicks added a quote from a general municipal law treatise on the limited powers of municipal corporations in general, and the Dillon's Rule precept that municipal "authority must be found either in an express grant or by necessary implication from such a grant."[314]

Chemical Bank v. Washington Public Power Supply System,[315] decided in 1983, involved the multi-billion dollar municipal bond default by an electrical power consortium of four Washington cities and nineteen special purpose districts. In *Chemical Bank*, the Supreme Court of Washington held that the Washington cities and utility districts had lacked adequate authority when they entered into contracts with the Supply System to purchase energy generated by three unbuilt nuclear plants.[316] The narrow holding in *Chemical Bank* stated that while Washington cities and districts had express statutory authority to purchase electrical power, the legislature had not granted them sufficient authority to agree in advance to make payments regardless of whether the promised energy was ever produced.[317]

The *Chemical Bank* decision has been criticized as having been "strained," "intellectually dishonest," and result-oriented in order to free publicly owned utilities from what had turned out to be a very bad bargain.[318] Whether or not those criticisms are valid, for purposes of this Article, the case is notable because its analysis grouped the charter and code cities together with the special purpose districts in a restrictive approach to municipal powers. It is also notable because the opinion's author was none other than Justice Robert Brachtenbach, who during his

312. *Id.* at 786–87.

313. *Id.* at 787.

314. *Id.* at 786.

315. Chem. Bank v. Wash. Pub. Power Supply Sys., 666 P.2d 329 (Wash. 1983).

316. *Id.* at 343–44.

317. *Id.* at 334–39.

318. *See, e.g.*, Clayton P. Gillette, *Bondholders and Financially Stressed Municipalities*, 39 FORDHAM URB. L.J. 639, 650 (2012); Kenneth C. Kettering, *Securitization and its Discontents: The Dynamics of Financial Product Development*, 29 CARDOZO L. REV. 1553, 1656–57 (2008); Robert L. Tamietti, Chemical Bank v. WPPSS: *A Case of Judicial Meltdown*, 17 NAT. RESOURCES LAWYER 373, 389 (1984); David P. Wohabe, Chemical Bank v. Washington Public Power Supply System: *The Questionable Use of the Ultra Vires Doctrine to Invalidate Governmental Take-or-Pay Obligations*, 69 CORNELL L. REV. 1094 (1984).

earlier career had been an ardent advocate for city home rule. In response to the argument that charter and code cities had a broad array of powers, Brachtenbach asserted that home rule powers in Washington are construed narrowly, and that when the state has a paramount or joint interest in a subject matter area, an express delegation of authority from the legislature is necessary.[319] Brachtenbach concluded that joint municipal development of electrical energy was something that the state was "vitally interested in" so that express legislative authorization was required.[320] In a lively dissent, Justice Robert Utter criticized Brachtenbach's opinion because it "place[ed] constraints on municipalities not intended by the legislature," adding that local governments "must be given the freedom and flexibility to use all advisable means" to provide electric power.[321]

City of Tacoma v. Taxpayers of City of Tacoma,[322] decided three years later, represented Justice Utter's attempt to counteract *Chemical Bank*'s restrictive language about municipal (or at least city) powers. But in terms of home rule doctrine, Utter's approach to the case represents a mixed result. *Tacoma v. Taxpayers* was a declaratory judgment action brought by Tacoma and Seattle, both charter cities, to determine whether their electric utilities could install energy conservation devices in commercial and industrial buildings without running afoul of the state constitution's ban on gifts of public funds.[323] Most of the opinion dealt with that constitutional issue and why energy conservation was the equivalent of the acquisition of electricity. But Utter quoted Dillon's Rule as applied in a Washington port district case,[324] followed by the observation that Dillon had recognized that "the rule of strict construction does not apply to the mode or means a municipal corporation uses to carry out its grant of power."[325] This could be interpreted as being "home rule supportive." But Utter then drew from another doctrinal area—the perplexing distinction between "governmental" and "proprietary" powers[326]—to support the two cities' energy conservation program. Quoting primarily from special purpose district cases, he noted that when "a governmental function is involved, less opportunity exists for invoking the doctrines of lib-

319. *Chem. Bank*, 666 P.2d at 340.

