

JUDGE DILLON DID NOT INVENT DILLON’S RULE: ORIGINS, ULTRA VIRES AND EXPRESSED POWER FOR MUNICIPAL CORPORATIONS IN THE CONTEXT OF CRITICISM CALLING FOR HOME RULE POWER, FOCUSED ON IDAHO

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ABSTRACT

Judge Dillon did not invent “Dillon’s rule.” In public administration and municipal law, a mythos has long existed that Iowa judge John F. Dillon invented what we call Dillon’s rule in the 1860s. Dillon’s rule is actually just another name for the doctrine of “ultra vires.” His jurisdictional locale in a conservative rural state without cosmopolitan large cities has been used to undermine and politicize the rule. In short, Dillon’s rule holds that municipal corporations have only that power expressly granted to them by the legislature and those other powers necessary to fulfill their express mission. Conversely, “home rule” cities may exercise any powers not expressly prohibited by the legislature, i.e., residual power. The Cooley doctrine went a step further, endowing localities with an inherent right to govern themselves. In Judge Dillon’s two famous cases he relied upon at least twenty-eight existing court opinions and a vibrant jurisprudence. The United States Supreme Court paved the American way for the doctrine of ultra vires in an 1804 case, the American source for Dillon’s rule. The first written reference to the rule in the corporation arena appears to be in Blackstone’s ninth edition in 1783. The earliest written legal usage of the term ultra vires in the English-American legal tradition appears in Lord Kames’ 1760 treatise. The United States Supreme Court has expressed approval of the rule. Critics have aggressively attacked Dillon’s rule, but there are historical and rational reasons for the rule, which pre-date Judge Dillon’s writings. It requires a careful analysis of each state’s constitutional and statutory provisions, as well as case law, in order to determine whether a state is a Dillon’s rule state or somewhere else on the spectrum. Idaho is a Dillon’s rule state.

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I. INTRODUCTION

This paper examines the limited power of municipal corporations, widely known as Dillon's rule and the "doctrine of expressed powers."¹ There has been a "limited amount of research" done in the "local policy leadership" area, including legal barriers.² This paper addresses perhaps the main legal barrier. It is also intended to correct the framework for discussing Dillon's rule. I use my home state of Idaho as an example of the adoption, application, and evolution of the rule. Idaho is a Dillon's rule state.³

Scholarly texts routinely tell us or imply that former Iowa Supreme Court Chief Justice and United States District Court Judge John F. Dillon of Iowa is the inventor of the rule.⁴ Notably, however, in the fourth edition (2014) of their text, Smith and

1. See generally James R. Alexander, *Dillon's Rule Under the Burger Court: The Municipal Liability Cases*, 18 *PUBLIUS: J. OF FEDERALISM*, Winter 1988, at 127.

2. Robert F. Blair & Anthony M. Starke Jr., *The Emergence of Local Government Policy Leadership: A Roaring Torch or a Flickering Flame?*, 49 *ST. & LOC. GOV'T REV.*, 275, 277 (2017).

3. *Black v. Young*, 834 P.2d 304, 310 (Idaho 1992).

4. CHARLES R. ADRIAN, *STATE AND LOCAL GOVERNMENTS, A STUDY IN THE POLITICAL PROCESS* 119 (McGraw-Hill Book Co., Inc. 2d ed. 1967) (1960); DAVID R. BERMAN, *LOCAL GOVERNMENT AND THE STATES: AUTONOMY, POLITICS, AND POLICY* 2, 64, 70-75 (M.E. Sharpe, Inc. 2003); ANN O'M. BOWMAN & RICHARD C. KEARNEY, *STATE AND LOCAL GOVERNMENT* 43 (Houghton Mifflin Co. 1990); TODD DONOVAN ET AL., *STATE AND LOCAL POLITICS: INSTITUTIONS AND REFORM* 353 (Cengage Learning Wadsworth 2d ed. 2011) (2009); THOMAS R. DYE & SUSAN A. MACMANUS, *POLITICS IN STATES AND COMMUNITIES* 211-12 (Prentice-Hall, Inc. 11th ed. 2003) (1969); DANIEL JUDAH ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 181 (Harper & Row 2d ed. 1972); VIRGINIA GRAY & PETER EISINGER, *AMERICAN STATES AND CITIES* 42 (HarperCollins Publishers, Inc. 1991); VIRGINIA GRAY & ROBERT L. HANSON, *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* 51 (CQ Press 9th ed. 2008); NICHOLAS HENRY, *GOVERNING AT THE GRASSROOTS: STATE AND LOCAL POLITICS* 181-82 (Prentice-Hall Inc. 1980); DUANE LOCKARD, *THE POLITICS OF STATE AND LOCAL GOVERNMENT* 129-30 (The MacMillan Co. 3d 1983); G.

Greenblatt allude to my contention that Dillon's rule is really an expression of the law of *ultra vires*.⁵ Legal sources also commonly acknowledge the source of local government power to be Dillon's rule.⁶ Students and scholars of public administration and municipal law, lawyers, and courts routinely refer to Dillon's rule, thereby immortalizing and crediting Judge Dillon with its creation. I urge that we look beyond the loaded term "Dillon's rule"—the nomenclature—and approach this subject with an open mind, *tabula rasa*.

As a threshold matter, it is noteworthy that cities exercise two types of powers: (1) "governmental" or public powers, which are legislative and regulatory functions; and (2) "proprietary" or private powers, which consist of the "internal financing and administration of the city and provision of utilities and services for the benefit of city residents."⁷ Proprietary functions can also be considered "private" functions, "analogous to the functions of a private corporation," which do not relate to traditional aspects of governing.⁸ Government functions can be considered "public" functions, such as legislative, executive, and judicial actions "required or commanded by law" and "for the general public good."⁹ The distinction is historical and now mostly a legal and academic curiosity, but it was once relevant for determining sovereign immunity from a lawsuit (if the act was governmental, suit was not allowed, but if the act was proprietary, suit was allowed), and it can be very difficult to define with precision.¹⁰ For our purposes,

THEODORE MITAU, *STATE AND LOCAL GOVERNMENT: POLITICS AND PROCESSES* 407–09 (Charles Scribner's Sons 1966); JACK RABIN & DON DODD, *STATE AND LOCAL GOVERNMENT ADMINISTRATION* 103,106 (Marcel Dekker, Inc. 1985); KEVIN B. SMITH & ALAN GREENBLATT, *GOVERNING STATES AND LOCALITIES* 365–67 (CQ Press 4th ed. 2014); KEVIN B. SMITH ET AL., *GOVERNING STATES AND LOCALITIES* 439, 451 (CQ Press 3d ed. 2011).

5. SMITH & GREENBLATT, *supra* note 4, at 365.

6. *See, e.g.*, Michael C. Moore, *Home Rule or Legislative Control?*, 14 Idaho L. Rev. 143, 146 (1977) [hereinafter Moore (1977)]; *see also* Gregory Taylor, *Dillon's Rule: A Check on Sheriffs' Authority to Enter 287(g) Agreements*, 68 AM. U. L. REV. 1053, 1060 (2019). The use of the term Dillon's rule is so ubiquitous that it receives its own entry in the preeminent legal dictionary, echoing the common definition and even crediting it to Judge Dillon. *Dillon's Rule*, BLACK'S LAW DICTIONARY (11th ed. 2019). A Lexis Advance search revealed 283 court decisions referring to Dillon's rule.

7. Moore (1977), *supra* note 6, at 144.

8. *Id.* at 144–46, *citing* Wm. Don Parkinson, *Sovereign Immunity in Idaho*, 7 IDAHO L. REV. 267, 269 (1971).

9. *Id.*

10. SANDRA M. STEVENSON, *ANTIEAU ON LOCAL GOVERNMENT LAW* § 35.01 at 3-15 (Matthew Bender & Co. 2d ed. 1997) [hereinafter STEVENSON (ANTIEAU)]. *See* Brian H. Hess, *Comment: The Planning/Organizational Dichotomy: A Specious Approach to the Discretionary Function Exception in the Idaho Tort Claims Act*, 40 IDAHO L. REV. 225, 232-34 (2003) (discussing the old government-proprietary powers line of demarcation for suing the government).

this distinction is relevant because Dillon's rule has been held to apply to the exercise of governmental powers and not to proprietary powers.¹¹

The actual origin of Dillon's rule can be traced to legal authority that pre-dates Judge Dillon's two famous court decisions (*Clark* and *Cedar Rapids*), one-volume treatise, and, his *magnum opus*, the multi-volume commentaries on municipal law.¹² Indeed, Judge Dillon's fame for this rule is no doubt a result of his extensive writings on municipal law during an era of tremendous local government corruption. He was clearly an aficionado on the subject, and "was the author of the first important treatise on the law of municipal corporations."¹³

In fact, the written roots of Dillon's rule in corporations law can be traced back (at the least) to the famed English law professor and Solicitor General to Her Majesty William Blackstone's ninth edition of his commentaries on English law in 1783, wherein he wrote that corporations have all such powers "unless they are contrary to the laws of the land, and then they are void."¹⁴ Brice observes:

In old times, as we have seen, corporations were considered to have most of the powers—the due exercise of such powers being secured by the imposition of certain formalities—and to be subject to the greater part of the obligations of ordinary citizens. But of late, from the introduction and development of the doctrine of *Ultra Vires*, these

11. *Hagan v. City of Barre*, 2009 Vt. Super. LEXIS 27, 31 n.13 (Vt. Super. Ct., June 29, 2009); *Hunters, Anglers & Trappers Ass'n of Vermont, Inc. v. Winooski Valley Park Dist.*, 913 A.2d 391, 395 (Vt. 2006) (citing JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 109, 182 (Little, Brown and Co. 5th ed. 1911) [hereinafter Dillon's Commentaries]); *Boise Dev. Co. v. Boise City*, 167 P. 1032, 1034–35 (Idaho 1917).

12. See *Clark v. City of Des Moines*, 19 Iowa 199, 209 (1865); *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455 (1868); JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (Chicago: James Cockcroft & Co.) (photo. reprt. 2011) (1872) [hereinafter Dillon's Treatise]; Dillon's Commentaries, *supra* note 11.

13. A.E.S., *Dillon's Rule: The Case for Reform*, 68 Va. L. Rev. 693, 693 (1982). There was at least one English treatise on municipal corporation law published several decades before Judge Dillon's treatise. JOHN W. WILLCOCK, THE LAW OF MUNICIPAL CORPORATIONS TOGETHER WITH A BRIEF SKETCH OF THEIR HISTORY AND A TREATISE ON MANDAMUS AND QUO WARRANTO (London, William Benning, Law Bookseller, 52, Fleet Street) (photo. reprt. 2011) (1827) [hereinafter Willcock].

14. SEWARD BRICE, A TREATISE ON THE DOCTRINE OF ULTRA VIRES 5 (Reprint, Scholar Select, 2015) (London, Stevens & Haynes, Law Publishers) (1874) [hereinafter Brice] (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 308 (Oxford, UK 9th ed. 2016) (photo. reprt. 2016) (1783)). With respect to the use of the term *ultra vires* in other legal contexts—deeds and covenants—it has been said that the earliest published use of the term can be found in Lord Kames' (Henry Home's) ancient legal treatise PRINCIPLES OF EQUITY, first published in 1760, wherein he observed that the common law recognizes "[a] principle in logics, [t]hat will without power cannot produce any effect" and is, therefore, "ultra vires."; D.L., *The American Law Register*, (1852-1891), 513–26, 514 (U. OF PENN. LAW REV.) (1877) (citing and quoting LORD HENRY HOME KAMES, PRINCIPLES OF EQUITY, 201 (Reprint, Scholar Select, 2015) (Alex, Laurie & Co. 3rd ed.) (1778)).

powers and obligations have been, especially as regards some kinds of corporations, considerably curtailed.¹⁵

Brice, Reese, and Field go on to discuss the evolution of the doctrine in English jurisprudence, the most important cases being *Colman* and *East Anglian Railways*, the former involving a railroad company that wanted to get into the steamboat business, which was *ultra vires*, and the latter emphasizing that an illegal contract entered into by a railroad company was also *ultra vires*.¹⁶ Reese recognizes the *Colman* case as “[t]he first reported case touching the application of doctrines of *ultra vires* in England.”¹⁷

This earlier and widespread precedent included the private and public corporation law doctrine of *ultra vires*, a doctrine that has been specifically applied by the state of Idaho’s courts to limit local governmental power.¹⁸ The Latin term *ultra vires* means, quite simply, “beyond the powers,” and is “the modern nomenclature for acts of a corporation which exceed or are beyond the powers conferred by law upon the legal entity.”¹⁹

As Alexander observed, Dillon’s rule is also inextricably connected with what he calls “the doctrine of expressed powers.”²⁰ In its simplest and most generic meaning, “expressed power” is legally defined as “[a] power explicitly granted by a legal instrument,” “[a] power that is granted to all corporations alike by statute, whether inserted in the charter or not,” and “[a] power statutorily allowed to corporations whose incorporators take advantage of it by reserving it in the corporate charter.”²¹ Bluntly, this doctrine arose in the United States as a result of the Tenth Amendment, part of the Bill of Rights written by James Madison and ratified in 1791: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”²² Instead of using the word “expressed,” the Tenth

15. BRICE, *supra* note 14, at 28.

16. *Id.* at 27-35; REUBEN A. REESE, THE TRUE DOCTRINE OF ULTRA VIRES IN THE LAW OF CORPORATIONS: BEING A CONCISE PRESENTATION OF THE DOCTRINE IN ITS APPLICATION TO THE POWERS AND LIABILITIES OF PRIVATE AND MUNICIPAL CORPORATIONS (Scholar Select, 2015) (Chicago: T.H. Flood & Co.) (1897), at 9, 21, 39, 53, 183, §§ 9, 21, 39, 53, and 136; GEORGE WASHINGTON FIELD, THE DOCTRINE OF ULTRA VIRES, 9-41 and 190-99 (Reprint, Scholar Select, 2015) (Des Moines: Mills & Co. Law Publishers) (1881); *Colman v. Eastern Counties Railway Co.*, 10 Beav. 1 (1846); *Eastern Anglian Railway Co. v. Eastern Counties Railway Co.*, 11 C.B. 775 (1851).

