

# CONSTITUTIONAL HOME RULE AUTHORITY DIMINISHED

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The Wisconsin Supreme Court recently held that the City of Milwaukee’s longstanding charter ordinance<sup>1</sup> requiring city employees to reside in the city is unenforceable following the legislature’s enactment of Wis. Stat. § 66.0502 which prohibits municipalities from adopting or enforcing residency requirements. It also held that the Milwaukee Police Association was not entitled to relief or damages under 42 U.S.C. § 1983 because it did not show that the City’s statement that it was going to continue enforcing its residency requirement after the legislature enacted §66.0502 deprived it of rights, privileges, or immunities protected by the Constitution or the laws of the United States. *Black v. City of Milwaukee*, 2016 WI 47, 369 Wis. 2d 272.

Although the court’s conclusion that sec. 66.0502 trumps the City’s charter ordinance does not come as a total surprise, the decision itself is disappointing in several respects. First, the court continues to adhere to a two-step analysis of home rule authority announced two years ago that ignores the express language of Wisconsin’s constitutional home rule amendment. Second, the decision, authored by Justice Gableman, lays out what it says is the established framework for analyzing an exercise of home rule only to depart from that framework, reaching further than necessary to flatly reject suggestions in prior case law that, with regard to local affairs and government, there might be a sphere of local control outside of the legislature’s reach. The clear takeaway from *Black* is that any exercise of the constitutional home rule authority vested in cities and villages to determine their “local affairs and government” is subject to legislative override provided the legislative enactment in question applies uniformly, on its face, to every city or every village.

Wisconsin’s constitutional home rule amendment authorizes cities and villages to “determine their local affairs and government, subject **only** to [the Wisconsin] constitution and to such enactments of the legislature of **statewide** concern as with uniformity shall affect every city or every village.” Wis. Const. Art. XI, sec. 3(1) (emphasis added).

In *Black*, police and firefighter associations sought a declaratory judgment that the City of Milwaukee’s 1938 charter ordinance requiring employees to reside in the City was preempted by the legislature’s enactment of § 66.0502 and no longer enforceable. The City contended that its charter ordinance remained viable because it involves a matter of “local affairs” and because residency of municipal employees is not a matter of statewide concern. The City asserted that residency of city employees is a local concern because (1) the City has an interest in maintaining a tax base from which to draw revenue; (2) the City has an interest in its employees sharing a common community investment as Milwaukee residents; and (3) the City has an interest in efficiently delivering city services. Additionally, the City argued that Wis. Stat. § 66.0502 affected Milwaukee much differently than other municipalities and therefore did not with uniformity affect every city or every village.

In contrast, the Police Association contended that residency requirements constitute a matter primarily of statewide concern because (1) when the Legislature enacted Wis. Stat. § 66.0502, it found that “public employee residency requirements are a matter of statewide concern”; and (2) the Legislature may legislate on matters that concern public health, safety, and welfare, and it was reasonable to presume that the Legislature determined that residency requirements negatively impact the welfare of public employees. The Police

Association argued “uniformity” must be understood as requiring “facial uniformity” and that § 66.0502 is facially uniform because, by its terms, it applies to all cities, villages, towns, counties, and school districts.

In response to the City and *amici* assertions that the twopart analysis set forth by the court in *Madison Teachers, Inc. v. Walker*<sup>2</sup> does not comport with the express language of the constitutional home rule amendment which says constitutional home rule authority is subject **only** to the constitution and enactments of **statewide** concern that with uniformity affect every city or every village, the court reiterated the two-step analysis as follows:

[O]ur home rule case law instructs us that, when reviewing [ a legislative enactment under the home rule amendment, we apply a two-step analysis. First, as a threshold matter, the court determines whether the statute concerns a matter of primarily statewide or primarily local concern.

If the statute concerns a matter of primarily statewide interest, the home rule amendment is not implicated and our analysis ends. If, however, the statute concerns a matter of primarily local affairs, the reviewing court then examines whether the statute satisfies the uniformity requirement. If the statute does not, it violates the home rule amendment.

*Black*, 2016 WI 47, ¶ 25.

Having set forth the two-step analysis, the court then weighed the competing interests (the state’s determination that public employees should have the right to choose where they wish to live versus the City’s interests in maintaining its residency requirement in order to protect its tax base, in its employees sharing a common community investment as city residents, and in efficient delivery of municipal services) to determine whether municipal residency requirements are a matter of primarily statewide or primarily local concern. Concluding that § 66.0502 constitutes a “mixed bag” because it concerns both statewide and local interests, the Court then abandoned its normal process, stating as follows:

At this point, we would ordinarily proceed to apply the test of paramountcy to determine whether the legislative enactment is “primarily” or “paramountly” a matter of local affairs or a matter of statewide concern. However, in this case, we do not apply the test of paramountcy to determine which interest (state or local) is paramount. Instead, we give the City the benefit of the doubt: we assume, without deciding, that Wis. Stat. § 66.0502 is a matter of local affairs.

Accordingly, we move on to consider the second step in the home rule analysis—whether Wis. Stat. § 66.0502 uniformly affects every city or village.

The Court then held that for purposes of the home rule amendment, an enactment is uniform when it is facially uniform and that sec. 66.0502 is facially uniform because it applies to “any city, village, town, county, or school district.” *Black v. City of Milwaukee*, 2016 WI 47, ¶¶ 7 and 39, 369 Wis. 2d 272.

Justice Rebecca Bradley agreed with the Court that §66.0502 trumps Milwaukee’s residency ordinance but wrote a separate concurrence to “point out that the original meaning of the home rule amendment to the Wisconsin Constitution decrees a different interpretation than this court gives.” Her concurrence does an excellent job of analyzing the language of the amendment. Justice Ann Walsh Bradley, joined by Justice Shirley Abrahamson, wrote a separate opinion concurring with the majority that the Police Association is not entitled to relief or damages but dissenting because she would have concluded that sec. 66.0502 did not prevent the City from continuing to enforce its charter ordinance. Justice Bradley’s dissent takes the majority to task for “contravene[ing] the well-recognized purpose of the Home Rule Amendment,” which is to grant power and self-government to municipalities, rather than the legislature,” and for “ignor[ing] the

facts of record regarding statewide and local interest.” Justice Bradley’s dissent agrees with “the amicus briefs of the League of Wisconsin Municipalities and the Wisconsin Institute for Law and Liberty, as well as the brief of the city of Milwaukee and the unanimous court of appeals’ observation that ‘the test articulated in *Madison Teachers* is somewhat at odds with the plain language of the home rule amendment.” *Black*, 2016 WI 47, ¶119 dissent of Justice A. Bradley.

1. Constitutional home rule is exercised by enactment of a charter ordinance as provided in Wis. Stat. sec. 66.0101.
2. 2014 WI 99, 358 Wis.2d 1, ¶101, 851 N.W.2d 337.

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Corresponding Legal Captions:

Home Rule 65

Home Rule 66