320. *Id.*

321. *Id.* at 348–50.

322. City of Tacoma v. Taxpayers of Tacoma, 743 P.2d 793 (Wash. 1987).

323. *Id.* at 794; WASH. CONST. art. VIII, § 7.

324. *See* Port of Seattle v. Wash. Utils. & Transp. Comm'n, 597 P.2d 383 (Wash. 1979).

325. *City of Tacoma*, 743 P.2d at 799–800.

326. This Article will not address the confusing and frequently critiqued definitional distinction between "governmental" and "proprietary" municipal powers, although others have attempted to do so. One of the best analyses of some of the issues involved is Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 IOWA L. REV. 277 (1990).

eral construction and of implied powers."[327] He also quoted Dillon to the effect that courts are less likely to interfere with the manner in which proprietary functions are carried out than they would be if a "governmental function" were involved.[328]

Utter's *Tacoma v. Taxpayers* opinion, in which Brachtenbach and three other justices concurred, methodically narrowed the holding of *Chemical Bank*[329] and helped restore some of the day-to-day flexibility that Washington's municipal utilities had lost in the *Chemical Bank* decision. But it did so at the expense of reciting Dillon's Rule, and it did nothing to counteract the notion that, outside of proprietary utility functions, Dillon's Rule might still be applicable to Washington charter cities.

Employco Personnel Services, Inc. v. City of Seattle[330] involved a City of Seattle electric rate ordinance providing that the city would not be liable to customers for damages resulting from the interruption of power. The Supreme Court of Washington, in 1991, held that the ordinance conflicted with a state utility statute that made utilities liable for certain acts that cause damage.[331] But in his reasoning, Justice Charles Z. Smith drew upon special purpose district cases and early city cases, repeating the Dillon's Rule statement that a "municipal corporation is limited in its powers to those necessarily or fairly implied. . . . If there is a doubt as to whether the power is granted, it must be denied."[332]

Arborwood v. City of Kennewick,[333] decided in 2004, held that a code city's ambulance charge to residents was neither a valid excise tax nor a valid fee under applicable statutes. The core issues in the case related to police powers versus proprietary powers, and the difference between taxes and fees.[334] But in response to an amicus argument from the Association of Washington Cities that a code city had substantial implied powers to carry out authority vested by a state ambulance statute, Justice Barbara Madsen cited *Tacoma v. Taxpayers* and repeated the Dillon's Rule precept, i.e., that "[a]s a municipal corporation, Kennewick's authority is limited to those powers expressly granted and to powers neces-

327. *City of Tacoma*, 743 P.2d at 800.
328. *Id.* at 803.
329. *Id.* at 802–04.
330. Employco Pers. Servs, Inc. v. City of Seattle, 817 P.2d 1373 (Wash. 1991).
331. *Id.* at 1377–78.
332. *Id.* at 1380.
333. Arborwood Idaho, LLC v. City of Kennewick, 89 P.3d 217 (Wash. 2004).
334. *See id.*

sary or fairly implied. . . . [I]f there is a doubt as to whether the power is granted, it must be denied."[335]

Okeson v. City of Seattle[336] was a five-to-four ruling in 2007 that a charter city's electric utility was without sufficient authority to make payments to mitigate its greenhouse gas emissions. Justice Gerry Alexander's majority opinion focused on the asserted difference between proprietary and general governmental powers, and reasoned that actions to combat global warming were a "general governmental" activity rather than a proper utility activity.[337] Applying an approach similar to that used in *Chemical Bank*, he read the statutory grant of electric utility authority in a narrow fashion, concluding that there was insufficient statutory authorization for the offset payments.[338] Justice Alexander's opinion also voiced Dillon's Rule, reciting that a "municipal corporation is limited in its powers to those granted in express words, or to those necessarily or fairly implied."[339]

