

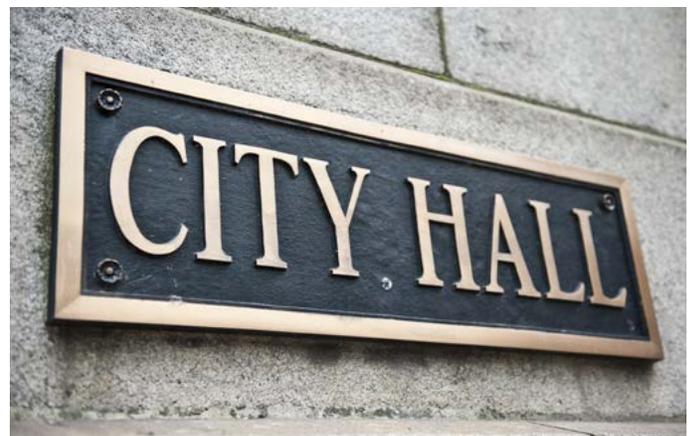


DILLON'S RULE, HOME RULE, AND PREEMPTION



Local communities are central to achieving effective, equitable public health outcomes. Policies informing the best practices in tobacco control today are products of imagination, experimentation, and innovation at the local level.

When a community is considering adopting a public health policy, the threshold legal question to ask is whether it has the authority to adopt the particular policy. Determining a local government's power to adopt a public health policy can be a complex legal subject that involves interpretation of constitutional provisions, statutes, and court decisions.¹ The purpose of this publication is to lay out the legal landscape of local government authority and to address legal factors policy makers should consider when contemplating adopting public health measures. Additionally, because local governmental authority has a great bearing on how courts interpret state preemption of local



laws, this publication also explores how different types of authority at the local level — Dillon's Rule and home rule — affect the judicial interpretation of preemption statutes, using examples from recent cases. This publication should be read along with the Public Health Law Center's other resources on the preemption doctrine.²

Localities as Laboratories of Innovative Public Health Policies

Effective and successfully implemented local public policies are often adopted by other localities, as well as governments at higher levels. The current momentum towards sales

restrictions of flavored tobacco products can be largely attributed to the work done in Providence, Rhode Island; New York City, New York; and Chicago, Illinois — the first local jurisdictions to restrict the sale of different flavored tobacco products following the enactment of the Family Smoking Prevention and Tobacco Control Act in 2009.³ The success of those cities in adopting and defending these policies against legal challenges provided a blueprint for other U.S. jurisdictions to adopt even more robust flavored tobacco sales restrictions. Recently, for example, Massachusetts became the first state to restrict the sale of all flavored tobacco products, including menthol.⁴

Local Governments and Health Justice

Local governments play an essential role in minimizing health disparities and ensuring equitable distribution of health outcomes. Given the different demographics, values, experiences, and other characteristics of communities throughout the U.S., it is impossible for the national or state governments to adopt laws and policies that satisfactorily and equitably address each community's needs. Therefore, local governments need the authority to set their own public health agendas and pursue priorities tailored to their community's unique requirements.⁵ By their nature, local governments are generally closer to their constituents, and thus more accessible, than the state and federal governments. This accessibility tends to engender an inclusive political process, which, in turn, ensures local self-government and political accountability.⁶ Meaningful, authentic community engagement and involvement in formulating public health policies through local democratic processes fosters health equity because it empowers communities to set their own public health agendas and priorities.⁷ Thus, maintaining authority at the local level is not only essential to achieving substantive public health outcomes, but it also enables equal participation of all stakeholders in the decision-making process.⁸

Nature of Governmental Power at the Local Level

A locality's ability to adopt particular policies depends on the nature and scope of its authority.⁹ The authority that governments exercise to protect public health, safety, and welfare is generally referred to as police power. In the U.S., police power is inherent in the sovereignty of state governments. Unlike state governments, local governments do not have sovereign authority and can only exercise those police powers delegated to them by their state governments. The nature and scope of local governmental authority varies widely. While some states grant their localities extensive, autonomous powers to undertake a wide range of public health initiatives, other states severely restrict local authority, and localities in those states can only do what their state governments specifically authorize.