17. REESE, *supra* note 16, at 55, § 39.

18. *Black v. Young*, 834 P.2d 304, 310 (Idaho 1992).

19. REESE, *supra* note 16, at 26, § 17; *Ultra vires*, BLACK’S LAW DICTIONARY (11th ed. 2019).

20. Alexander, *supra* note 1, at 131.

21. *Express Power*, BLACK’S LAW DICTIONARY (11th ed. 2019).

22. U.S. CONST. amend. X.

Amendment speaks of powers “delegated” to the federal government, the expressed powers.²³ The states retain all residual powers, much like the home rule concept or, perhaps more accurately, the Cooley doctrine. The linkage between “expressed power” and the Tenth Amendment was perhaps first most directly made by Chief Justice Chase in dissent in the *Legal Tender Cases* in 1870,²⁴ but the essential logic of the doctrine certainly flows from an early case cited by Alexander,²⁵ wherein the United States Supreme Court held:

The soil and the people within [the geographical limits of the United States] are under the political control of the Government of the United States, or of the states of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these.²⁶

Finally, the earliest use of the wording of “expressed power” in the municipal corporation area appears to occur in 1884 in Louisiana in the *Scott’s Executors* case.²⁷

The criticism of Dillon’s rule can be quite polemical and jejune, peppered with just enough politics to create a natural division. A pair of Idaho legal scholars, Professor of Law James S. Macdonald and then-J.D. candidate Jacqueline R. Papez, focus on the widely-held belief that the law of limited power for local government was created by an Iowa judge in the late 1860s, at a time of bribery by railroad companies of local governmental entities and other anachronisms, essentially a product of the zeitgeist.²⁸ Blair and Starke also subtly dig at Judge Dillon’s jurisdictional chic by claiming that the rule was “a legal interpretation by a nineteenth century Iowa state judge”²⁹ Macdonald and Papez’s argument largely mirrors the history set forth by Grumm and Murphy, which focuses on the peculiarities of the 19th century in the United States and credited Judge Dillon with “formulat[ing]” the rule.³⁰ Richardson also proclaims that Judge Dillon “first set out the rule” in 1865.³¹ The Idaho legal scholars call it “the single most regressive feature of the current legal landscape surrounding the state-local government

23. *Id.*

24. *Legal Tender Cases*, 79 U.S. 457, 573 (1870) (Chase, C.J., dissenting).

25. Alexander, *supra* note 1, at 131.

26. *United States v. Kagama*, 118 U.S. 375, 379 (1886).

27. *Scott’s Ex’rs v. Shreveport*, 20 F. 714, 715–17 (Cir. Ct. La. 1884).

28. James S. Macdonald & Jacqueline R. Papez, *Over 100 years Without True “Home Rule” in Idaho: Time for Change*, 46 IDAHO L. REV. 599–600 (2010).

29. Blair & Starke, *supra* note 2, at 278.

30. John G. Grumm & Russell D. Murphy, *Dillon’s Rule Reconsidered*, 416 ANNALS AM. ACAD. POL. & SOC. SCI. 120, 121 (1974).

31. Jesse J. Richardson, Jr., *Dillon’s Rule is from Mars, Home Rule is from Venus: Local Government Autonomy and the Rules of Statutory Construction*, 41 PUBLIUS: J. FEDERALISM 661, 664 (2011).

relationship,” dismiss it as the “19th century world-view of an Iowa judge,” and even go so far as to call Dillon’s rule the “Antichrist.”³²

There are many other critics of Dillon’s rule and the doctrines of expressed power and *ultra vires*. In his treatise, Field recognizes that “[t]he doctrine has been frequently . . . characterized as *odious, ungracious, and unwelcome*.”³³ A more recent critic claims the doctrine has an “elusive nature” and is not needed in our modern world, with “increased expectations and [the] expanded role of modern local government,” that it has a “low predictive value” that stymies cities from understanding their actual powers, that judges are forced to decipher often vague legislative intent (this is an odd argument given that if your powers are specifically listed, they should be easier to understand), and that it brings the “dual evils” of not really bringing cities under state control, yet hamstringing effective administration at the local level.³⁴ Louise Byer Miller notes that “states have found it increasingly necessary to devolve substantial power to their political subdivisions,” that the “rule . . . runs counter to the American tradition of local government,” and that it is not always clear “as to what constitutes a local matter.”³⁵ She also bemoans that the United States Supreme Court under Chief Justice Burger “reinforced” Dillon’s rule and “set back the home rule movement.”³⁶ Bowman and Kearney emphasize that the “controversial” *Community Communications* opinion reaffirms that “local governments continue to be held to the standards of Dillon’s Rule.”³⁷ Reese refers to “that disturbing element in the law of corporations known as the ‘[d]octrine of [u]ltra [v]ires’”³⁸

Critically, as a threshold matter, it must be recognized that the law existed in multiple jurisdictions *before* Judge Dillon’s pronouncements, and there are a variety of reasons, including the basic reasons of Tenth Amendment federalism and state sovereignty and the Constitutional separation of powers, which buttress what we widely call Dillon’s rule.³⁹ Idaho’s courts have rejected legal arguments made under the Idaho Constitution and statutes that localities have been granted a general right

32. Macdonald & Papez, *supra* note 28, at 599–600.

33. FIELD, *supra* note 16, at 580 (emphasis in original).

34. A.E.S., *supra* note 13, at 701–03, 705, 711.

35. Louise Byer Miller, *The Burger Court’s View of the Relationship Between the States and Their Municipalities*, 17 PUBLIUS 85, 88 (1987).

36. *Id.* at 91–92. Miller focuses on two Burger Court-era decisions: *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40 (1982). These opinions and their recognition that cities are not sovereign has remained viable to modern times in Supreme Court jurisprudence. *Fed. Trade Comm’n v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216 (2013).

37. BOWMAN & KEARNEY, *supra* note 4, at 44.

38. REESE, *supra* note 16, at 26.

39. See *infra* Section IV discussion and citations.

of powers, reinforcing Idaho's long-standing commitment to Dillon's rule or, perhaps more appropriately, *ultra vires* or the doctrine of express powers.⁴⁰

Indeed, a historical perspective reveals that cities of limited or defined powers have ancient origins. For example, Judge Dillon wrote that "[t]he first distinct recognition of a municipal corporation was in the 18th [year] of Henry VI (A.D. 1439), with reference to the English city Kingston-upon-Hull, which had an express charter of incorporation granted to it [by Henry VI] . . ."⁴¹ An older English legal scholar identifies St. Riquier in France as the oft-claimed earliest municipal corporation, or "commune" in France, under King Louis VI in 1126.⁴² A "commune" is "the smallest French territorial division for administrative purposes."⁴³ There is some evidence that King Louis VI made Corbie a commune three years before St. Riquier.⁴⁴

The history of cities goes back many centuries, but one scholar affirms "[t]he great municipal revolution . . . broke out in the first years of the twelfth century."⁴⁵ Thierry claims that Amiens became a commune in France in 1117, and the second volume of his two-volume treatise explores pre-twelfth century municipalities in western Europe, tracing from the Roman period.⁴⁶ Another source indicates the southwestern city of Oloron in France may have been the earliest commune in 1080, and other early French communes include Hainaut (1200, and perhaps as early as 1171), Saint-Omer (1127), and Morlâas (1101).⁴⁷ Since there is "no connecting link between ancient [Roman] "leges municipales" (i.e., municipalities) and the charters of the 1100s," it is probably safe to trace the modern municipal corporation to the twelfth century.⁴⁸ The ultimate and definitive tracing of the origin, source, and extent/limitation of powers of cities is a veritable rabbit hole that could lead back to even more distant empires and multijurisdictional entities that pre-date the known written record, and it seems reasonable that a more thorough historical search would likely turn up earlier cities of limited powers.

40. N. Idaho Bldg. Contractors Ass'n v. City of Hayden, 343 P.3d 1086, 1092–93 (Idaho 2015).

41. Dillon's Treatise, *supra* note 12, at 58.

42. WILLCOCK, *supra* note 13, at 4–5.

43. *Commune*, OXFORD DICTIONARY OF ENGLISH (3d ed. 2010).

44. ARTHUR HASSALL, A HANDBOOK OF EUROPEAN HISTORY 476–1871, at 51 (London, MacMillan & Co. 1897). "Coutumes" were "local customary laws" that "refer[] to both the customary laws and usages of a region and to any collection of these laws." JEAN CASWELL & IVAN SIPKOV, THE COUTUMES OF FRANCE IN THE LIBRARY OF CONGRESS: AN ANNOTATED BIBLIOGRAPHY 3 (2006). "Coutumier" is also defined as "[a] collection of the customs, usages, and forms of practice in use over many centuries in France." *Coutumier*, BLACK'S LAW DICTIONARY (Deluxe 10th ed. 2014). The issue of what was the first commune is a bit of a moving target, with another source claiming that the first one was granted in the 11th century in France under Philip I, Le Mans in 1072. XVII ENCYCLOPEDIA BRITANNICA, 35 (Spencer Baynes & W. Robertson Smith eds., 1905).

45. 2 AUGUSTIN THIERRY, FORMATION AND PROGRESS OF THE TIERS ÉTAT OR THIRD ESTATE IN FRANCE 131 (Reprint, Scholar Select 1859).

46. *Id.* at 149, 153, 180-81.

47. CASWELL & SIPKOV, *supra* note 44, at 41, 44, 47, 61.

48. JEAN BRISSAUD & MARCEL PLANIOL, PART III—FRANCE IN A GENERAL SURVEY OF EVENTS, SOURCES, PERSONS AND MOVEMENTS IN CONTINENTAL LEGAL HISTORY 222 (Reprint, Scholar Select 1912).

Willcock also provides us with a useful typology of cities:

The Authority by which corporations may warrant their existence, for it is more doubtful whence some actually derived it, is threefold. First, Prescription; that is, because they have existed from the reign of king Richard the First, or so long that no period subsequent to that time can be shown when they did not exist, they are entitled to continue. Secondly, Act of Parliament; for whatever is by that declared lawful must be acknowledged, and its institutions cannot be impugned. Thirdly, the King's Charter: this power has immemorially existed in the Crown, but the charter is wholly inoperative until it has been accepted by those to whom it is offered.⁴⁹

Brice gives us a longer typology of cities: (1) Common law, which arise from a sort of "universal assent," including from the king; (2) Prescription, which are cities that have existed from "time immemorial" without charter or act, presumably lost; (3) Implication, which are cities with duties imposed upon them, such as by the king; (4) Charter, which are cities created by "letter patent from the Crown;" and (5) Parliamentary, which are cities created by act of Parliament.⁵⁰

Finally, in their legal tome on private corporations, Angell and Ames give an excellent overview of the origin and development of cities, focusing on the Roman Empire and the limitations and rights that were granted to the citizens of cities in various circumstances.⁵¹

II. DILLON'S RULE

It is appropriate to set forth the basics of what scholars and practitioners of public administration and municipal law have come to know as Dillon's rule, which is a rule of statutory construction.⁵² A competing doctrine is "home rule," which refers to a presumption that states have affirmatively and generally granted the

49. WILLCOCK, *supra* note 13, at 16.

50. BRICE, *supra* note 14, at 29–31.

51. JOSEPH K. ANGELL & SAMUEL AMES, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE*, 9–16 (2d ed. 1843, Scholar Select) (2015).

52. Richardson, *supra* note 31, at 663. A rule of statutory construction is a rule that dictates how a court will engage in the "act or process of interpreting a statute," or "the principles developed by courts for interpreting statutes." *Statutory Construction*, BLACK'S LAW DICTIONARY (10th ed. 2014). Thus, Dillon's rule is simply a rule that courts created and follow that results in narrow interpretations of municipal power statutes; any doubts about expressed power are resolved against the municipal corporation. HOMER H. SWANEY, *ESSAY ON ULTRA VIRES*, 2 (Washington, D.C.: Rufus H. Darby, Printer) (1883).

power to a local governmental entity to enact policies on matters of local concern, a term that is also widely used in academic and legal circles.⁵³

The term “Dillon’s rule” is typically traced to two Iowa Supreme Court opinions, *Clark* and *Cedar Rapids*.⁵⁴ Shortly after these cases were published, Judge Dillon also set forth his rule in his famous 1872 treatise on municipal corporation law and again in his multi-volume commentaries on municipal corporation law.⁵⁵

In the first case, *Clark*, Judge Dillon authored an opinion concerning the authority of certain city officials to sign warrants without receiving any express authorization from the city council. Judge Dillon famously wrote:

It is a familiar and elementary principle that municipal corporations have and can exercise such powers, and such only, as are expressly granted, and such incidental ones as are necessary to make those powers available and essential to effectuate the purposes of the corporation; and these powers are strictly construed.⁵⁶

In the second case, dealing with the authority of a city over its streets, *Cedar Rapids*, Judge Dillon set out the rule with more flair:

The true view is this: Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, and the corporation could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the legislature.⁵⁷

In the *Clark* and *Cedar Rapids* opinions, Judge Dillon expressly relied on twenty-eight reported court decisions and two treatises to reinforce his holding.⁵⁸ The court decisions come from seven jurisdictions, including thirteen from New

53. Macdonald & Papez, *supra* note 28, at 598-609; Heidi Koenig & Amy Kise, *Law and the City Manager: Beginning to Understand the Sources of Influence on the Management of Local Government*, 6 J. PUB. ADMIN. RES. & THEORY, 443, 451 n.3 (1996); BERMAN, *supra* n.4, at 63; Lydia R. Wilson & Robert McCreight, *Public Emergency Laws & Regulations: Understanding Constraints & Opportunities*, 9 J. HOMELAND SEC. & EMER. MGMT., n.2, art. 7, 8 (2012).