Biggers v. Bainbridge Island[340] in 2007 rejected a code city's moratorium on shoreline development. The "lead" opinion, by the politically conservative Justice Jim Johnson,[341] was concurred in by only three other justices. Johnson rejected the moratorium on the grounds that it conflicted with the state's Shorelines Management Act by prohibiting what state law permitted,[342] adding that the "court has frequently held that local governments possess only those powers expressly delegated or found by necessary implication."[343] Justice Mary Fairhurst dissented on the grounds that the moratorium was a proper exercise of a city's police power.[344] Four members of the court signed an opinion by Justice Tom Chambers that emphasized the vitality of a city's police power, asserted that this was a local regulatory matter in which the state and the city

335. *Id.* at 225.

336. Okeson v. City of Seattle, 150 P.3d 556 (Wash. 2007).

337. *Id.* at 563–64.

338. *Id.* at 563–64.

339. *Id.* at 561. As it happened, the legislature promptly granted the authorization, expressly stating that its intent was to "reverse the result" in the *Okeson* case. 2007 Wash. Sess. Laws 1546.

340. Biggers v. City of Bainbridge Island, 169 P.3d 14 (Wash. 2007).

341. Justice Jim Johnson, who retired in 2014, was regarded as the only justice with a consistently conservative approach to many legal issues. *See, e.g.*, Joel Connelly, *Conservative Jim Johnson Will Retire from Washington Supreme Court*, SEATTLE POST-INTELLIGENCER (Mar. 17, 2010), http://blog.seattlepi.com/seattlepolitics/2014/03/17/conservative-johnson-will-retire-from-supreme-court/; Steve Miletich, *Two State Supreme Court Justices Stun Some Listeners with Race Comments*, SEATTLE TIMES (Oct. 22, 2010), http://seattletimes.com/html/localnews/2013226310_justices22m.html.

342. *Biggers*, 169 P.3d at 23.

343. *Id.*

344. *Id.* at 27.

shared authority, but concluded that in this specific instance the city's moratorium was not reasonable because it was, in effect, a permanent ban on the issuance of building permits on the shoreline.[345] It is significant that a majority of the court rejected the lead opinion's restrictive approach to city powers.

VI. MAKING SENSE OF THE HOME RULE DOCTRINE IN WASHINGTON STATE

A. What the Judges Said and What They Did

When evaluating the judiciary's apparent "ping pong" approach to the doctrine of city powers over the past five decades, it is helpful to distinguish between the municipal law rhetoric the judges chose to use, and what doctrines they actually relied on (or needed to rely on) to reach the results in these cases.

It is fair to say that the home rule-oriented opinions represent a consistent line of doctrine, based on constitutional and statutory delegations of authority to first class and code cities, with each opinion systematically building on its predecessors back to *Ennis* in 1929. The recognition of broad city powers—exercisable unless clearly circumscribed by the legislature—was a core element of the reasoning in *Winkenwerder*, *Issaquah v. Teleprompter*, *Bellevue v. Painter*, *Heinsma v. Vancouver*, *Rohrbach v. Edmonds*, and in the positions that a majority of the justices took in *Biggers v. Bainbridge Island.* In each of those cases, the *Ennis* court's conclusion was a prerequisite to the holding, i.e., that first class (and later code) cities "are vested with very extensive powers" and that Dillon's Rule did not apply.[346]

In contrast, most of the opinions during the same period that recited Dillon's Rule in the context of city powers did not do so as a key element in the reasoning necessary to reach the case's outcome. In other words, what the judges *said* about municipal powers in each of those cases was not required to sustain what they *did.* The outcomes in *Bowen v. Kruegel* and *Lutz v. City of Longview* were based on the doctrine that when a statute expressly delegates specific responsibilities to the city council, only that council may exercise those powers, which cannot be further delegated. *Chemical Bank, Employco Personnel Services, Inc. v. City of Seattle*, and the lead opinion in *Biggers v. Bainbridge Island*, were similarly based on legislative supremacy over city actions that conflicted with

345. *Id.* at 25–27.