A vaping store in New York City discounts flavored Juul pods prior to the ban on most flavored e-cigarette products.

Police Powers Generally

Local governments, such as counties, cities, and townships, are administrative subdivisions of the state and subject to state control.¹⁰ Localities only possess those governmental powers that the states may delegate to them.¹¹ Accordingly, before local governments can adopt public health policies, they need to look to state law to determine whether they have the authority to do so. Although the nature and extent of local authority varies considerably, local governmental authority generally falls in two general categories: Dillon's Rule¹² and home rule.¹³ While Dillon's Rule jurisdictions typically enjoy a narrow set of powers, home rule localities are relatively autonomous and their powers tend to be broadly interpreted.

Local Authority in Dillon's Rule Jurisdictions

Generally, local governments are considered creatures of state law with limited authority. The inherently limited nature of local governmental authority is reflected in a legal doctrine typically referred to as Dillon's Rule. The doctrine derives its name from Judge John F. Dillon, an Iowa Supreme Court judge and influential legal scholar, who argued that because

local governments were administrative agencies of the state, they had limited authority to make laws and could only exercise those powers specifically granted by state law.¹⁴ Accordingly, local governments could only exercise (i) powers expressly granted by state law; (ii) powers necessarily implied in or incident to the powers expressly granted; and (iii) powers absolutely essential to the declared objects and purpose of the local government. Additionally, under Dillon's Rule, there is a presumption against the existence of local governmental power such that if there is a doubt as to whether a locality is authorized to exercise a particular power, the doubt is resolved against the exercise of that power.¹⁵ Because Dillon's Rule jurisdictions are not autonomous, their ability to adopt public health policies is limited to a narrow range of subjects.¹⁶

In Dillon's Rule jurisdictions, if the state does not delegate to a local government the authority to adopt a particular policy, a locality's adoption of that policy is void.¹⁷ In Vermont, for example, Dillon's Rule was used to invalidate a public health ordinance aimed at protecting a city's source of drinking water.¹⁸ The City of Montpelier in Vermont has one source of drinking water, Berlin Pond. To protect this source of water from pollution, the city adopted an ordinance restricting human recreational activity — boating, fishing, and swimming — on the pond. A local sporting goods business challenged the city ordinance, arguing that under Dillon's Rule, the State of Vermont had the exclusive authority to regulate activity on the pond. The Vermont Supreme Court agreed with the sporting goods business. The court found that Berlin Pond was a public water body, and only the state had authority over it. Because the state had not delegated authority over the pond to the city, in accordance with Dillon's Rule, the public health ordinance protecting the city's sole drinking water was invalid.

As this Vermont case illustrates, without a clear grant of authority from the state, Dillon's Rule localities lack the power to initiate policy to protect public health. Thus, due to Dillon's Rule rigidity, some localities may hesitate to adopt measures addressing the negative health effects of tobacco. Accordingly, under Dillon's rule, a Vermont locality would likely be unable to adopt an ordinance restricting the sale of flavored tobacco products because state law does not grant such authority to local governments.¹⁹ Additionally, because it is at times unclear whether a local policy would fall into a specific grant of authority, Dillon's Rule localities are often hesitant to adopt public health policies, given the risk of legal challenges.²⁰ This is especially so because a doubt as to whether a Dillon's Rule locality has power to act is resolved against the locality and the power is denied.

Simply because a locality is a Dillon's Rule jurisdiction, however, does not necessarily mean that it lacks the power to address local public health issues. As noted above, a locality's power to undertake a particular policy has to be traced back to the state and, in some instances, states do grant their localities the authority to address a variety of public health issues. In fact, in addition to granting their localities a wide range of enumerated, specific powers, some Dillon's Rule states have given their localities general police power, which those localities may use to adopt public health measures, including those addressing the tobacco epidemic.²¹

For example, although Virginia is considered a Dillon's Rule jurisdiction,²² the state legislature has granted its municipalities general police powers through which communities can adopt policies to protect public safety.²³ Moreover, even though Virginia law enumerates specific powers for municipalities,²⁴ the enumeration is not a limitation on municipal powers. The enumerated powers are an addition to the general police power.²⁵ Under this grant of authority, Virginia municipalities may adopt a wide range of measures to protect their communities from the public health effects of tobacco. The Virginia Supreme Court has validated the exercise of this general police power to adopt a smoke-free ordinance.²⁶ Thus, although Dillon's Rule jurisdictions typically have limited power, policymakers should carefully examine their state laws to determine the scope of authority their localities wield.

