

Legal Principles of Municipal Law

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Today's Topics

- The Creature Concept
- Dillon's Rule v. Home Rule
- Wisconsin Constitution and Municipal Legal Powers
- Statutory Home Rule in Wisconsin
- Chapters 60 to 68, Wisconsin Statutes
- Forms of Municipal Government in Wisconsin
- The Future of Municipal Legal Authority

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The Creature Concept

- All municipal bodies are creatures of the State.
- Except as limited by its own Constitution, the State may alter or even abolish its creatures.
- "Cities are bodies politic and corporate, established by law to assist in the civil government of the state and to regulate and administer the internal or local affairs of the territory within their corporate limits. Cities have only such powers as are expressly granted to them by the legislature and such others as are necessary and convenient to the exercise of the powers expressly granted."
- City of Milwaukee v. Raulf, 164 Wis. 172, 159 N.W. 819 (1916).

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Creature Concept

- Historical Development
- Municipal Corporations – like all corporations -- formed only with the consent of the Crown.
- In United States, business corporations and municipal corporations formed only with the consent of the State.
- Individual charters.
- Wisconsin moved to general charters for municipalities in 1924.
- Tension in the Creature Concept: State control v. Local control.

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Dillon's Rule

- The ultimate statement of the Creature Concept.
- First stated by Iowa Supreme Court Justice John F. Dillon over 100 years ago.
- "A municipal corporation possess and can exercise only the following powers: (1) those granted in express words; (2) those necessarily or fairly implied in ... the powers expressly granted; and (3) those essential to the accomplishment of the declared objects . . . of the corporation."

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Dillon's Rule

- The power implied may not be "simply convenient, but must be indispensable" to the express powers to be found to exist.
- "Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation."
- McQuillin, *The Law of Municipal Corporations* (3rd Ed.) sec. 4:11 (2014)
- Dillon's rule thus codifies the complete power of the State over local governments.

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Home Rule

- Home rule is the antithesis of Dillon’s Rule.
- It comes in two forms. In its most basic form, it reverses the presumption of Dillon’s rule. Local government is presumed to have the power to do anything that has not been taken away by the State.
- The municipality is still a creature – the State has power to take away local power – but it is presumed to exist locally until taken away.
- In Wisconsin, we regrettably call this “statutory home rule.” It is reflected in Wis. Stat. sec. 62.11(5) for cities and Wis. Stat. sec. 61.34(1) for villages.

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Home Rule

- In its second and stronger form, the grant of power to local government is in the State Constitution.
- This moves the grant of local power beyond the ability of a State legislative body to strip away – the Constitution would have to be amended to assert control over the creature.
- It comes in many forms, sometimes only as to specific areas of law and almost always restricted to matter local in nature, however defined.

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Constitutional Home Rule in Wisconsin

- In 1924, the same time Wisconsin moved from special charters to general charters for municipalities, the voters approved the Home Rule amendment to our Constitution.
- Art. XI, Sec. 3 states:
- **“Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of statewide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature.”**

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Constitutional Home Rule

- On its face, the provision seems simple (recognizing that lawyers will always argue about definitions).
- Cities and villages have a constitutional right to govern their local affairs and government, subject to only two restrictions:
 - The right is subject to other provisions in the Constitution, and
 - The right is subject to the legislature adopting legislation on a matter of state-wide concern that affects every village or every city uniformly.

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Constitutional Home Rule

- Not so fast, my friend.
- Almost from the beginning, the Wisconsin Supreme Court exhibited an antipathy for the grant of powers to local government. A series of cases limited the reach of the amendment, culminating in *Van Gilder v. City of Madison*, 222 Wis. 58, 267 N.W. 45 (1936). Expressing concern for creating an *imperium in imperio* (state within a state), the Court broke the second exception to the Home Rule amendment into two parts: The State Legislature could act if its rule was uniform, or if it covered a matter of state-wide concern.