346. *See* Ennis v. Superior Court, 279 P. 601 (Wash. 1929). *See* also *supra* text accompanying notes 171–173.

statutory language—although *Chemical Bank* addressed a potpourri of other issues as well. The decisions in *Massie v. Brown* and *Spokane v. J-R Distributors* were driven by the concept of protecting judicial independence, and their language about limited city powers must be understood in that context. *Arborwood v. Kennewick* and *Okeson v. City of Seattle* were based primarily on the distinction between taxes and fees. *Arborwood* also relied on the distinction between proprietary powers and governmental powers, as did *Tacoma v. Taxpayers*. In none of these cases was the Dillon's Rule doctrine of limited municipal powers at all necessary to build a coherent legal rationale for the outcome. In other words, in those cases, the continued use of Dillon's Rule language represents unnecessary dicta as much as it represents the "crabbed judicial interpretations" that Krane has criticized.[347] Or to the extent a Dillon principle was still applicable, it was the universally accepted principle that when a city action conflicts either with the state constitution or a contrary statute, that action is invalid.

B. Where Are We Now?

How are we to understand the last 125 years of city home rule law in Washington, and how can we determine what that constitutional, statutory, and court-made law is or should be today? It is helpful to analyze the question within each of those three categories.

Constitutionally, Washington is best thought of as a hybrid home rule state, with certain powers vested in cities by the constitution and other powers dependent on a legislative grant. At the same time, Washington should be considered a "Dillon's Rule state" for its special purpose districts, noncharter counties, and the state's nine noncode cities and sixty-nine towns.[348] The state constitution's drafters intentionally rejected the earlier practice of legislature-granted city charters, and first class charter cities were given great flexibility in how they structure themselves, consistent with state law.[349] This means that the legislature must affirmatively act if it desires to constrain charter city choices about structure or process matters.[350] Under the state constitution, the form of government in other classes of cities and towns must be prescribed by statute.[351] At the same time, all cities have constitutionally granted police

347. KRANE ET AL., *supra* note 10, at 13.

348. *See* sources cited *supra* note 246.

349. WASH. CONST. art. XI, § 10.

350. See, for example, the discussion of *Bowen v. Kruegel*, *supra* at text accompanying notes 289–295.

351. WASH. CONST. art. XI, § 10.

powers equivalent to those of the state—again, so long as the exercise of those powers does not conflict with general laws.[352] The constitution is silent with respect to other types of city powers, i.e., the power to provide various public services.

Statutorily, we have seen an important change during the past 125 years. Immediately after statehood, the legislature enacted detailed statutes granting specific powers to various classes of cities, including positive grants of police power that were unnecessary from a constitutional standpoint.[353] The significant adjustment came in 1967, when the legislature, at the request of city advocates, enabled all cities to bring themselves under the Optional Municipal Code.[354] That comprehensive statute gave cities several choices regarding form of government, and most importantly, vested code cities with "all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law," including, among other things, the power to provide "local social, cultural, recreational, educational, governmental, or corporate services," including utility services commonly rendered by cities.[355] First class cities, earlier, in 1965, had been expressly granted the same broad statutory powers as any other classes of cities and towns.[356] McBain's 1916 summary of the statutory status of home rule in Washington remains an accurate depiction, i.e., the constitution gives the legislature great control over cities through "general law," and thus, home rule "has been and is more largely a matter of legislative grace than of constitutional right."[357] But at the same time, McBain accurately observed that home rule in the state remained vibrant "due to the liberal practice of the legislature in conferring powers and in refraining from occupying fields of municipal control."[358]

While the constitutional and statutory framework for Washington city powers is relatively straightforward, judge-made law has been much less so. As described above,[359] the Supreme Court of Washington first took a narrow view of city powers—perhaps out of habit and its familiarity with Dillon's Rule. This may also have been because, to the extent the Washington State Constitution was intended to promote home rule, the early justices were sympathetic to what Barron labels the "Old Con-

352. *Id.* § 11.