54. Richardson, *supra* note 31, at 664-65; *Clark v. City of Des Moines*, 19 Iowa 199, 209-12 (1865); *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455, 475 (1868).

55. Dillon’s Treatise, *supra* note 12 § 5, at 101-05; Dillon’s Commentaries, *supra* note 11 § 237, at 448-51.

56. *Clark*, 19 Iowa at 212.

57. *Cedar Rapids*, 24 Iowa at 475.

58. *Id.* at 456-82; *Clark*, 19 Iowa at 201-28.

York, seven from Massachusetts, and two from the United States Supreme Court.⁵⁹ The earliest two cases cited are from 1804.⁶⁰

Judge Dillon emphasizes that the fundamental principle underlying all corporations in the United States is that they exist “only by virtue of express *legislative enactment*, creating, or authorizing the creation, of the corporate body.”⁶¹ Alexander credits Dillon with the notion that “the power of the state legislature over municipalities must be considered ‘supreme and transcendent.’”⁶² Reese echoes the inorganic quality that “[a] corporation, being an artificial creation, is the very thing it is made by statute which brought it into being, and nothing more.”⁶³ Relying on Chief Justice Shaw’s opinion in *Spaulding*,⁶⁴ Judge Dillon quoted his honor as writing that corporations “can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association.”⁶⁵

59. *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837); *Beaty v. Knowler*, 29 U.S. 152 (1830); *Dartmouth College v. Woodward*, 17 U.S. 518 (1819); *Head & Armory v. Providence Ins. Co.*, 6 U.S. 127 (1804); *Estep v. Keokuk County*, 18 Iowa 199 (1865); *People v. Kerr*, 27 N.Y. 188 (Ct. App. 1863); *W. Coll. of Homeopathic Med. v. Cleveland*, 12 Ohio St. 375 (1861); *Hood v. Mayor and Alderman of Lynn*, 83 Mass. 103 (1861); *Brady v. Mayor of N.Y.C.*, 20 N.Y. 312 (Ct. App. 1859); *Smead v. Indianapolis, Pittsburgh & Cleveland R.R. Co.*, 11 Ind. 104 (1858); *Appleby v. Mayor of N.Y.C.*, 15 How. Pr. 428 (N.Y. 1858); *Mitchell v. Rockland*, 45 Me. 496 (1858); *Inhabitants of Cong. Twp. No. 11 v. Weir*, 9 Ind. 224 (1857); *Bd. of Comm’rs of Tippecanoe Cty. v. Cox*, 6 Ind. 403 (1855); *Vincent v. Inhabitants of Nantucket*, 66 Mass. 103 (1853); *Halstead v. Mayor of N.Y.C.*, 3 N.Y. 430 (Ct. App. 1850); *Mayor of Albany v. Cunliff*, 2 N.Y. 165 (Ct. App. 1849); *Boom v. City of Utica*, 2 Barb. 104 (N.Y. 1848); *Boyland v. City of New York*, 1 Sandf. 27 (N.Y. 1847); *Hodges v. City of Buffalo*, 2 Denio 110 (N.Y. 1846); *Cornell & Clark v. Town of Guilford*, 1 Denio 510 (N.Y. 1845); *Dill v. Wareham*, 48 Mass. 438 (1844); *Purdy v. People*, 4 Hill. 384 (N.Y. 1842); *Martin v. Mayor of Brooklyn*, 1 Hill 545 (N.Y. 1841); *Anthony v. Adams*, 42 Mass. 284 (1840); *Spaulding v. Lowell*, 23 Pick. 71 (Mass. 1839); *People v. Morris*, 13 Wend. 325 (N.Y. 1835); *Cuyler v. Trs. of the Vill. of Rochester*, 12 Wend. 165 (N.Y. 1834); *Parsons v. Inhabitants of Goshen*, 11 Pick. 396 (Mass. 1831); WILLCOCK, *supra* note 13; *Stetson v. Kempton*, 13 Mass. 272 (1816). The authorities cited by Judge Dillon also cite many other authorities. See Angell and Ames, *supra* note 51; *Willard v. Newburyport*, 29 Mass. 227 (1831); *Kean v. Stetson*, 22 Mass. 492 (1827); *New-York Firemen Ins. Co. v. Ely*, 5 Conn. 560 (1825); *First Par. in Sutton v. Cole*, 20 Mass. 232 (1825); *Norton v. Mansfield*, 16 Mass. 48 (1819); *Bangs v. Snow*, 1 Mass. 181 (1804); *People v. Utica Ins. Co.*, 15 Johns. 358 (N.Y. 1818); JAMES KENT, COMMENTARIES ON AMERICAN LAW (Forgotten Books 9th ed. 2012) (1858).

60. *Bangs*, 1 Mass. at 181; *Head & Armory*, 6 U.S. at 127.

61. Dillon’s Treatise, *supra* note 12, at 52.

62. Alexander, *supra* note 1, at 129.

63. REESE, *supra* note 16, at 4.

64. *Spaulding*, 23 Pick. at 74.

65. Dillon’s Treatise, *supra* note 12, at 102.

In addition to hundreds of other court opinions, Dillon's rule has also been cited with approval and explained by the United States Supreme Court. Judge Dillon's opinion in *Cedar Rapids* was cited and quoted with approval by the high court in *Merrill* and *Atkin*, wherein municipalities were called mere "auxiliaries" and "agencies" of the state and "creatures of law."⁶⁶ In this respect, I disagree with Miller's assertion that "the [United States Supreme] Court [has] reinforced (without directly addressing) Dillon's rule. . . ."⁶⁷ Blair and Starke accurately observe that the "U.S. Supreme Court has affirmed Dillon's Rule as the law of the land. . . ."⁶⁸ In 1923, the high court also cited with explicit approval, Judge Dillon's explanation of the rule as set forth in his cases, treatise, and commentaries.⁶⁹

Banfield and Wilson, emphasizing the *Trenton* opinion, famously wrote that "a city cannot operate a peanut stand at the city zoo without first getting the state legislature to pass an enabling law . . .," an analysis that I urge is overbroad in the sense that if a city has authority to establish a zoo, it is arguable that providing refreshments for customers is incidental to its mission.⁷⁰

It should be noted that there was an opposing viewpoint to Dillon's rule that arose about the same time in Michigan, known as the "Cooley Doctrine," which was articulated in a concurring opinion filed by Justice Thomas M. Cooley.⁷¹ This doctrine held that there was an "inherent right of self-governance" for cities.⁷² Justice Cooley, however, later retreated from this viewpoint.⁷³ In the *Port Huron* case, he explained that "[m]unicipalities are to take nothing from the general sovereignty except what is expressly granted."⁷⁴ The United States Supreme Court's opinion upholding and adopting Dillon's rule in the *Merrill* and *Atkin* cases also caused the Cooley Doctrine to "fade[] from prominence, at least in the courts."⁷⁵

A. The Idaho Approach

Interestingly, Idaho's appellate courts have not actually cited the famed Dillon's rule cases for the proposition that municipal corporations have limited powers. A Westlaw search revealed that no Idaho appellate court in a published opinion has ever cited the second Dillon case, *Cedar Rapids*.⁷⁶ The Idaho Supreme Court cited the first Dillon case, *Clark*, one time, but it was cited for a proposition

66. *Atkin v. Kansas*, 191 U.S. 207, 220–21 (1903); *Merrill v. Monticello*, 138 U.S. 673, 681 (1891).

67. Miller, *supra* note 35, at 91.

68. Blair & Starke, *supra* note 2, at 278.

69. *City of Trenton v. New Jersey*, 262 U.S. 182, 187 n.1 (1923).

70. EDWARD C. BANFIELD & JAMES Q. WILSON, *CITY POLITICS* 64–65 (1963).

71. *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44 (1871) (Cooley, J., concurring).

72. Richardson, *supra* note 31, at 8.

73. *Port Huron v. McCall*, 10 N.W. 23, 26 (Mich. 1881).

74. *Id.* See also JESSE J. RICHARDSON, JR., MEGHAN ZIMMERMAN GOUGH & ROBERT PUENTES, *IS HOME RULE THE ANSWER? CLARIFYING THE INFLUENCE OF DILLON'S RULE ON GROWTH MANAGEMENT* 10 (2003), <https://www.brookings.edu/research/is-home-rule-the-answer-clarifying-the-influence-of-dillons-rule-on-growth-management/> (last visited Feb. 23, 2021).

75. Richardson, *supra* note 31, at 669.

76. *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455 (1868).

that had nothing to do with Dillon's rule—the legal issue of privity of contract.⁷⁷ However, it is quite clear that Idaho follows Dillon's rule, given the *Black* holding.⁷⁸ As has been discussed, there is, however, some disagreement, both subtle and overt, over Idaho's status. For example, as of 2011, one scholar finds that thirty-nine states accept Dillon's rule (including Idaho), ten states reject it, and one state (Florida) has conflicting law on the issue.⁷⁹ Another scholar in 1987 asserted that “[m]ost of the states have enacted [home rule] provisions,” and “over 80 percent of the states reject Dillon's rule or have modified it to constitutionally recognize the residual powers of local government,” including Idaho, which has “used its Dillon's rule authority to grant shared powers,” but it is difficult to evaluate this issue with precision.⁸⁰ Richardson, Gough, and Puentes produce a table ranking of all fifty states that shows Idaho as allowing the least discretionary authority to local government entities.⁸¹ In a subsequent paper, Richardson (2011) sets out a table produced by a study conducted by scholars in 2010, which ranks Idaho thirty-sixth out of fifty states in an index based on three dimensions: (1) local government importance; (2) local government discretion; and (3) local government capacity.⁸² The application of Dillon's rule, as you can see, is rather analytically muddled.

In what I found to be the most succinct, relatively modern restatement of Dillon's rule in an Idaho case, the Idaho Supreme Court explained: “municipal corporations have three sources of power and no others: (1) Powers granted in express words; (2) Powers fairly implied in or incident to those powers expressly granted; and (3) Powers essential to the accomplishment of the declared objects and purposes of the corporation.”⁸³ Given this clear language and virtual plagiarism

77. *Bush v. Artesian Hot & Cold Water Co.*, 43 P. 69, 70 (Idaho 1895).

78. *Black v. Young*, 834 P.2d 304, 310 (Idaho 1992).

79. Richardson, *supra* note 31, at 666–67.

80. Miller, *supra* note 35, at 88, 92 (citing and quoting Elazar, *supra* note 4, at 203–05, 229–30, n.5).

81. RICHARDSON, GOUGH, & PUENTES, *supra* note 74, at 27.

82. Richardson, *supra* note 31, at 20 (citing Harold Wolman, Robert McManmon, Michael Bell & David Brunori, *Comparing Local Government Autonomy Across States*, 101 NAT'L TAX ASS'N PROC. 381 (2008)).

83. *Black*, 122 Idaho at 308, 834 P.2d at 310 (citing *Alpert v. Boise Water Corp.*, 795 P.2d 298, 304 (Idaho 1990)); *O'Bryant v. City of Idaho Falls*, 303 P.2d 672, 674–75 (Idaho 1956); *Byrns v. City of Moscow*, 121 P. 1034, 1036 (Idaho 1912). I must confess that I was the law clerk who drafted the court's opinion in the *Black* case, for Justice Chas. F. McDevitt, and thus it holds a special place in my heart. However, after reviewing a number of Idaho cases, it stands out to me as the most pertinent, recent, and complete reference to Dillon's rule. The *O'Bryant* case cites secondary authority for Dillon's rule. *O'Bryant*, 303 P.2d at 674–75 (citing Dillon Commentaries, *supra* note 11). Likewise, Dillon's Treatise, *supra* note 12, was cited and quoted with approval by the Idaho Supreme Court in *Bradbury v. City of*

of Judge Dillon's words, there can be no real doubt that Idaho is a Dillon's rule state.⁸⁴

B. Criticism of Dillon's Rule

In their law review article, Macdonald and Papez call Dillon's rule the "Antichrist" and dismiss its influence as the "19th century world-view of an Iowa judge."⁸⁵ They also call it "[p]erhaps the single most regressive feature of the current legal landscape surrounding the state-local government relationship. . . ."⁸⁶ They argue that it was designed to address mid-19th century issues, particularly bribes from railroad companies.⁸⁷ It was "a reaction to a set of concerns that have long since become anachronistic"⁸⁸ and provided solace to "laissez-faire extremist[s]."⁸⁹ Indeed, Paul identifies Judge Dillon as a "traditional conservative[]" who moved towards laissez-faire views "under the impact of advancing social radicalism," an inspiring figure to "[r]ight-wing conservatism in America," and a "traditional legal conservativ[e]," although it is hard to see much current meaning in these characteristics from the mid-19th century, other than as a guide to the perceived or wished political origin of his legal philosophy.⁹⁰

Macdonald and Papez assert that Dillon's rule "has become a tool used to keep municipalities, often more liberal, in lock-step with state-wide thinking, often more conservative."⁹¹ Similarly, Richardson quotes Gere, another vociferous critic, as calling the rule a "strait-jacket" for localities and "rigid and inflexible."⁹² The atmospherics of Gere's anti-Dillon's rule argument, which largely mirror the criticisms discussed above, are summarized as "Dracula-like, sucking all autonomy from local governments."⁹³ Being labeled a legal "Antichrist" and "Dracula-like" is, in my view, wildly misleading and somewhat hysterical.

The main thrust of Macdonald and Papez is that Idaho's courts have adopted and followed Dillon's rule despite the fact that Idaho's constitution and statutes contain provisions that should be interpreted as *general grants of home rule power* to cities. First, they quote from the Idaho Constitution:

Idaho Falls, 177 P. 388, 389 (Idaho 1918), and more recently, in *Caesar v. State*, 610 P.2d 517, 519 (Idaho 1980).

84. RICHARDSON, GOUGH, & PUENTES, *supra* note 74, at 18, 42; Richardson, *supra* note 31, at 6.

85. Macdonald & Papez, *supra* note 28, at 599-600. Being called the "Antichrist" deserves multiple mentions.

86. *Id.* at 599.