Local Authority in Home Rule Jurisdictions

Due to the limitations of Dillon Rule's restrictive view of local authority, many states have amended their constitutions and adopted legislation to grant their local governments home rule authority.²⁷ Today, at least 47 states have adopted some form of home rule for their localities.²⁸ Essentially, home rule decentralizes state governmental power to the local level and limits state interference in local matters.²⁹ Home rule authority gives localities the broadest powers of self-government or autonomy possible so that localities may adopt initiatives without looking to state law for specific authorization.³⁰ Additionally, home rule authority reverses the Dillon's Rule presumption against the existence of power at the local level. Under the home rule doctrine, any doubt regarding authority at the local level is resolved in favor of the existence of that authority.³¹ As with Dillon's Rule, home rule authority varies among states, and state law defines the nature and scope of a locality's authority under this rule.³²

The following cases illustrate how home rule authority enables localities to take the initiative to address public health measures tailored to their needs. In addition, the knowledge that courts will not invalidate local regulation of particular subjects unless the legislature has clearly preempted such local regulation guards against the chilling effects of preemption-based litigation threats.



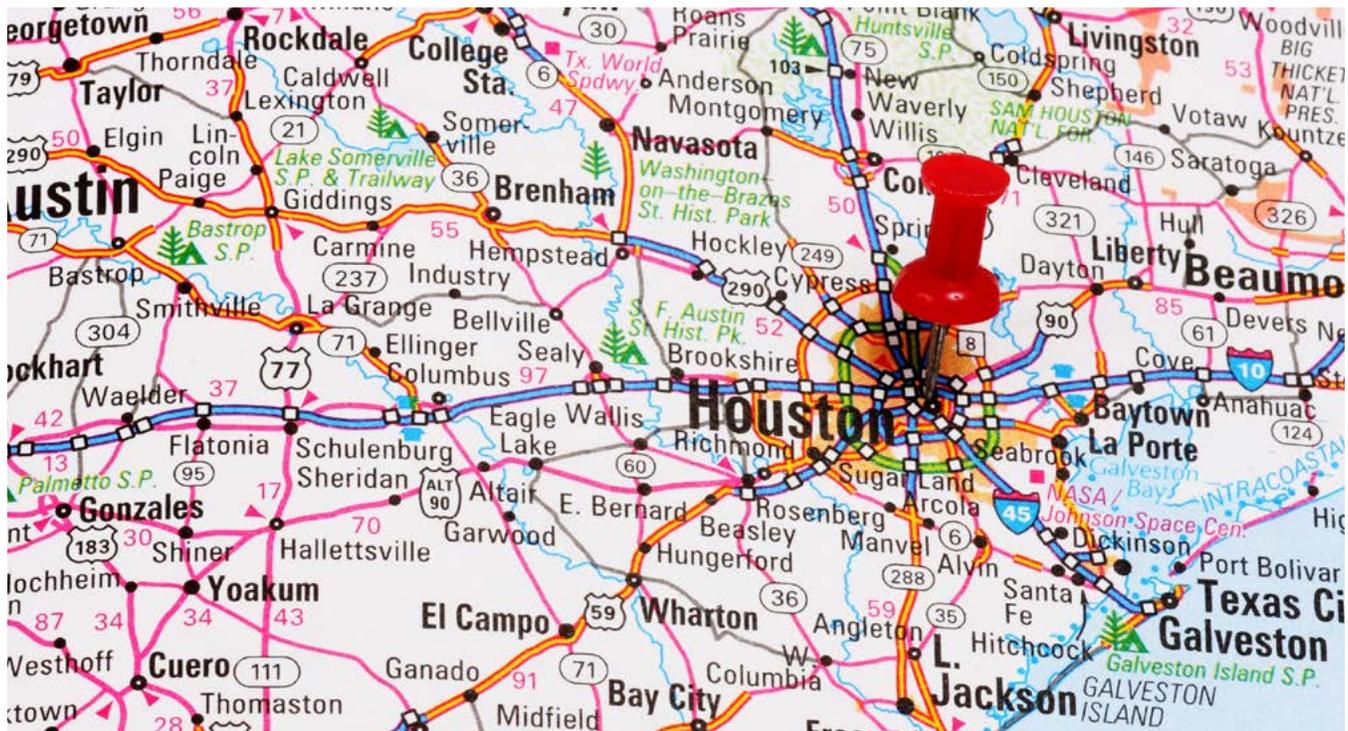
Topeka, Kansas

Tobacco 21 Ordinance Lawful Exercise of Home Rule Authority

Topeka, Kansas

Home rule localities have broad powers to protect public health. When a duly adopted local law is challenged in court, one of the main ways the law can be invalidated is by showing that the state has clearly prohibited the exercise of local power. As one court has noted, “if the Legislature decides to preempt a subject matter normally within a home-rule city’s broad powers, it must do so with unmistakable clarity.”³³ Home rule authority is a major defense against preemption.³⁴ In *Dwagfys Mfg., Inc. v. City of Topeka*,³⁵ for example, the Kansas Supreme Court recently used the home rule doctrine to uphold a Topeka ordinance that raised the tobacco minimum legal sales age (MLSA) from 18 to 21 years. In 2017, following Topeka’s adoption of an ordinance raising the MLSA from 18 to 21, a tobacco retailer challenged the ordinance, arguing that it was preempted by state law. The retailer argued that the ordinance was invalid because raising the MLSA to 21 conflicted with state law, which set the MLSA at 18. The retailer also argued that the state legislature had preempted the field of tobacco sale regulation by enacting the Kansas Cigarette and Tobacco Product Act, which regulated the sale of tobacco at the state level.