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Constitutional Home Rule

- In the nearly 100 years since the adoption of the Home Rule amendment, I could find only two cases where the Supreme Court upheld a municipality's act as within the protection of "local affairs and government."
- By decreasing margins, the Supreme Court clings to this interpretation of the Home Rule amendment that is contrary to its plain language. See *Madison Teachers, Inc. v. Walker*, 2014 WI 99, and *Black v. City of Milwaukee*, 2016 WI 47.

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Statutory Home Rule

- Wis. Stat. Sec. 62.11(5) reads in relevant part:
- "POWERS. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its power by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language."

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Statutory Home Rule

- Same language for villages in Wis. Stat. sec. 61. 34.
- In *Hack v. Mineral Point*, 203 Wis. 215, 233 N.W. 82 (1931), the Supreme Court said that "[A] city operating under the general charter finding no limitations in express language has under the provisions of this chapter all the powers that the Legislature could by any possibility confer upon it."
- This is a reversal of Dillon's Rule. One looks not for a grant of power to a municipality, but for some limitation on its power.

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Statutory Home Rule

- Not so fast my friend.
- The Supreme Court has established a four part test to determine if the power has been withdrawn by the legislature:
 - (1) whether the legislature has expressly withdrawn the power of municipalities to act;
 - (2) whether the ordinance logically conflicts with the state legislation;
 - (3) whether the ordinance defeats the purpose of the state legislation; or
 - (4) whether the ordinance goes against the spirit of the state legislation.
- (See, e.g., *Anchor Savings & Loan Ass'n v. Equal Opportunities Commission of the City of Madison*, 120 Wis. 2d 391, 355 N.W. 2d 234 (1984).

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Statutory Home Rule

- The third and fourth parts of that test do not seem to be in accord with the statutory requirement that the powers "shall be limited only by express language."
- Note that Statutory Home Rule may reach a matter of state-wide concern so long as the four part test set out above is satisfied.
- The law is often cited as encompassing the municipality's broad authority in the exercise of its police power.

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Chapters 60-68, Wis. Stats.

- Numerous other grants of power of significance to municipalities.
- Chapter 60, Towns
- Chapter 61, Villages
- Chapter 62, Cities
- Chapter 63, Civil Service
- Chapter 64, Other Forms of Municipal Government
- Chapter 65, Municipal Budget Systems
- Chapter 66, General Municipality Law

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Chapters 60-68

- Chapter 67, Municipal Borrowing and Municipal Bonds
- Chapter 68, Municipal Administrative Procedure
- Many other provisions affect municipal government.

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Forms of Municipal Government

- Chapter 64 allows for a City Manager or Commission form of government. Villages may use Manager form.
- City Manager replaces the Mayor as the chief executive officer of the City and serves at the pleasure of the Council.
- City may or may not keep a Mayor, but the role is diminished to being a member of the Council with some ceremonial duties.
- Commission form places management in the hands of the Common Council, made up of the alderpersons and the Mayor. Mayor has no veto power.

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Forms of Municipal Government

- First Class City.
- Statutes are riddled with special rules for Milwaukee.
- Milwaukee retains the charter it had when the General Charter Law came into effect; no other city or village did.
- Mayor has a line-item veto.
- School District is coterminous with city limits.
- Oak Creek law made it easier for towns to become villages or cities to stop annexation.

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Future of Municipal Legal Authority

- Both the courts and state legislature have a distressing trend of limiting local power.
- The Legislative Fiscal Bureau found at least 128 instances of preempting or limiting local power, or imposing unfunded mandates since 2011.
- This is a nearly 100-year trend, pursued on a bi-partisan basis. Despite lip service to the idea of local control, it appears that the courts and the legislature are much more comfortable thinking of local government in the pre-home rule/general charter, 19th century model.

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Future of Municipal Legal Authority

- This trend is unlikely to change without a change in the Supreme Court, the Legislature, and the Executive to persons more friendly to local control in fact. It may require legislative or constitutional amendments.
- In the meantime, municipal lawyers may – with a healthy warning to their clients – act as if the statutes and constitution mean what they say.

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Questions?

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