87. *Id.* at 600.

88. *Id.* at 609.

89. *Id.* at 610 (quoting Joan C. Williams, *The Invention of the Municipal Corporations: A Case Study in Legal Change*, 34 AM. U.L. REV. 369, 437 (1985) (citing ARNOLD M. PAUL, *THE CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895* (1960))).

90. PAUL, *supra* note 89, at 29, 78-81, and 164.

91. Macdonald & Papez, *supra* note 28, at 612.

92. Richardson, *supra* note 31, at 677 (quoting Edwin A. Gere, Jr., *Dillon's Rule and the Cooley Doctrine: Reflections of the Political Culture*, 8 No. 3 J. Urb. Hist., 271-98 (1982)).

93. RICHARDSON, GOUGH, & PUENTES, *supra* note 74, at 7.

LOCAL POLICE REGULATIONS AUTHORIZED. Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.⁹⁴

This provision has been in Idaho's constitution since it was first adopted on July 3, 1890.⁹⁵

There is nothing to assist in understanding the intent of the framers of Idaho's constitution in adopting this provision. It was passed unanimously, 40-0, and no debate was recorded.⁹⁶ In his tome, *Idaho's Constitution*, Dennis C. Colson, Professor of Law at the University of Idaho, simply says that section 2 of art. XII "granted to counties and cities an inherent local police power to pass any ordinance that did not conflict with state law."⁹⁷

Second, they quote an Idaho statute relating to the powers of municipal corporations:

CORPORATE AND LOCAL SELF-GOVERNMENT POWERS. Cities governed by this act shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; accept grants-in-aid and gifts of property, both real and personal, in the name of the city; acquire, hold, lease, and convey property, real and personal; have a common seal, which they may change and alter at pleasure; may erect buildings or structures of any kind, needful for the uses or purposes of the city; and exercise *all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho.*⁹⁸

Significantly, the emphasized language was added by the legislature in 1976,⁹⁹ replacing the old language, which authorized cities to only exercise "such other powers as may be conferred by law."¹⁰⁰

Macdonald and Papez take the position that Idaho should have *never* been a Dillon's rule state, or at the least it should have certainly been removed from that

94. IDAHO CONST. art. XII, § 2 (emphasis added).

95. IRVING WARREN HART, PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889 180, 632, 1435, and 1491 (Caldwell, Idaho: Caxton Printers, Ltd. 1912).

96. *Id.* at 1491.

97. DENNIS C. COLSON, IDAHO'S CONSTITUTION: THE TIE THAT BINDS 197 (1991).

98. IDAHO CODE § 50-301 (2020) (emphasis added).

99. 1976 Idaho Sess. Laws 784.

100. Macdonald & Papez, *supra* note 28, at 606.

category when the legislature amended the law in 1976.¹⁰¹ Their point is not isolated. Stephen L. Beer wrote a law review article in 1972, *before the statutory amendment*, and relied primarily upon the Idaho constitutional provision and an old Idaho case called *State v. Robbins*, concluding that Idaho is or should be considered a constitutional home rule state.¹⁰²

Beer's reliance on *Robbins* is, in my view, inapposite. It dealt with a state law that authorized counties *and* cities to issue licenses to sell beer within their jurisdictions, the final license to be authorized by the state commissioner of law enforcement when presented with a valid local license.¹⁰³ The applicant applied for a license from the city of Moscow (its retail location) and the county of Latah (the location of Moscow), receiving a license from the former but being denied by the latter.¹⁰⁴ The state issued its license upon receipt of the valid city license.¹⁰⁵ The county filed charges, and the applicant was convicted.¹⁰⁶ The court relied upon art. XII, § 2 of the Idaho Constitution to hold that the state law did not make it mandatory that a county issue a license to a retailer located within a city, and it made it clear that "the right to exercise the police power of the state in local police, sanitary, and other regulations, has not been granted to counties and municipalities by the constitution without limitation. That right is limited to such regulations as are not in conflict with general laws."¹⁰⁷ This holding seems entirely consistent with Idaho's Dillon's rule heritage.

Beer and, subsequently, Moore (discussed in the proceeding paragraphs), discuss at length the history of Idaho case law on Idaho Const. art. XII, § 2 and Idaho Code § 50-301, showing how the Dillon's rule and Cooley doctrine spectrum has been traversed back and forth by the Idaho Supreme Court. Beer and Moore also take pains to explain the difference between constitutional and statutory home rule, the former being immune from legislative whim and requiring a constitutional amendment to change and the latter being purely subject to legislative whim; in effect, a cloaked Dillon's rule.¹⁰⁸ In his 1977 article, Moore calls the 1976 statutory amendment to Idaho Code § 50-301 "a step towards home rule," but an amendment that only changed the law to a "limited extent," and that further amendment or interpretation by the Idaho Supreme Court would be necessary to arrive at true home rule.¹⁰⁹

It is also noteworthy that another legal scholar has also concluded that Idaho should be considered a home rule state due to its constitutional language.¹¹⁰ In earlier editions of Antieau's treatise, he relies on Idaho's constitutional provision

101. *Id.* at 602.

102. IDAHO CONST. art. XII, § 2; *State v. Robbins*, 81 P.2d 1078 (Idaho 1938); Stephen L. Beer, *Constitutional Home Rule for Idaho Cities*, 8 IDAHO L. REV. 355, 368 (1972).

103. *Robbins*, 81 P.2d at 1078.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1080.

108. Beer, *supra* note 102, at 355; Moore (1977), *supra* note 6, at 148.

109. Moore (1977), *supra* note 6, at 170–71.

110. STEVENSON (ANTIEAU), *supra* note 10, § 21.01, at 1–12.

and eight Idaho Supreme Court opinions to support his categorization of Idaho as a home rule state, including the previously discussed *Robbins* case.¹¹¹

As with *Robbins*, I find all of these cases distinguishable and not supportive of a home rule categorization for Idaho. The *Clark*, *Foster's*, *Hart*, *Musser*, *Brunello*, and *Ridenbaugh* cases all relied extensively upon the powers granted to the city of Boise in its charter, which it has since surrendered, and take pains to explain how the ordinance at issue is not in conflict with the general laws of the state.¹¹² In the *Gale* opinion, the court again explained that a city ordinance requiring a liquor license was not in conflict with state liquor laws and was clearly a “police” power within the meaning of that word in the constitution.¹¹³ While these cases provide some semblance of support for the notion of home rule, they rest upon unique circumstances and cannot overcome the clear Dillon’s rule language in the *Black* opinion and other Idaho Supreme Court cases.

Idaho’s courts have never expressly held that Idaho’s constitution granted general home rule power to localities, and even the adoption of the new language by the legislature in 1976 has not moved Idaho’s courts to change their opinion.¹¹⁴ Former Idaho Attorney General (and former Idaho Supreme Court Justice) Wayne Kidwell issued an official opinion in 1976 that concluded Idaho’s constitutional provision is only a general grant of “police powers,” and, beyond that, “Idaho cities must look to the legislature for enabling legislation.”¹¹⁵ Beer even pointed to a 1969 letter opinion given by a deputy attorney general in Idaho to the mayor of Moscow, advising that “[t]he extent of [cities’] authority must thereby be limited to the legislative grant.”¹¹⁶ The term “police power” has not been well defined in this specific context, but it is obviously something less than general power and could be understood as “the power, inherent in the state, to make laws to restrict and regulate, within the bounds of reasonableness and constitutional rights, the conduct and business of individuals for the protection and promotion of public health, safety, property, morals, and welfare.”¹¹⁷ In a subsequent article, Moore

111. CHESTER JAMES ANTIEAU, MUNICIPAL CORPORATION LAW, § 3.00, at 3–4 (Matthew Bender & Co., 1993).

112. *Clark v. Alloway*, 170 P.2d 425, 430-32 (Idaho 1946); *Foster’s, Inc., v. Boise City*, 118 P.2d 721, 725–27 (Idaho 1941); *State v. Hart*, 157 P.2d 72, 73 (Idaho 1945); *State v. Musser*, 176 P.2d 199, 201–02 (Idaho 1946), *abrogated by* *Waller v. Florida*, 397 U.S. 387 (1970); *State v. Brunello*, 176 P.2d 212, 213 (Idaho 1946); *In re Ridenbaugh*, 549 P. 12, 13-14 (Idaho 1897).

113. *Gale v. City of Moscow*, 97 P. 828, 830–31 (Idaho 1908).

114. *N. Idaho Bldg. Contractors Ass’n v. City of Hayden*, 343 P.3d 1086, 1092-93 (Idaho 2015).

115. 1976 OP. IDAHO ATT’Y GEN. 76-3 at 9.

116. Beer, *supra* note 102, at 358 & note 12.

117. Moore (1977), *supra* note 6, at 145.

conceded that “the Idaho Constitution makes no provision for constitutional ‘home rule.’”¹¹⁸

In his 1977 article, Moore explained that Idaho only had three “true” home rule cities, Boise, Bellevue, and Lewiston, which were chartered by Idaho’s territorial legislature and continued in force after statehood.¹¹⁹ However, I do not believe one can call them true “home rule” cities with residual powers, when their powers were detailed in legislative charters. Moreover, the cities of Boise and Lewiston have long since surrendered their charters, Boise via a vote of the people of the city on August 22, 1961 (96% in favor) and legislative enactment (House Bill 101 in 1961) and Lewiston via a vote of the people of the city (82.7% in favor) on October 14, 1969, choosing instead to become municipal corporations under Idaho statute, primarily due to the ease of annexing new territory via the municipal statutes.¹²⁰ Tellingly, Boise’s mayor was quoted as saying that the vote “grants Boise the long-awaited opportunity to free itself of the unnatural restrictions which have bounded it for so many years [under a charter].”¹²¹ Bellevue, a small town in central Idaho near the famous resort town of Sun Valley, remains the only charter city in Idaho, and commentators have noted that annexation restrictions, which must be approved by the legislature, may cause future problems for Bellevue.¹²² Thus, the privilege of being a charter city was and is not viewed by some experts as particularly favorable with respect to city powers.

With respect to the 1976 legislative amendment to statute, at the time of Macdonald and Papez’s article in 2010, no Idaho court had actually interpreted the new language.¹²³ Yet, like the *Black* opinion and others discussed herein, there have been multiple cases presented to the Idaho Supreme Court since 1976, wherein the court could have cited the 1976 law change and authorized a locality to exercise a

118. Michael C. Moore, *The Idaho Constitution and Local Governments – Selected Topics*, 31 IDAHO L. REV. 417, 420 (1995) [hereinafter Moore (1995)].

119. Moore (1977), *supra* note 6, at 149, citing 1866 Idaho Sess. Laws 205-09 (an act to incorporate Boise City); *id.* at 87-93 (an act to incorporate the City of Lewiston); 1883 Idaho Sess. Laws 85-119 (an act to incorporate the City of Bellevue); IDAHO CONST. art XI, § 1 and art. XXI, § 2.

120. Boiseans to Vote Today on City Charter Repeal, IDAHO DAILY STATESMAN, August 22, 1961, at 10 [hereinafter Boiseans to Vote]; Boise City Charter Dies in Lopsided Tuesday Vote; Only 151 Vote Retention, IDAHO DAILY STATESMAN, August 23, 1961, at 28; Governor’s Signature Ends Boise Charter Government, IDAHO DAILY STATESMAN, September 2, 1961, at 8 [hereinafter Boise Charter Dies]; Charter Voted Out by Overwhelming Majority, LEWISTON MORNING TRIB., October 15, 1969, at 12; Orchards Annexed; Recall is Planned, Lewiston Morning Trib., December 16, 1969, at 12; H.B. 101, 36th Leg., Reg. Sess. (Idaho 1961) (an act relating to Boise City and to the charter of Boise City).

121. Boiseans to Vote, *supra* note 120, at 10; Boise City Charter Dies, *supra* note 120, at 28.

122. Kimberly Williams Brackett, *Curious Mind: Bellevue Operates on Territorial Charter*, MAGICVALLEY.COM, ¶ 7, (Sept. 23, 2014), https://magicvalley.com/news/local/curious-mind-bellevue-operates-on-territorial-charter/article_dbbbdbba-42d6-11e4-8101-238882dbb260.html.

123. Macdonald & Papez, *supra* note 28, at 608. My own independent research on Westlaw confirmed the observation of Macdonald and Papez at the time it was made. Subsequent to their article, the actual meaning of this section was finally addressed by the Idaho Supreme Court in *N. Idaho Bldg. Contractors Ass’n v. City of Hayden*, 343 P.3d 1086, (Idaho 2015), a case which I will discuss later.

power not specifically granted to it.¹²⁴ Indeed, Michael C. Moore, a long-time Idaho practitioner and expert on municipal law, opined in his 1977 law review article that the statutory amendment “[is] a step toward home rule in municipal affairs.”¹²⁵ Macdonald and Papez even fairly point out with some degree of irony and frustration that the 1977 Moore article was cited in an Idaho Supreme Court decision for the proposition that Dillon’s rule *is the law in Idaho*.¹²⁶

Macdonald and Papez bemoan four overall aspects of Dillon’s rule in Idaho: (1) it fails to conform to Idaho constitutional and statutory law, (2) it fails to empower localities to deal with economic crises, (3) the reasons for creating Dillon’s rule in the mid-1800s no longer exist, and (4) there are other constitutional and statutory limits on local power that render Dillon’s rule to be mere “judicial parsimony.”¹²⁷ They provide as examples of potential local legislation in contemporary times gay rights, guns, and taxes.¹²⁸ To this list, I would add the modern concept of “sanctuary cities,”¹²⁹ a city minimum wage,¹³⁰ and protections

124. I reviewed the court record and appellate briefs filed in the *Black* case, and there was no citation or discussion of IDAHO CODE § 50-301 whatsoever, which is puzzling. Record on Appeal, *Black v. Young*, 834 P.2d 304 (No. 19294) (in archival storage at the Office of the Clerk of the Idaho Supreme Court).