The Kansas Supreme Court rejected these arguments and noted that the home rule amendment to the Kansas Constitution empowered local governments to determine their local affairs by ordinance. The court noted that a locality’s exercise of its home rule authority cannot be invalidated without a clear legislative intent to preempt the regulated subject. Since Kansas state law regulating the sale of tobacco products did not expressly preempt further local regulation of tobacco products, the court upheld the Topeka MLSA ordinance as a valid exercise of police power under its home rule authority.



Smoke-Free Ordinance Lawful under Home Rule Doctrine

Houston, Texas

Home rule authority makes it clear that local power to adopt public health measures cannot be displaced by simply pointing to a state law that addresses the same issue or regulating the same subject. For example, in 2007, when the City of Houston adopted a smoke-free ordinance restricting smoking in public places, including bars, restaurants, and places of employment, an association of bar owners challenged the ordinance, arguing that it was preempted by state law.³⁶ The association's argument was based on the Texas Alcoholic Beverage Code (the Code), which was the exclusive law regulating the manufacture, sale, distribution, transportation, and possession of alcoholic beverages. Specifically, the Code provided:

Except as is expressly authorized by this code, a regulation, charter, or ordinance promulgated by a governmental entity of this state may not impose stricter standards on businesses required to have a license or permit under this code than are imposed on similar premises or businesses that are not required to have such a license or permit.³⁷

The association argued this language preempted local laws regulating premises and business licensed under the Code, and therefore the city could not prohibit smoking within those businesses and premises. The court disagreed with the association and harmonized the Code with Houston's exercise of its home rule authority. The court noted that simply because the legislature had enacted a law addressing a subject did not mean that the subject matter was completely preempted.³⁸ Regulating smoking was within Houston's home rule authority, and nothing in the Code preempted local regulation of smoking. The court further noted that for the state legislature "to preempt a subject matter normally within a home-rule city's broad powers, it must do so with unmistakable clarity." Since the Code did not mention tobacco or smoking, Houston's smoke-free ordinance was not preempted with unmistakable clarity.

Preemption in Home Rule Jurisdictions

Home rule authority does not insulate local governments from state oversight. In fact, states can limit or override local laws through preemption — a legal doctrine that the tobacco industry has used as a deregulatory tool against local public health initiatives.³⁹ The past few decades have seen "an unprecedented effort to roll back home rule and the policymaking role of local governments"⁴⁰ through preemption.