353. *See supra* text accompanying notes 158–162.

354. *See supra* text accompanying notes 235–245.

355. WASH. REV. CODE § 35A.11.020 (2012).

356. 1965 Wash. Sess. Laws 1799.

357. MCBAIN, *supra* note 8, at 455.

358. *Id.* at 456.

359. *See supra* notes 152–157 and accompanying text.

servative City" approach to local independence, i.e., despite local control of form of government, substantive municipal powers should continue to be limited.[360] Then, as progressive attitudes gained ascendance around 1910, court rhetoric rapidly changed. By 1929, the court was expressly taking the position that Dillon's Rule "should not be followed in determining a question involving the powers of a city of the first class."[361] But after World War II the court again issued some narrow rulings on city powers,[362] and in response to that and lobbying by city advocates, the legislature materially strengthened city powers in 1965 and 1967.[363] Statutory home rule was now firmly in place, with both first class and charter cities expressly granted all local powers not in conflict with general laws, and the legislature expressly instructed that those powers were to be "liberally construed."[364] After enactment of the Optional Municipal Code, the best understanding of both charter and code city powers is that each of those categories of cities has (1) strong constitutional police power except to the extent a city enactment conflicts with general state law, plus (2) "all the powers possible for a city or town to have . . . and not specifically denied . . . by law,"[365] including without limitation the broad laundry lists of powers spelled out in Washington Revised Code § 35.22.280 and § 35A.11.020. Furthermore, the Optional Municipal Code has, by statute,[366] extended to code cities the Supreme Court of Washington's 1929 pronouncement that Dillon's Rule is inapplicable to first class charter cities.[367] Nevertheless, as described above, the Supreme Court of Washington has sporadically resurrected Dillon's Rule in cases relating to first class and charter cities, allowing that doctrine to occasionally reappear as a sort of "zombie jurisprudence."

The persistence of Dillon's Rule rhetoric in Washington's Supreme Court opinions is puzzling, but it can be explained in at least three ways that relate to how common law works in the United States. First, as noted above, Dillon's Rule *does* continue to apply to special purpose districts. The lack of express anti-Dillon's Rule language in their statutes arguably means that the rule still applies to second class cities, to towns, and to noncharter counties, except regarding the police power, which all cities, towns, and counties possess in the constitutionally granted "strong" form

360. *See supra* text accompanying notes 75–78.
361. Ennis v. Superior Court, 279 P. 601, 605 (Wash. 1929).
362. *See supra* text accompanying notes 209–210.
363. *See supra* text accompanying notes 234–247.
364. WASH. REV. CODE § 35.22.900 (2012) and § 35A.01.010 (2012).
365. WASH. REV. CODE § 35A.11.020 (2012).
366. WASH. REV. CODE § 35A.01.010 (2012).
367. Ennis v. Superior Court, 279 P. 601, 605 (Wash. 1929).

of police power.[368] This means that the Dillon's Rule doctrine limiting the powers of "municipalities" lives on in judicial discourse. Because cities are a type of "municipality," it is very easy for lawyers and judges to misunderstand, or ignore, the vast doctrinal difference between the law relating to city powers and special purpose district powers in Washington State. This is the likely explanation for the use of restrictive Dillon's Rule language in most of the Dillon's Rule opinions discussed immediately above, where the outcomes could have been easily reached on other grounds without any reference to a supposed doctrine of limited city powers.