125. Moore (1977), *supra* n.6, at 171.

126. Macdonald & Papez, *supra* note 28, at 608.

127. *Id.* at 609–10.

128. *Id.* at 612–14.

129. See Christopher N. Lasch et al., *Understanding Sanctuary Cities*, 59 B.C. L. REV. 1703 (2018) (recent law review article providing an excellent overview of the sanctuary city phenomenon, which dates back to the 1980s); Lori Riverstone-Newell, *The Diffusion of Local Bill of Rights Resolutions to the States*, 45 ST. & LOC. GOV’T REV. 14 (2013) (discussing the concept of sanctuary cities and the power of cities to enact ordinances that are contrary to state or federal law). Typically, one thinks of the relationship between the federal government and local government when it comes to sanctuary policies, but there is always the question of whether a city has the power under state law to do any particular thing, and there are some states that have explicitly banned sanctuary policies. Christina Goldbaum, *State Courts Become Battleground Over Trump’s Sanctuary Cities Policy*, N.Y. TIMES (Dec. 12, 2018), <https://www.nytimes.com/2018/12/12/nyregion/sanctuary-cities-state-courts.html>. The question of the federal government telling local government what to do is a different issue, *i.e.*, enforcing federal immigration law, and is rooted in the Tenth Amendment and akin to a form of an “unfunded mandate.” Symposium, *Sanctuary Cities*, 81 ALBANY L. REV. 679–720, 690, 698 (2017).

130. Indeed, on at least two occasions, the Idaho Attorney General has provided legal advice on the issue of whether an Idaho locality could exercise the power to set its own minimum wage. Letter from Mitchell E. Toryanski, Deputy Att’y Gen. for the Idaho Att’y Gen., to Gary J. Schroeder, State Sen. (Oct. 23, 2006) Our File No. 2006LEG228—Minimum Wage/Cities’ Power to Mandate; Letter from Brian Kane, Assistant Chief Deputy to the Idaho Att’y Gen., to Luke Malek, State Representative (May 13, 2015)

for the LGBTQ community when state human rights or anti-discrimination laws do not make them members of a protected class.¹³¹ Their solution to the continuing recognition of Dillon’s rule is threefold: (1) a constitutional amendment that requires a “liberal interpretation” of the existing language; (2) a statutory amendment that also requires a liberal interpretation to the 1976 law change; and (3) a change in course by the Idaho Supreme Court at the next available opportunity to reject Dillon’s rule under existing Idaho law, consistent with the reasoning used by the Utah Supreme Court in rejecting the continuing application of Dillon’s rule in the Utah *Hutchinson* case.¹³²

I distinguish *Hutchinson* from Idaho law because the Utah state law involved in that case is different than Idaho’s law. I also note that *Hutchinson* has been restricted against applying to statutorily created entities.¹³³ The *Hutchinson* case, however, provides an excellent overview of all the criticisms of Dillon’s rule.

A.E.S. also calls for a repeal of Dillon’s rule in Virginia, pointing out the following: (1) there are “increased expectations and [an] expanded role of modern local government;” (2) Judge Dillon was a “skeptic of the competence of local government;” (3) he was particularly concerned with protecting private property; (4) it has a “low predictive value,” leaving localities guessing as to their actual powers; (5) courts have trouble with consistency because of the need to “ferret out legislative intent;” and (6) the competence of local government has improved, where it is now “professionally operated” and “sophisticated.”¹³⁴

Our File No. 15-51356—Minimum Wage. In both letters, the Attorney General warned that since Idaho has enacted a statewide minimum wage law, it is likely such a municipal ordinance would not survive legal challenge in Idaho’s courts. Idaho enacted a law in 2016 which banned political subdivisions from setting a minimum wage. 2016 Idaho Sess. Laws, ch. 145, § 1, p. 412 (codified at IDAHO CODE § 44-1502). In a very recent letter, Assistant Chief Deputy Attorney General Brian Kane explicitly called Idaho a “Dillon’s rule” state. Letter from Brian Kane, Assistant Chief Deputy, to Lawrence Denney, Idaho Sec’y of State (Aug. 13, 2019) The Chief of Staff for the Boise Mayor also agreed that Idaho is a “Dillon’s rule” state. Memorandum from Jade Riley, Chief of Staff, to the Mayor and City Council (Feb. 25, 2019).

131. Idaho has at least thirteen localities and one county that have adopted some form of protection for the LGBTQ community. Maria L. La Ganga, *Meridian Bans LGBTQ Discrimination, Sending What Backer Calls “Message of Inclusivity,”* IDAHO STATESMAN (Sept. 26, 2018), <http://www.idahostatesman.com/news/article218999140>

.html; CHRISTY MALLORY & BRAD SEARS, DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY IN IDAHO, WILLIAMS INST., UCLA SCH. OF L. (Sept. 2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Idaho-ND-September-2017.pdf>.; *Ada County Adds LGBTQ Status to Anti-Discrimination Policy*, Associated Press (Aug. 21, 2019), <https://apnews.com/5d5f84b92acd47589cfd3241aadb29>. Although there have been several attempts to bring the LGBTQ issue to the state level in Idaho, the Idaho Human Rights Act has not been amended to include it, instead applying only to the more traditional protected classes of “race, color, religion, sex or national origin or disability” and age. IDAHO CODE § 67-5901.

132. *State v. Hutchinson*, 624 P.2d 1116 (Utah 1980); Macdonald & Papez, *supra* note 28, at 615–17.

133. *Harmon v. Ogden City Civil Serv. Comm’n*, 917 P.2d 1082, 1084 n.3. (Utah 1996).

134. A.E.S., *supra* note 13, pp. 693-94, 701-05.

In her article, Miller adds that states have found it more attractive to “devolve power to [municipalities].”¹³⁵ She also asserts that Dillon’s rule “runs counter to the American tradition of local government.”¹³⁶ She echoes A.E.S. and many others in saying that it is difficult to identify exactly what constitutes a local power.¹³⁷ She asserts that the United States Supreme Court under Chief Justice Burger has “curbed municipal power and set back the home rule movement.”¹³⁸ Alexander agrees with Miller’s view that the Burger Court was “extremely faithful to Dillon’s rule.”¹³⁹

C. The Legislative History of the 1976 Amendments to IDAHO CODE § 50-301

It is hornbook law that a court will not look at legislative history when it finds a statute or constitutional provision to be clearly written.¹⁴⁰ No Idaho cases since the amendment of Idaho Code § 50-301 in 1976 have indicated any concern with the clarity of the law. Nevertheless, it is interesting and provides both support for and opposition against the Dillon’s rule critics to delve into the history of this 1976 statutory amendment, which was initially known as House Bill 422 or, previously, RS 685.¹⁴¹

The statement of purpose for House Bill 422 (1976) is set forth as follows:

The purpose of this bill is to grant a *limited form of local self-government* authority to Idaho’s cities. Currently, Idaho’s cities may exercise only those powers and perform only those functions

135. Miller, *supra* note 35, at 88.

136. *Id.*, *supra* note 35 at 88, citing ELAZAR, *supra* note 4, at 203–05.

137. Miller, *supra* note 35, at 88.

138. *Id.*, at 92. The Court’s recognition on limits of city powers and the supremacy of states seems alive and well today. Under today’s court, Justices Scalia and Thomas wrote that “in another line of cases, we have emphasized the near-limitless sovereignty of each State to design its governing structure as it sees fit” and “States have ‘absolute discretion’ to determine the ‘number, nature and duration of the powers conferred upon [municipal corporations] and the territory over which they shall be exercised.’” *Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 327 (2013) (Scalia, J., concurring).

139. Alexander, *supra* note 1, at 135.

140. See, e.g., *Pioneer Irrigation Dist. v. City of Caldwell*, 288 P.3d 810, 814 (Idaho 2012) (citing *Hayden Lake Fire Prot. Dist. v. Alcorn*, 109 P.3d 161, 166 (Idaho 2005)) (“Where a statute is unambiguous, its plain language controls.”).

141. In Idaho’s legislature, an “RS” is a routing slip, accompanied by a number. It is draft legislation, before the legislation is approved for printing as a bill, at which point a new number is assigned. As explained on the Idaho legislature’s website, an RS is not public information until it becomes a bill. IDAHO CODE § 74-109; RS: *Draft Legislation—Not Available Until Introduced*, IDAHO LEGISLATURE, <http://legislature.idaho.gov/sessioninfo/rs/>.

specifically mentioned in the Constitution of the State of Idaho or in the Idaho Code. If the Constitution and the Code are silent, cities may not act. Unlike the state government, which may exercise any power and perform any function not prohibited by the United States Constitution, Idaho's cities do not have "residual powers." They may act only if they have been specifically authorized to act—and only in the manner prescribed by the Idaho Constitution or the Idaho Code.

Enactment of this bill would provide Idaho's cities with *real local control over local affairs* by permitting them to exercise those powers and perform those functions not specifically prohibited by or in conflict with the Idaho Constitution or the Idaho Code. Because the Idaho Code is presently so restrictive, the immediate impact of the enactment of this bill would not be great. It would, however, establish a general framework upon which *meaningful local self-government* could be constructed over a period of time.¹⁴²

The language I emphasized indicates both a desire for some degree of home rule—"real local control" and "meaningful local self-government"—but it is still "limited."¹⁴³ At best, one could interpret this statement to mean that local government can act in affairs that are local in nature and not specifically prohibited or where there is silence in the law.

The 1976 legislation was initially assigned to the House Local Government Committee, where at its meeting on January 16, 1976, the legislation was described as "[r]elating to self-governing powers of cities; amending section 50-311 to provide that cities may exercise and perform all functions of local self-government."¹⁴⁴ Once again, the language focuses on the "local" nature of the types of powers that may be exercised by cities. The bill was again discussed in committee on January 20, 1976, where nothing new was said, other than the iconoclastic Representative Perry Swisher was named its sponsor.¹⁴⁵ The bill was successfully moved for printing on January 21, 1976.¹⁴⁶

In its February 4, 1976 meeting, the committee once again discussed the legislation, receiving favorable testimony from a number of city officials. It also received an opinion from Attorney General Wayne Kidwell, who opined that Idaho's existing law granted "home rule" to cities on "police powers," so long as not

142. Idaho H.B. 422 (1976) (underline in original) (emphasis added) (Copy in possession of author. Original in Idaho Legislative Services Library).

143. *Id.*

144. 1976 Idaho Sess. Laws, ch. 214, p. 784 (codified as IDAHO CODE § 50-301).

145. MINUTES OF IDAHO HOUSE LOCAL GOVERNMENT COMMITTEE, January 20, 1976 (discussing RS 685).

146. DAILY DATA, Final Edition, Forty-Third Idaho Legislature, Second Regular Session, January 5, 1976 through March 19, 1976, H422 (Copy in possession of author. Original in Idaho Legislative Services Library).

inconsistent with any other constitutional or statutory provision—hardly a strong endorsement of home rule.¹⁴⁷

The legislation was finally moved to the floor of the House with a “do pass” recommendation in the committee meeting on February 24, 1976.¹⁴⁸

After passing on the House floor 39-30-1,¹⁴⁹ the legislation moved over to the Senate and was assigned to the Local Government & Taxation Committee. There, in its meeting on March 10, 1976, the committee heard testimony, including the following reflected in the committee minutes by Jim Weatherby, a former political science professor at Boise State University:

Mr. Weatherby told the committee that the purpose of this bill is to grant a *limited form of local self-government* authority to Idaho cities. Currently, Idaho’s cities may exercise only those powers and perform only those functions specifically mentioned in the Constitution of the State of Idaho or in the Idaho Code. Mr. Weatherby said that cities should be given those authorities that are not granted by the Constitution and the Idaho Code. With the passage of H 422 the Legislature would give them *home rule*, then we can come back and propose to the Legislature areas we feel that are too restrictive or in conflict [with] the Code. *This is a most limited form of home rule.*¹⁵⁰

Thus, for the first time in the printed record, the term “home rule” was used, but it was emphasized to be a “limited” form of home rule.

In the same meeting other testimony was heard for and against the legislation—the powerful Idaho Association of Commerce and Industry was opposed—and one Senator, Max Yost, noted that he felt the legislation “does not go far enough to give Idaho a good strong home rule,” and that he “believes that Idaho does have a good basis for home rule now.”¹⁵¹ The legislation was ultimately

147. MINUTES OF IDAHO HOUSE LOCAL GOVERNMENT COMMITTEE, February 4, 1976 (statement of Idaho Deputy Att’y Gen. Wayne Kidwell).

148. MINUTES OF IDAHO HOUSE LOCAL GOVERNMENT COMMITTEE, February 24, 1976 (discussing HB 422).

149. In my experience in Idaho’s state government, this is a very divided vote, with significant Republican opposition in a rather conservative state. H. JOURNAL 182–83 (Idaho 1976).

150. MINUTES OF IDAHO SENATE LOCAL GOVERNMENT & TAXATION COMMITTEE, March 10, 1976, pp. 1–2 (testimony of Jim Weatherby).

151. *Id.* at 2 (statement of Max Yost, Senator, Idaho, discussing H.B. 422).

passed out of Senate committee and on the floor,¹⁵² and was thus made into law with the signature of Governor Andrus on March 22, 1976, effective July 1, 1976.¹⁵³

Thus, the record developed in the Senate does provide some support for Macdonald and Papez's argument that Idaho should have always been and, after 1976, certainly should be a home rule state. Alas, Idaho's courts have not taken the bait.