Preemption is a legal doctrine through which a higher government limits the authority of a lower government.⁴¹ The preemption doctrine is founded in the Supremacy Clause of the U.S. Constitution, which elevates federal law over state law and displaces state laws that are in conflict with federal law. Similar to the federal-state hierarchical structure, because local governments are subordinate to state governments, state laws supersede local laws if the two conflict, and state legislatures may limit or eliminate local authority.

State legislative control of local governments is typically noted in state laws granting home rule authority.⁴² Accordingly, prior to adopting public health measures, local jurisdictions should carefully examine their state laws to determine whether there are limitations to their home rule authority. This authority can be limited in different ways. While in most cases state legislatures expressly preempt local authority when they regulate certain subjects, in other cases, preemption may only be established through litigation. Because there is a presumption against preemption in home rule jurisdictions, courts do not typically find local laws preempted unless there is clear legislative intent to do so. In other words, the state must expressly preempt local authority. Recently, however, an alarming number of judicial decisions have found the exercise of home rule authority implicitly preempted or otherwise limited by unclear state laws.



Chicago, Illinois

Preemption of Home Rule Ordinance Taxing Tobacco Products

Chicago, Illinois

In *Iwan Ries & Co. v. City of Chicago*, the Illinois Supreme Court found that state law preempted Chicago's tax on tobacco products.⁴³ In 2016, Chicago adopted an ordinance imposing a tax on non-cigarette tobacco products, also known as an OTP (or "other tobacco products") tax. The tobacco industry challenged the OTP tax, arguing that state law limited Chicago's authority to adopt that tax.

By way of background, in 1988, the Illinois legislature amended the Illinois Municipal Code and expressly prohibited home rule localities from taxing “the use, sale or purchase of tangible personal property.” The legislature, however, exempted local taxes on cigarettes or tobacco products from this prohibition. In other words, although Illinois state law prohibited localities from imposing certain taxes, that prohibition did not apply to the taxation of cigarettes or tobacco products. Later in 1993, the legislature again amended the Municipal Code and further limited local taxation of tobacco products. Under the 1993 amendment, which is still the law today, Illinois municipalities may impose a tax on cigarettes or tobacco products only if they had imposed “such a tax” before July 1, 1993.

Prior to July 1, 1993, Chicago taxed only cigarettes — it did not tax other tobacco products (OTPs). Chicago sought to tax OTPs for the first time in 2016. The question in the *Iwan Ries* case therefore was whether Chicago could permissibly tax OTPs. The city argued that because it had taxed cigarettes before July 1, 1993, it was not preempted from taxing OTPs since it had imposed “such a tax” on cigarettes. The court, however, rejected this argument and found that state law expressly preempted the tax on OTPs, and that Chicago could only tax OTPs if the tax had been in place before July 1, 1993. Consequently, the court ruled that the Illinois Municipal Code expressly preempted any municipal tax on OTPs unless the OTP tax had been imposed before July 1, 1993. That Chicago taxed cigarettes — a category of tobacco products — was not sufficient to permit taxes on OTPs.

Although the Illinois legislature did not clearly indicate the intent to preempt future taxes on OTPs after July 1, 1993, the Illinois Supreme Court interpreted Chicago’s home rule authority narrowly and found that state law preempted the OTP tax.⁴⁴ This case illustrates how local tobacco control efforts in home rule jurisdictions can be thwarted by ambiguous preemption statutes and narrow judicial interpretations of home rule authority.

Preemption of Home Rule Tobacco 21 Ordinance

Genesee County, Michigan

Even in cases when the scope of a state preemption statute is not clear, some courts have taken a restrictive view of home rule authority and found local tobacco control laws preempted. A recent decision by the Michigan Court of Appeals in *RPF Oil Co. v. Genesee County* is one example.⁴⁵ In 2017, exercising its home rule authority, Genesee County adopted an ordinance raising the MLSA from 18 to 21 years, becoming the first county in Michigan to raise the MLSA to 21 years. RPF Oil Company, a tobacco retailer, sued on the ground that the Michigan Age of Majority Act preempted the ordinance. Under the Act, “a person who is at least 18 years of age



Genesee County, Michigan

... is an adult of legal age ... and shall have the same duties, liabilities, responsibilities, rights, and legal capacity as persons heretofore acquired at 21 years of age."⁴⁶ The court agreed with the retailer and invalidated the Genesee County ordinance.