The second reason is related to the first, and has to do with one of the peculiarities of the process of judge-made common law. Attorneys try to win cases by citing cases that appear to support the outcome they wish to achieve. Judges cite cases, or jingles from cases, when it helps support a rationale for the outcome they think is just. But from time to time lawyers and judges will call upon doctrines that appear legitimate on their face, but which are simply not consistent with the developed doctrine in a particular area. This can be ascribed to a strong desire to reach desired conclusions, or to carelessness. Either or both of these factors were at play in *Chemical Bank, Employco Personnel Services, Inc. v. City of Seattle*, and the lead opinion in *Biggers v. Bainbridge Island.*

Finally, many American common law judges are so used to making law that they are prone to bend or altogether ignore statutory law. This might explain why judges are comfortable drawing upon previous cases to support what they think "the law" is or should be, despite clear statutes that are meant to supersede these common law doctrines. If a judge is personally convinced that Dillon's Rule is still good law for municipalities—including cities—then that judge might ignore contradictory provisions in a statute such as the Optional Municipal Code.

C. How to Proceed

There are at least two distinct measures that should be pursued to reduce the confusion about city home rule powers in Washington State. Ironically, Professor Trautman made two similar recommendations in his

368. Notwithstanding the lack of the anti-Dillon inoculation provided to optional code cities (and by reference, to charter cities) in WASH. REV. CODE § 35A.01.010 (2012), the legislature nevertheless has granted second class cities and towns fairly broad powers. WASH. REV. CODE § 35.23.440(53) (2012) vests second class cities with the power "[t]o provide for the general welfare," and WASH. REV. CODE § 35.27.370(16) (2012) gives towns the authority to take all actions "not inconsistent with the Constitution and laws of the state . . . as may be deemed expedient to maintain the peace, good government and welfare of the town and its trade, commerce and manufacturers."

oft-quoted 1963 article, *Legislative Control of Municipal Corporations in Washington*.[369] First, he suggested that the legislature "protect its prerogatives in relation to municipalities" by making its wishes known through statutes.[370] The legislature did the major part of that task by enacting the Optional Municipal Code four years later. Now, lawmakers would do well to review and revise the accreted 125 years of general statutes on general city powers[371] and first class charter city powers.[372] Much in those statutes could be deleted as unnecessary surplusage because they purport to grant powers that code cities and first class cities already possess under the broad grant of Washington Revised Code § 35A.11.020 and under the broad police power grant of art. XI, section 10 of the Washington State Constitution. Grants of powers (including proprietary powers) that duplicate those broad grants could be deleted and replaced with a few carefully drafted but comprehensive summaries of city powers.

Professor Trautman's second recommendation was directed toward the Supreme Court of Washington. He suggested: "It is not too late . . . for the court to continue, and to strengthen, its interpretations in favor of the powers of . . . cities when doubt exists and in favor of all municipal corporations when an issue of potential conflict with state statutes arises."[373] In addition to its past recognition of the strong constitutional charter powers of first class cities and strong police powers of all cities, it is time for the court to *consistently* pay attention to the statutes providing robust city powers regarding public services. The court should follow its own recent advice about how the judiciary and the legislature "can work together in harmony and in the spirit of reciprocal deference to the other's important role,"[374] follow the solid line of Washington opinions giving full credence to city home rule statutes, and treat Dillon's Rule as "zombie jurisprudence" that needs to remain permanently dead.

369. Trautman, *supra* note 4, at 782–83.

370. *Id.*

371. WASH. REV. CODE § 35.21 (2015).

372. WASH. REV. CODE § 35.22 (2015).

373. Trautman, *supra* note 4, at 783.

374. *In re* Estate of Hambleton, 335 P.3d 398, 407 (Wash. 2014) (quoting Hale v. Wellpinit Sch. Dist. No. 49, 198 P.3d 1021, 1029 (Wash. 2009)).