III. A RESPONSE TO THE CRITICISM: THE TRUE ORIGIN OF DILLON'S RULE

It is inaccurate to attribute, expressly or by implication, the origin of the law of limited powers for local government to a rural Iowa judge writing in the middle of nowhere in the late-1860s. As discussed above, in his two seminal opinions Judge Dillon himself cites a veritable plethora of pre-existing court decisions in support of his holding.¹⁵⁴ Most notably, in *Clark*, Judge Dillon references the doctrine of *ultra vires*, a legal doctrine that applies to private and public corporations.¹⁵⁵ In terms of reported court decisions, this doctrine has been traced in the United States to the 1804 United States Supreme Court opinion in *Head & Armory* and the Massachusetts Supreme Court opinion in *Bangs*.¹⁵⁶ Smith and Greenblatt expressly state that "Dillon's [r]ule is built on the legal principle of *ultra vires*, which means 'outside one's powers.'"¹⁵⁷ Alexander explains that the United States Supreme Court's eternal refusal to recognize any sovereign other than the states and the United States "became known as the doctrine of expressed powers."¹⁵⁸ In Idaho, the Supreme Court very directly emphasized Idaho's status as a Dillon's rule state, using almost identical language to that set forth in *Clark* with no reference whatsoever to Judge Dillon, yet called the unauthorized action of a city to be *ultra vires*.¹⁵⁹ Thus, it is more technically accurate to credit the law of limited powers for local governmental entities to a pre-existing body of law, specifically including the doctrines of *ultra vires*.¹⁶⁰

The doctrine of *ultra vires* applies to all types of corporations, although due to more recent model incorporation laws that grant private corporations the power to do anything that is not illegal, it has largely died out in the private corporation

152. *Id.* Moreover, once again, the floor vote received significant opposition, but it passed 19-16. S. JOURNAL 231-32 (Idaho 1976).

153. DAILY DATA, *supra* note 146.

154. *Clark v. City of Des Moines*, 19 Iowa 199, 209-10 (1865); *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455, 470-74 (1868).

155. *Clark*, 19 Iowa at 209.

156. *Head & Armory v. Providence Ins. Co.*, 6 U.S. 127 (1804); *Bangs v. Snow*, 1 Mass. 181 (1804). The key holding in *Head & Armory* is that "a corporation can only act in the manner prescribed by law." *Head & Armory*, 6 U.S. at 166. The key holding in *Bangs* is that "parishes had no powers except those given by the statute[]," noting that "this doctrine has been so uniformly holden in the judicial courts." *Bangs*, 1 Mass. at 190.

157. SMITH & GREENBLATT, *supra* note 4, at 366.

158. Alexander, *supra* note 1, at 131.

159. *Black v. Young*, 834 P.2d 304, 310 (Idaho 1992).

160. The doctrine of expressed power appears to be a slightly later name for the rule of construction we are discussing. *Barnert v. Mayor of Paterson*, 6 A. 15, 15-16 (N.J. 1886).

arena.¹⁶¹ It is a doctrine that clearly arose from charters and statutory enactments permitting and governing the creation of all types of corporations—at common law, a corporation “had the capacity of a group of natural persons, that is, a capacity to do an unauthorized or forbidden act.”¹⁶²

Thus, to argue that cities should have home rule powers is tantamount to arguing the controversial notion that corporations are or should be the same as people. The highly controversial *Citizens United* case, which held corporations to have the same First Amendment rights as individuals, comes to mind.¹⁶³ Yet, in a United States Supreme Court decision interpreting the powers of a statutory corporation, the Court noted that we must distinguish corporations from natural persons as corporations must depend entirely on statute for their powers.¹⁶⁴ In a similar case involving the power of a state-created corporation, the Court referred to such an entity as a “mere artificial being, invisible and intangible; yet it is a person, for certain purposes in contemplation of law.”¹⁶⁵ In his law treatise, Reese explains: “A person is not confined in the exercise of his capacities to any business, but may do any act or enter into any contract not prohibited by law. An artificial person may do no acts nor enter into any contracts except such as are authorized by law; the one’s power being inherent whilst the powers of the other are conferred.”¹⁶⁶ For limited purposes of sovereign immunity from lawsuit, L.B. Miller points out that the United States Supreme Court has held that “a municipal corporation possesses the status of a ‘person.’”¹⁶⁷

Likewise, the case law of England, from which our common law is partly derived, appears fully consistent with our own where “the common law attached to [pre-statutory corporations] all the capacities of ordinary individuals.”¹⁶⁸ Beattie explains that “[s]tatutory corporations, which are the creation of more modern legislation, are created for certain and specific purposes and . . . cannot do any acts

161. Frederick S. Kuhlman, *Government Estoppel: The Search for Constitutional Limits*, 25 LOY. L.A. L. REV. 229, 244 (1991); FIELD, *supra* note 16, at 580.

162. Robert S. Stevens, *A Proposal as to the Codification and Restatement of the Ultra Vires Doctrine*, 36 YALE L.J. 297, 298 (1927). Concomitantly, there is also no common law right to local self-government – the right is purely statutory. Grumm & Murphy, *supra* note 30, at 121. Blackstone also speaks of corporations acting at least in some ways as a natural person. BLACKSTONE’S COMMENTARIES, *supra* note 14, at 308.

163. *Citizens United v. Fed. Elections Comm’n*, 588 U.S. 310 (2010).

164. *Bank of the U.S. v. Dandridge*, 25 U.S. 64, 67 (1827).

165. *Bank of Augusta v. Earle*, 38 U.S. 519, 588 (1839).

166. REESE, *supra* note 16, at 9.

167. Miller, *supra* note 35, at 87; *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

168. *Common Law*, BLACK’S LAW DICTIONARY (Deluxe 10th ed. 2014); DAVID J. BEATTIE, *ULTRA VIRES IN ITS RELATION TO LOCAL AUTHORITIES 1* (London: The Solicitors’ Law Stationery Society, Ltd.) (1936).

beyond those authorized by the creative statute.”¹⁶⁹ Beattie goes on to cite and discuss a laundry list of English court decisions from the 1800s that applied the doctrine of *ultra vires*.¹⁷⁰ I wholly agree with the historical observation that while initially corporations were “endowed with the same rights and subject to the same liabilities as individuals . . . it became necessary for the public good, to restrict their powers to narrower limits.”¹⁷¹

In his law treatise, Reese traces the principles of the doctrine of *ultra vires* in the United States back to the United States Supreme Court’s opinion in *Head & Armory*.¹⁷² In total, Reese discusses eleven cases which pre-date Judge Dillon’s enunciation of the rule.¹⁷³ Furthermore, he identifies the United States Supreme Court opinion in *Pearce* as the “first case . . . where the doctrine of *ultra vires* was directly considered.”¹⁷⁴ The *Pearce* decision relied on English authority, *Head & Armory*, and *Perrine*.¹⁷⁵ The *Perrine* case involved a canal company that lacked explicit authority via its state law charter to charge a toll to boat passengers, and the Court cited several prior opinions and recognized: “Now it is the well-settled doctrine of this court, that a corporation created by statute is a mere creature of the law, and can exercise no powers except those which the law confers upon it, or which are incident to its existence.”¹⁷⁶

Reese also identifies *Thomas* as an *ultra vires* origin case that had probably been cited more often than any other case for the doctrine at that time.¹⁷⁷ With respect to municipal corporations, he cites a veritable laundry list of court opinions that pre-date Judge Dillon’s pronouncement for the proposition that “[m]unicipal corporations can exercise only such powers as are expressly granted to them, or such as are necessary to carry into effect those that are granted.”¹⁷⁸

169. BEATTIE, *supra* note 168, at 2.

170. *Id.*

171. Charles Henry Parshall, *Ultra Vires*, (June 1891) (unpublished historical thesis, Cornell Law School) (on file with Cornell Law Library, Cornell Law School). It should be noted that Parshall discusses two legal terms historically related to *ultra vires*, “*mala prohibita*” and “*quo warranto*.” *Id.* at 2 and 26. As he explains, the initial statutes governing corporations listed specific prohibitions, and *mala prohibita* simply means any action that goes against a statute. *Malum Prohibitum*, BLACK’S LAW DICTIONARY (Deluxe 10th ed. 2014). “*Quo warranto*” was simply an old “common law writ used to inquire into the authority by which a public office is held or a franchise is claimed.” *Quo Warranto*, BLACK’S LAW DICTIONARY (Deluxe 10th ed. 2014); Parshall, *supra* at 26–27.

172. REESE, *supra* note 16, § 21, at 30; *Head & Armory v. Providence Ins. Co.*, 6 U.S. 127 (1804).

173. REESE, *supra* note 16, §§ 21–31, at 30–39.

174. REESE, *supra* note 16, § 30, at 37–38; *Pearce v. Madison & Indianapolis R.R. Co.*, 62 U.S. 441 (1858).

175. *Pearce*, 62 U.S. at 444 (citing *Eastern Anglian Railway Co. v. Eastern Counties Railway Co.*, 11 C.B. 775, 803 (1851); *Head & Armory v. Providence Ins. Co.*, 6 U.S. 127 (1804); *Perrine v. Chesapeake & Delaware Canal Co.*, 50 U.S. 172 (1850)).

176. *Perrine*, 50 U.S. at 184.

177. REESE, *supra* note 16, § 35, at 43–45; *Thomas v. R.R. Co.*, 101 U.S. 71, 83 (1879).

178. REESE, *supra* note 16, § 170, at 232 n.4. In the modern seminal multi-volume legal treatise on municipal law, McQuillin extensively discusses the doctrine of *ultra vires*. 18 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 53:77.28 (3rd ed. 2013).

Reese also eloquently sets forth what he calls the “alpha” and “omega” of the doctrine of *ultra vires*:

[The alpha] is that a contract by which a corporation disables itself from performing its functions and duties undertaken and imposed by its charter is, unless the state which created it consents, *ultra vires*. A charter not only grants rights, it also imposes duties. An acceptance of those rights is an assumption of those duties. . . . It is not like a deed or patent, which vests in the grantee or patentee not only title but full power of alienation, but it is more—it is a contract whose obligations neither party, state nor corporation, can, without the consent of the other, abandon. [The omega] is that the powers of a corporation are such, and such only, as the charter confers; and an act beyond the measure of those powers, as either expressly stated or fairly implied, is *ultra vires*. A corporation has no natural or inherent rights or capacities. Created by the state, it has such powers as the state has seen fit to give it—only this and nothing more. And so when it assumes to do that which it has not been empowered by the state to do, its assumption of powers is void, the act is a nullity; the contract is *ultra vires*.¹⁷⁹

Some modern non-legal scholars, including Grumm and Murphy, Wood, and Richardson, have also recognized the source of Dillon’s rule as an application of the doctrine of *ultra vires*. Grumm and Murphy explain that, historically speaking, “unless a locality could convincingly demonstrate otherwise, the presumption was that it had acted *ultra vires*.”¹⁸⁰ Grumm and Murphy also describe the rationale of Dillon’s rule as arising from a “general doctrine of state supremacy” and a “doctrine of expressed powers.”¹⁸¹ Wood bluntly states that “[h]istorically, local governments have been subject to the Ultra Vires Rule (also known as Dillon’s rule).”¹⁸² Likewise, Richardson admits that “the idea of state control over local governments existed long before Judge Dillon articulated the rule.”¹⁸³ He points to an 1816 opinion from the Massachusetts Supreme Court, wherein the court held:

The right of towns to grant or raise money . . . is certainly derived from statute. Their corporate powers depend upon legislative charter or

179. REESE, *supra* note 16, § 19, at 29.

180. Grumm & Murphy, *supra* note 30, at 124.

181. *Id.* at 123.

182. Curtis Wood, Exploring the Determinants of the Empowered U.S. Municipality, 43 ST. & LOC. GOV'T REV. 123, 123 (2011).

183. Richardson, *supra* note 31, at 665.

grant But, in all cases, the powers of towns are defined by the statute

. . .

For the powers of towns, as well as parishes, are either entirely derived from some legislative act, or defined and limited by the general statutes prescribing the powers and duties

. . .

[I]n the present state of the law; towns now being the creatures of legislation, [are] enjoying only the powers which are expressly granted to them.¹⁸⁴

Finally, Alexander provides a detailed outline of *ultra vires*:

Activities other than those expressly authorized would be considered *ultra vires* (i.e., beyond the express range of municipal jurisdiction and authority and thereby without legal effect). *Ultra vires* not only constrained municipal action within that authority expressly delegated by the state legislature, but also restrained a state from empowering a municipality to exercise broad authority outside the range of matters generally understood to be “purely local” in nature.¹⁸⁵

A. Reasons Supporting Dillon’s Rule and the Doctrines of *Ultra Vires* and Expressed Power

In one of the earliest cases on the subject, the *Parsons* case, the Supreme Judicial Court of Massachusetts, in somewhat paternalistic fashion and using the vernacular of the time, explained the reasoning behind limited powers:

This limitation upon the power and authority of towns to enter into contracts and stipulations is a wise and salutary provision of law, not only as it protects the rights and interests of the minority of legal voters, but as it may not [unfrequently] prove beneficial to the interests of the majority, who may be hurried into rash and unprofitable speculations by some popular and delusive excitement, to the influence of which even wise and considerate men are sometimes liable.¹⁸⁶

A.E.S., while calling for reform of Dillon’s rule in Virginia, notes that it is endowed with various positive qualities, including: (1) it reinforces state

184. *Id.* (citing *Stetson v. Kempton*, 13 Mass. 272, 278, 281, and 284 (1816)).