Although the court acknowledged that "Michigan is strongly committed to the concept of home rule," the court concluded that the Age of Majority Act preempted the ordinance raising the MLSA to 21 years. According to the court, by raising the MLSA to 21 years, the ordinance "prohibit[ed] what Michigan law permits by diminishing the rights and privileges granted by state law to persons who have reached the age of majority."⁴⁷ The court found that the Age of Majority Act prohibited age-based distinctions between persons who are above 18 years of age, and raising the MLSA to 21 was the kind of age-based distinction the law prohibited.

Interestingly, the court characterized the use of tobacco products as a "right" under Michigan law, and localities could not permissibly limit the scope of that "right" by making age-based distinctions. As noted above, under the home rule doctrine, there is a presumption against preemption, and courts do not typically find preemption of ordinances enacted by home rule localities unless the state legislature has clearly expressed intent to do so. In this case, however, although the Age of Majority Act did not expressly preempt Michigan

home rule localities from raising the MSLA for tobacco products, the court interpreted the Age of Majority Act broadly and concluded the Genesee County Tobacco 21 ordinance was preempted. This broad judicial interpretation of a preemption statute is inconsistent with the more typical interpretation of local authority in home rule jurisdictions because, as even the court in *Genesee County* noted, “constitutional and statutory provisions which grant power to municipalities are to be liberally construed.”⁴⁸

Preemption of Flavored Tobacco & Tobacco 21 Ordinance

Barrington, Rhode Island

Even in states where the state legislature has not expressed intent to preempt local regulations, the tobacco industry has often urged courts to interpret state laws regulating tobacco to curtail home rule authority. Pointing to state laws that address tobacco products, the industry claims that tobacco control is a matter of statewide concern. Therefore, the industry argues that because local governments are only authorized to address matters of purely local concern, their regulation of matters of statewide concern is impermissible.

This approach was recently used in Rhode Island to invalidate a local ordinance that regulated the sale of tobacco products in the Town of Barrington.⁴⁹ In 2017, exercising its constitutional home rule authority, the Barrington town council adopted an ordinance restricting the sale of flavored tobacco products and raising the MSLA to 21 years. Tobacco retailers challenged the ordinance, arguing that the town council lacked the authority to enact the ordinance under the town’s home rule charter. The challengers argued that because the Rhode Island state legislature had enacted a law relating to the sale of tobacco products, the regulation of tobacco sales was a matter of statewide concern and only the state legislature had the exclusive power to regulate tobacco sales. The court agreed that regulating tobacco sales was a matter of statewide concern in Rhode Island, and a local regulation of such matter had to meet a three-part test. Under the test, a Rhode Island court examining the validity of a local ordinance regulating a matter of statewide concern has to determine:

- 1 Whether uniform regulation throughout the state is necessary or desirable;
- 2 Whether a particular matter is traditionally within the historical dominion of one entity; and
- 3 Whether the action of a municipality has a significant effect upon people outside the home rule town or city.

As to the first variable, the court found that uniform regulation of tobacco throughout the state was desirable (if not necessary) because different regulations by different localities would

create a regulatory patchwork, which would “lead to confusion and decrease compliance with various federal and state regulations.”⁵⁰ For the second variable, the court found that the state had traditionally regulated tobacco, including requiring tobacco sellers to be licensed and prohibiting selling of tobacco to underage persons. Finally, as to the third variable, although the court found that effects of the Barrington ordinance on people outside the town were not significant, the court hypothesized that if municipalities across the state were to adopt their own tobacco sales regulations, those regulations “would have some significance.”⁵¹ Consequently, the court ruled that Barrington lacked the authority to regulate tobacco sales under its home rule charter because the regulation of tobacco sales was a matter of statewide concern. This decision has far-reaching consequences, as it essentially means that only the state legislature can regulate tobacco sales, and no locality in Rhode Island has the authority to regulate the sale of tobacco products. The decision puts in jeopardy various progressive local ordinances in Rhode Island that seek to protect communities from the tobacco epidemic.