185. Alexander, *supra* note 1, at 130 (citing Dillon’s *Treatise*, *supra* note 12, § 381, at 374–76).

186. *Parsons v. Inhabitants of Goshen*, 11 Pick. 396, 406 (Mass. 1831).

sovereignty; (2) it can protect individual and state interests; and (3) it can protect minority and state policy interests from local biases.¹⁸⁷ Indeed, if one considers the (in)famous red-blue map of American counties or precincts in recent presidential elections, there are undoubtedly many more smaller towns that might love to implement more politically conservative ordinances.¹⁸⁸ A.E.S. also concedes that

187. A.E.S., *supra* note 13, at 707.

188. Indeed, a number of local governmental entities have enacted “Second Amendment sanctuary” or sanctuary-like ordinances and resolutions, including the cities of Star, Nampa, Kuna, and Eagle, Idaho. Katherine Rosenberg-Douglas, *Second Amendment ‘Sanctuary County’ Movement Expands as Organizers Take Aim at New Gun Laws*, CHI. TRIB. (Apr. 17, 2019), <https://www.chicagotribune.com/news/local/breaking/ct-met-second-amendment-sanctuary-county-movement-illinois-20190416-story.html>; Thomas Plank, *Star Passes Second Amendment Sanctuary City Resolution; Becomes 1st Idaho City to do so*, IDAHO PRESS (July 23, 2020), https://www.idahopress.com/news/local/star-passes-second-amendment-sanctuary-city-resolution-becomes-1st-idaho-city-to-do-so/article_702cea18-a0d5-574b-be2e-c033ccb04323.html; Kate Talerico, *Second Boise Suburb Declares Itself “2nd Amendment Sanctuary City.” What That Means*, IDAHO STATESMAN (Sept. 11, 2020), <https://www.idahostatesman.com/news/local/community/west-ada/article245584005.html>; David Statts, *“What We Are All About:” Idaho’s 3rd Largest City Declares Itself 2nd Amendment City*, IDAHO STATESMAN (Nov. 3, 2020), <https://idahostatesman.com/article246933677.html>; Hayley Harding, *This Idaho Town Becomes the Newest “Second Amendment Sanctuary City.” What that Means*, IDAHO STATESMAN (Jan. 5, 2021), <https://www.idahostatesman.com/news/local/community/west-ada/article248272655.html>. A recent article claims that “[t]here are currently more than a dozen Second Amendment sanctuary cities and counties in Idaho.” Brian Holmes, *Can Idaho cities and counties legally declare themselves to be “Second Amendment sanctuaries?”*, KTVB, <https://www.ktvb.com/article/news/local/208/can-idaho-cities-and-counties-legally-declare-themselves-to-be-second-amendment-sanctuaries/277-5f98bce3-78cb-45e0-babb-310c2cde6ac8>. Second Amendment sanctuaries are facing their first court challenge in Oregon. Lindsay Whitehurst & Andrew Selsky, *Second Amendment sanctuaries facing 1st court test in Oregon*, Associated Press (May 16, 2021), <https://apnews.com/article/us-news-oregon-gun-politics-government-and-politics-1dec173dc5d6d7d5f343b933bb883368>.

Likewise, a town in Texas enacted a “sanctuary city for the unborn” ordinance. Ryan W. Miller, *Sanctuary City for the Unborn: All-Male City Council in Texas Town Bans Most Abortions*, USA TODAY (June 13, 2019), <https://www.usatoday.com/story/news/nation/2019/06/13/waskom-texas-declared-sanctuary-city-unborn-bans-abortion/1443699001/>.

Finally, the state of Florida banned sanctuary cities for illegal immigration purposes. Frank Miles, *Florida Legislature Passes GOP Ban on Sanctuary-City Policies; DeSantis Expected to Sign into Law*, FOX NEWS (May 2, 2019), <https://foxnews.com/politics/florida-legislature-passes-gop-ban-on-sanctuary-city-policies-desantis-to-sign-into-law.print>. These political back and forth potshots are, in my view, a danger of home rule.

some type of judicial review is important to hold in check local authority, although a “reasonableness standard” would be preferable.¹⁸⁹

From a more historical standpoint, Willcock credits the invention of municipal corporations via charter or legislative act with being a chief reason behind the demise of feudalism.¹⁹⁰ He also emphasizes that the whole reasoning behind municipal corporations was to regulate internal, local affairs, thus not stepping into deeper minefields of policy.¹⁹¹

Beer, himself an advocate for home rule in Idaho, acknowledged that home rule does not work when the people do not educate themselves on the issues and participate in the governing process, leading to corruption and inefficiency.¹⁹²

Finally, I urge policymakers to carefully consider the extent to which they want to create more virtual sovereign entities in the United States. How many sovereigns should lord over the people? In Idaho alone, the Association of Idaho Cities and the Idaho Blue Book identify two hundred incorporated cities.¹⁹³ Do we really want to turn local entities into virtual natural beings with inherent powers? Do we really want to broach the “fundamental question of the constitutional relationship between states and their political subdivisions”?¹⁹⁴ Would home rule encourage cities to return to their scandalous behaviors that some claim inspired the rule? Should a city be allowed, for example, to increase the penalties associated with DUIs because it believes harsher punishment is warranted in a more densely populated, high-traffic and pedestrian urban area? Where a legislature has legislated (or declined to legislate) in an area, should cities be allowed to supplement or change that legislation? For example, in Idaho, should cities be able to expand human rights law to the LGBTQ community where the legislature has comprehensively enacted state human rights legislation? What is the difference, if any, between this example and the issue of whether Idaho cities may impose a different minimum wage than that set by the Idaho legislature? Recently, in Idaho, the city of Meridian banned the use of cell phones while driving, even though the legislature passed a less restrictive measure and rejected a stricter measure as an “overreach.”¹⁹⁵

The recent resurgence in the “sanctuary city” movement, largely considered to be a left-wing mechanism used by big cities, has spawned right-wing action in many other municipalities, including banning abortion and gun ownership

189. A.E.S., *supra* note 13, at 709.

190. WILLCOCK, *supra* note 13, at 1.

191. *Id.* at 16–17.

192. Beer, *supra* note 102, at 357.

193. *Cities in Idaho*, ASS’N OF IDAHO CITIES, <https://idahocities.org/page/Cities> (last visited Oct. 29, 2020); 2019–2020 IDAHO BLUE BOOK, at 280, https://sos.idaho.gov/blue_book/2020/06_County.pdf.

194. Alexander, *supra* note 1, at 127.

195. Kate Talerico, *Meridian Bans Handheld Phone Use When Driving. Here’s When You’ll Start Getting Tickets*, IDAHO STATESMAN (Oct. 22, 2019, 7:56 PM), <https://www.idahostatesman.com/news/local/community/west-ada/article236547348.html>. The Idaho Legislature recently passed legislation regulating usage of cell phones while driving, specifically preempting local ordinances. An Act Relating to Motor Vehicles of 2020, H.B. 614, 65th Legislature, § 2(10) (Idaho 2020) (codified at IDAHO CODE § 49-1401A).

restrictions.¹⁹⁶ Florida specifically banned sanctuary cities.¹⁹⁷ Where should a line, if any, be drawn? These are broad policy questions, and I urge that care be given before altering the fundamental architecture of American federalism.

B. Ultra Vires in Idaho

In the *Black* opinion, the Idaho Supreme Court, after setting forth the sources of local governmental power consistent with Dillon's rule, specifically held that an ordinance of the City of Ketchum was "*ultra vires*."¹⁹⁸ A Westlaw review of Idaho case law using the term "*ultra vires*" and dealing with local governmental entities revealed a total of thirty-four published opinions dealing with local government entities and *ultra vires*.¹⁹⁹ One of the gurus of political science in Idaho and longtime University of Idaho professor Sidney Duncombe acknowledged that "[c]ity governments . . . are governed primarily under state laws and constitutional provisions" and "the powers of cities and other local governments have been strictly construed by the courts."²⁰⁰

The *Black* opinion remains controlling case law in Idaho. It has been cited in seven court decisions. Most recently, in *In re Old Cutters, Inc.*, the federal district court in Idaho extensively cited the *Black* case—including its reliance on the doctrine of *ultra vires*—in evaluating whether the city of Hailey could add a couple conditions to an annexation ordinance that went beyond Idaho's annexation statute.²⁰¹ Significantly, the city of Hailey argued that while the annexation statute did not expressly permit the conditions, it nevertheless had such authority by virtue of the 1976 amendment to section 50-301 of the Idaho Code.²⁰² United States District Judge Edward J. Lodge (a former Idaho state court judge), rejected this assertion: "If I.C. § 50-301 permitted a city to contract for any conditions it wanted without specific authority for imposing such conditions in another statute, a city's

196. See, e.g., Miller, *supra* note 188 (banning most abortions); Rosenberg-Douglas, *supra* note 188 (banning gun ownership restrictions).

197. Miles, *supra* note 188.

198. *Black v. Young*, 834 P.2d 304, 310 (Idaho 1992) (citing *Mix v. Bd. of Comm'rs of Nez Perce City*, 112 P. 215, 218 (Idaho 1910)). I note that the *Black* decision was a 5-0 unanimous opinion, decided by five justices who were all appointed by Democrat governors.

199. See, e.g., *Chavez v. Canyon Cty.*, 271 P.3d 695 (Idaho 2012); *Willson v. Boise City*, 55 P. 887 (Idaho 1899).

200. SIDNEY DUNCOMBE & ROBERT WEISEL, *STATE AND LOCAL GOVERNMENT IN IDAHO AND IN THE NATION* 116 (University of Idaho Press) (1984).

201. *In re Old Cutters, Inc.*, No. 1:13-CV-00057-EJL, 2014 WL 1319854 at *14–18 (D. Idaho Mar. 31, 2014), *dismissed* (Nov. 26, 2014).

202. *Id.* at 19.

power would be endless. . . . Hailey cannot rely upon I.C. § 50-301 for [its acts].”²⁰³ While a federal district court decision is not controlling authority for the existence of Idaho law, it is nonetheless persuasive and certainly not inconsistent with any Idaho court decision.²⁰⁴

Finally, the Idaho Supreme Court has also weighed in on the meaning of section 50-301. In the *North Idaho Bldg. Contractors Ass’n* opinion, the Idaho Supreme Court rejected the argument that the 1976 amendment to the statute gives cities the power to levy any taxes necessary to exercise its powers.²⁰⁵ While it could certainly be argued that this case is limited to the power to tax, it nevertheless relied upon the existing, controlling jurisprudence relative to Dillon’s rule in refusing to grant a power under the language added to the statute in 1976,²⁰⁶ leaving the statutory amendment functionally meaningless. While the court did not specifically raise the doctrine of *ultra vires*, the court’s reasoning is fully consistent with the *Black* opinion.²⁰⁷ The Idaho Supreme Court’s decision in this case also validates Judge Lodge’s decision in the *In re Old Cutters, Inc.*, federal district court case.²⁰⁸

Curiously, Macdonald and Papez fail to cite the *Black* case or discuss the doctrine of *ultra vires*.²⁰⁹ They suggest that the law relating to the power of local governmental entities was created by an Iowa judge in the mid-1800s in response to the bribery abuses perpetrated by railroad companies against local governmental entities.²¹⁰ It is my position that this law traces itself back at least fifty years before Judge Dillon’s famous cases (and probably much older than that) and goes hand-in-hand with the corporate law doctrine of *ultra vires*, the doctrine of expressed power, and the notion that statutory municipal corporations are not natural persons.

Finally, while not specifically mentioning *ultra vires*, the *Black* opinion, or Dillon’s rule, the Idaho Supreme Court quite recently denied the city of Pocatello the power to profit in excess of the amounts necessary for the water and sewer systems to remain self-supporting—no statute gave it that authority, a clearly *ultra vires*-style holding.²¹¹

C. The *Ciszek* Case: An Opening for Home Rule in Idaho?

The discussion thus far has emphasized the reality that Idaho has long been a Dillon’s rule state (with a few outlying cases that muddle things up), employing the doctrine of *ultra vires* to limit local authority. However, in 2011, the Idaho Supreme Court came down with a rather curious opinion, a *coup de main* of sorts, that evokes

203. *Id.*

204. *Id.*; See *Black v. Young*, 834 P.2d 304, 310 (Idaho 1992).

205. *N. Idaho Bldg. Contractors Ass’n v. City of Hayden*, 343 P.3d 1086, 1093 (Idaho 2015).

206. *Id.*

207. *Cf. Black*, 834 P.2d at 310.

208. *In re Old Cutters, Inc.*, No. 1:13-CV-00057-EJL, 2014 WL 1319854 (D. Idaho Mar. 31, 2014), *dismissed* (Nov. 26, 2014).

209. Macdonald & Papez, *supra* note 28.

210. *Id.* at 600.

211. *Hill-Vu Mobile Home Park v. City of Pocatello*, 402 P.3d 1041 (Idaho 2017).

the wanderings of the Idaho Supreme Court across the Dillon's rule and Cooley doctrine spectrum, as pointed out by Beer and Moore.²¹² The *Ciszek* case dealt with a county board of commissioners' decision to rezone several parcels, and whether such "swap zoning" is authorized by statute, specifically the Idaho Local Land Use Planning Act.²¹³

Without any reference whatsoever to the *Black* line of holdings, the court immediately arrived at the following holdings, suggesting that perhaps some type of home rule *is* constitutional in nature in Idaho:

Idaho counties exercise police powers of the State pursuant to a constitutional grant of authority. "Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary, and other regulations as are not in conflict with its charter or with the general laws." Idaho Const. art. XII, § 2

While a local governing body must comply with the procedural and substantive provisions of LLUPA, its authority in the land use arena is not derived solely from LLUPA. Rather, cities and counties of this State have traditionally exercised their constitutional police powers to provide for planning and zoning activities in their jurisdictions and, therefore, their ability to act is not confined to only those actions specifically mentioned in LLUPA.²¹⁴

To support this holding, the court cited its prior decision in *Plummer*.²¹⁵ Therein, the court found that a city had the power to grant an "exclusive solid waste collection franchise" even though it lacked any express or implied statutory authority to do so.²¹⁶ The court explained that "[i]n other words, the constitutional grant of authority to exercise general police powers was recognized as a broader grant of authority than those powers specifically articulated in statute" and the power itself was not expressly prohibited by statute.²¹⁷ Finally, in a somewhat sweeping statement that guides future court reviews of local government action, the Idaho Supreme Court held: "So long as the actions of local governing boards are not unreasonable, i.e., arbitrary, capricious, or discriminatory, and bear a

212. *Ciszek v. Kootenai County Bd. of Comm'rs*, 254 P.3d 24 (Idaho 2011).

213. IDAHO CODE §§ 67-6501 to 6539 (2020) (Idaho Local Land Use Planning Act) [hereinafter LLUPA].

214. *Ciszek*, 254 P.3d at 32.

215. *Plummer v. City of Fruitland*, 87 P.3d 297 (Idaho 2004).

216. *Plummer*, 87 P.3d at 300.

217. *Ciszek*, 254 P.3d at 32.

‘substantial relationship to the public health, safety, morals, and general welfare,’ local governing boards act within their constitutional authority.”²¹⁸

The *Ciszek* case is somewhat startling and difficult to reconcile with *Black*, perhaps even antithetical in analysis. Yet, it did not overrule or even mention *Black*. The court should have distinguished how the statutory process for the vacation of streets with added conditions in *Black* differs from the rezoning process that arguably did not strictly follow its statutory process, i.e., distinguished the cases. In *Ciszek*, the court also recognized that a statute can expressly prohibit certain conduct.²¹⁹ Indeed, in the *In re Old Cutters, Inc.* federal bankruptcy court case, the court distinguished and limited the *Ciszek* opinion to cases where a city is not violating a statute.²²⁰ I believe *Ciszek* may provide a basis for some degree of constitutional home rule authority, although there is plenty of contrary, controlling authority in Idaho and a governing board would be wise to pick and choose its battles carefully.²²¹

Idaho is a Dillon’s rule state, and any suggestion otherwise is chimerical. The court did not cross the Rubicon in *Ciszek*. Yet, the court has indicated some degree of home rule-like authority over *local* matters in *Ciszek*, with the proviso of not conflicting with the general laws of the state,²²² a nuance that, to me, negates or swallows true home rule almost entirely. I completely agree with Moore’s 1995 view that a city simply cannot violate a state law.

IV. THE ARGUABLE FEDERAL CONSTITUTIONAL NATURE OF DILLON’S RULE

When it comes to discussing localities and the United States Constitution, it is critical to begin with the understanding that, unlike the states, there is no acknowledgment whatsoever of local government in our nation’s guiding document.²²³ While local entities “are undeniably public actors,” there is no status for them under the United States Constitution.²²⁴ They are mere “political subdivisions” of the states, which are unconstrained in making them, but “they are not sovereign entities” or “equivalent to the states themselves.”²²⁵ As Justice Kennedy remarked, “[t]he Framers split the atom of sovereignty” into one nation and the states, no more and no less.²²⁶

218. *Ciszek*, 254 P.3d at 33 (citing and quoting *Dry Creek Partners v. Ada County Comm’rs*, 217 P.3d 1282, 1290 (Idaho 2009)). I would distinguish the *Dry Creek* case as one that dealt with the application of the county’s zoning code, not LLUPA or state law. *Dry Creek*, 217 P.3d at 1290.

219. *Ciszek*, 254 P.3d at 32.

220. *In re Old Cutters, Inc.*, 488 B.R. 130, 151–55 (Bankr. D. Idaho 2012) *aff’d*, 2014 WL 1319854 (D. Idaho 2014), *dismissed* (Nov. 26, 2014).

221. *See, e.g.*, *Black v. Young*, 834 P.2d 304, 310 (Idaho 1992); *Caesar v. State*, 610 P.2d 517, 519 (Idaho 1980); *Bradbury v. City of Idaho Falls*, 177 P. 388, 389 (Idaho 1918); *Mix v. Bd. of Comm’rs of Nez Perce City*, 112 P. 215, 218 (Idaho 1910).

222. *Ciszek*, 254 P.3d at 32–33.

223. *Miller*, *supra* note 35, at 87.

224. *Alexander*, *supra* note 1, at 133.

225. *Miller*, *supra* note 35, at 87, 90.

226. *Lydia R. Wilson & Robert McCreight*, *supra* n.53, at 7; *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

While no court has specifically held that the limited powers of local government are derived and protected by the United States Constitution, it is arguable that such a basis exists. Smith and Greenblatt recognize the connection between Dillon's rule and the Tenth Amendment.²²⁷ Richardson argues that Dillon's rule "relates to the separation of powers" and "[i]n effect, Dillon's rule merely reflects settled legal principles derived, in part, from the Tenth Amendment of the United States Constitution."²²⁸ The Tenth Amendment embodies the American tradition of federalism, providing "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."²²⁹ Indeed, Richardson says that the critics of Dillon's rule should aim their bow at the Tenth Amendment, not court decisions.²³⁰

Richardson's assertion is supported to some degree by the opinion of the United States Supreme Court in the *Community Communications* opinion.²³¹ Therein, the Court described "the federalism principle that we are a Nation of States, a principle that makes no accommodation for sovereign subdivisions of States."²³² More expansively, the Court explained:

Ours is a "dual system of government," which has no place for sovereign cities. As this Court stated long ago, all sovereign authority "within the geographical limits of the United States" resides either with: "The Government of the United States, or [with] the States of the Union. *There exists within the broad domain of sovereignty but these two.* There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these." We are a nation not of "city-states" but of States It was expressly recognized by the plurality opinion in *City of Lafayette* that municipalities 'are not themselves sovereign.'²³³

Alexander emphasizes the *Community Communications* opinion, which dealt with the liability for private damages while operating in the course of their public functions, as holding that "general enabling statutes extending home-rule powers to municipalities did not constitute a sufficient legal basis for a municipality to argue

227. SMITH & GREENBLATT, *supra* note 4, at 365.

228. Richardson, *supra* note 31, at 3, 5.

229. U.S. Const. amend X.

230. Richardson, *supra* note 31, at 21.

231. Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40 (1982).

232. *Id.* at 50 (emphasis in original).

233. *Id.* at 53–54 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 400 (1978) (emphasis in original) (citations omitted)).

that its particular activities were in pursuance of an expressed state policy.”²³⁴ In other words, home rule statutes do not appear to matter to the high court. This result seems to naturally flow from the reality that “municipalities have never been accorded independent sovereign status.”²³⁵ Similarly, in the *Hunter* opinion, the Court held municipal corporations to be “political subdivisions of the state, created as convenient agencies,” and that the state has “absolute power” over municipalities.²³⁶ Richardson, Gough, and Puentes also cite the Tenth Amendment as the basis for the law of limited powers for local government entities.²³⁷ Grumm and Murphy imply that statutory language that purports to grant localities powers not expressly prohibited by statute abrogates the Tenth Amendment.²³⁸ Additionally, it is a “variant on the Tenth Amendment,” and “the most direct contravention of Dillon’s rule thus far devised.”²³⁹

I do not mean to conclude that the Tenth Amendment necessarily prohibits granting home rule powers to localities, but it is noteworthy that the Supreme Court of the United States and some scholars have drawn a direct line between the limited powers of local government and the Tenth Amendment. This raises the specter of a state’s general grant of powers to localities being a sort of unconstitutional delegation of state powers as embodied in the Tenth Amendment. The extent to which this is done may be the key. It is important to acknowledge that the Supreme Court has upheld some *express* grants of home rule powers, where the broadest form of home rule authority was called “*imperium in imperio*.”²⁴⁰ Again, I acknowledge that this argument may be rather novel, but I do believe it flows from critical historical, academic, and jurisprudential support for Dillon’s rule and *ultra vires* as applied to local government. Moreover, this argument may also shed some light on what has driven the Idaho Supreme Court to refuse to grant general powers to localities under both the Idaho Constitution and 1976 statute.

V. CONCLUSION

There is much to agree with in the views expressed by Macdonald and Papez as well as other critics. The thrust of their argument is eminently reasonable. However, I urge that tracing and dismissing the law of limited powers for local government to a rural Iowa judge—impliedly an uncultured simpleton acting on

234. Alexander, *supra* note 1, at 135.

235. *Id.* at 128.

236. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907).

237. RICHARDSON, GOUGH, & PUENTES, *supra* note 74, at 3.

238. Grumm & Murphy, *supra* note 30, at 126.

239. *Id.* at 126.

240. *City of St. Louis v. W. Union Tel. Co.*, 149 U.S. 465, 468 (1893). Even in this case, a constitutionally-chartered city was still subject to the Constitution and laws of the state. Thus, even the broadest form of home rule is still subject to the whims of the legislature, a beguiling yet illusory and symbolic form of power. This is the reality with home rule—it is always subject to legislative change, thus a somewhat circular dynamic. “Imperium in imperio” is defined as “a government, power, or sovereignty within a government, power, or sovereignty.” *Imperium in imperio*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/imperium%20in%20imperio> (last visited Nov. 13, 2020).

then-current concerns—is simply inaccurate. The relevant academic and legal literature discussed in this paper trace this body of law to an earlier time *vis-à-vis* the doctrines of *ultra vires* and expressed power as well as other expressions of limited municipal corporation powers.²⁴¹

In addition, their point concerning Idaho's courts failing to interpret Idaho Code §50-301 is no longer true, and the courts thus far have not agreed with their assertion that the 1976 amendment changed Idaho law.²⁴² It almost goes without saying that it is somewhat absurd that a successful legislative change to the law would carry no meaning. Put another way, it is axiomatic that a law change, unless technical or clean-up in nature, must result in some kind of substantive change in the law. The doctrine of legislative knowledge holds that "the legislature is knowledgeable about all existing law relating to its pending bills."²⁴³ Why would a legislature amend a statute without intending to alter its meaning somehow? In this case, given the recorded testimony, it appears that some kind of change was intended.

Richardson explains that the issue of limited local powers really was not controversial until the mid-1800s.²⁴⁴ He explained that it was at this time that cities and society began growing and changing at a rapid rate, and state legislatures began taking action by enacting laws specifically designed to limit local authority.²⁴⁵ In addition, it was also during this time period that "widespread corruption in municipalities" heightened relevancy of the limited powers rule.²⁴⁶ Grumm and Murphy explain the context of the time as rapid population growth of cities, increasing immigration and migration, and extensive economic activities, all of which coalesced to place new demands upon local government.²⁴⁷ Richardson, Gough, and Puentes remind us that the era was filled with "widespread corruption in municipalities."²⁴⁸

While the various criticisms of the law outlined by Macdonald and Papez are certainly reasonable in nature, there are also a variety of reasonable arguments in support of what we call Dillon's rule and against home rule power.²⁴⁹

241. See, e.g., *Bangs v. Snow*, 1 Mass. 181 (1804); *Head & Armory v. Providence Ins. Co.*, 6 U.S. 127 (1804); BLACKSTONE'S COMMENTARIES, *supra* note 14, at 308; *Brice*, *supra* note 14, at 16; *Colman v. Eastern Counties Railway Co.*, 10 Beav. 1 (1846); *Eastern Anglian Railway Co. v. Eastern Counties Railway Co.*, 11 C.B. 775 (1851); *KAMES*, *supra* note 14, at 201.

242. *N. Idaho Bldg. Contractors Ass'n v. City of Hayden*, 343 P.3d 1086, 1092–93 (Idaho 2015).

243. *Presumption of Legislative Knowledge*, BLACK'S LAW DICTIONARY (Deluxe 10th ed. 2014).

244. *Richardson*, *supra* note 31, at 669.

245. *Id.*

246. *RICHARDSON, GOUGH, & PUENTES*, *supra* note 74, at 7.

247. *Grumm & Murphy*, *supra* note 30, at 122.

248. *RICHARDSON, GOUGH, & PUENTES*, *supra* note 74, at 7.

249. *Id.* at 14–15.

With respect to the disagreement and confusion concerning how many states follow Dillon's rule, it is my belief that only a comprehensive examination of each state's constitution, statutes, and case law, and perhaps actual policies and practices in the cities, would be the best way to evaluate this issue. Dillon's rule and the Cooley Doctrine are Manichean and reside on the opposite ends of a spectrum. Charter cities and home rule reside somewhere inside the spectrum (with home rule itself taking up sizeable space on that spectrum, depending upon its extent), and the 50 states are spread across that spectrum at several points.²⁵⁰

Moreover, while I in no way mean to diminish the work and resulting immortality of Judge Dillon and his *oeuvre* on municipal law, the law of limited power for local governmental entities is quite a bit more complicated and older, coming from clearly more cosmopolitan jurisdictions than Iowa, than presented by Macdonald and Papez, and it remains controlling law in Idaho.²⁵¹ I acknowledge the persuasive legal reasoning of Macdonald and Papez with respect to the language in the Idaho Constitution and 1976 Idaho statute, and if I was advising the Legislature on how best to protect the application of Dillon's rule or *ultra vires* in Idaho, I would recommend they change the language in both provisions. It would not surprise me if an Idaho court one day agrees with the reasoning used by Macdonald and Papez.

While the discussion appears in addressing private corporations, Swaney also discusses municipal corporations, and I think his introductory comment is profound:

A corporation is an artificial person created by law for a specific purpose, with such a grant of privileges as secures a succession of members without losing its identity. It exists independent of the persons who compose it, but has no existence independent of the acts creating it, and derives all its powers from those acts, and its powers are specifically granted and can only be exercised for the purposes contemplated.²⁵²

Moreover, while again specifically addressing private corporations, I find one of his supporting reasons for the doctrine of *ultra vires* to be entirely applicable to municipal corporations: "By tolerating *ultra vires* acts, the powers of corporations would be extended indefinitely, and might jeopardize the sovereign power which created them."²⁵³

Judge Dillon is iconic. I am not on a mission to dismiss him, but instead aim to correct the historical record. In my view, in addition to Dillon's commendable works, the most prominent and early legal bases for limited local powers are Blackstone's Commentaries, the Stetson, Bangs, and Head & Armory court decisions (with the Black and Cizek lines of cases being paramount in Idaho), and constitutional and statutory provisions. The doctrine of *ultra vires* applied to

250. See discussion *supra* notes 79, 80, 81, 82.

251. *Black v. Young*, 834 P.2d 304, 310 (Idaho 1992).

252. SWANEY, *supra* note 52, at 1 (footnotes and citations omitted).

253. *Id.* at 2.

municipal corporations originated earlier than Dillon's pronouncements.²⁵⁴ I will continue to call it "Dillon's rule" and ultra vires, but I will do so knowing he drew from an extensive and existing line of law to formulate his succinct articulation of the rule of strict construction of limited power for local government entities. Law that remains controlling in Idaho.

254. See, e.g., *Bangs v. Snow*, 1 Mass. 181 (1804).