The K & W Auto decision is an example of a significant judicial departure from the traditional understanding of home rule authority. That a state can limit local police power of home rule locality by simply adopting legislation touching on a public health subject is contrary to the presumption against preemption in home rule jurisdictions and thwarts the role of localities as laboratories of innovative public health policies.

The Way Forward

State preemption of local laws goes beyond tobacco control. In the last few years, an unprecedented wave of state preemption laws has curtailed many local initiatives intended to address social determinants of health. Local policies that have been a subject of this new preemption include laws aimed at addressing drivers of health disparities, and have included measures affecting anti-discrimination, minimum wages, firearm safety, fracking, sanctuary cities, and environmental justice.⁵² Moreover, this new preemption is being used as a deregulatory tool where state legislatures simply limit public health initiatives at the local level without putting in place meaningful statewide public health protections.⁵³ Although most states have sought to abandon Dillon’s Rule and adopted home rule for their localities, different interest groups continue to seek ways to limit local authority by supporting sweeping preemption laws and restrictive judicial interpretation of home rule authority.

The recent surge in hyper-preemptive⁵⁴ statutes and the increased restrictive judicial interpretation of home rule powers vis-à-vis preemption has caused different organizations and scholars to reexamine the home rule doctrine and develop principles that draw an appropriate balance between states and their local governments. Earlier this year, the National

League of Cities, together with Local Solutions Support Center, released a publication entitled “Principles of Home Rule for the 21st Century.” The publication explores the need to reform the home rule doctrine and provides a robust Model Constitutional Home Rule Article, which states could use to reform home rule provisions that have recently proved unable to protect public health policies at the local level.⁵⁵

This publication was prepared by the Public Health Law Center at Mitchell Hamline School of Law, Saint Paul, Minnesota. The Center provides information and technical assistance on law and policy issues related to public health. The Center does not provide legal advice and does not enter into attorney-client relationship. This document should not be considered legal advice. The Public Health Law Center thanks research assistant Noah Steimel for his work on this publication. This publication was made possible by funding from the Robert Wood Johnson Foundation. Its contents are solely the responsibility of the authors and do not necessarily represent the official views of the Foundation.

Endnotes

- 1 SANDRA M. STEVENSON, *ANTIEAU ON LOCAL GOVERNMENT LAW* § 21.01 (2d ed. 2009).
- 2 See *Untangling the Preemption Doctrine in Tobacco Control*, PUB. HEALTH L. CTR. (Apr. 2018), <https://publichealthlawcenter.org/sites/default/files/resources/Untangling-the-Preemption-Doctrine-in-Tobacco-Control-2018.pdf>; *Why Preemption is Bad for Tobacco Control*, PUB. HEALTH L. CTR. (Oct. 2014), <https://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-why-preemption-bad-tobacco-control-2014.pdf>; *Preemption: The Biggest Challenge to Tobacco Control*, PUB. HEALTH L. CTR. (Oct. 2014), <https://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-preemption-to-bacco-control-challenge-2014.pdf>.
- 3 See, e.g., Massachusetts Department of Public Health, *Flavored Tobacco Product Restriction Enforcement Guide 2*, <http://files.hria.org/files/TC3476.pdf> (noting that the Massachusetts Association of Health Boards and Massachusetts Municipal Association developed model flavor regulations to be adopted by localities based on the Providence, RI, ordinance).
- 4 See *An Act Modernizing Tobacco Control*, § 28, 2019 Mass. Legis. Serv. ch. 133 (West.) (codified at MASS. GEN. LAWS ch. 270, § 28 (2019)).
- 5 Julie Ralston Aoki et al., *Maximizing Community Voices to Address Health Inequities: How the Law Hinders and Helps*, 45 J. L. MED. & ETHICS 11, 11 (2017); see also *Blanchard v. Berrios*, 72 N.E.3d 309, 317-18 (2016) (noting that granting localities broad powers of self-government “is premised on the understanding that problems affecting units of local government and their residents should be addressed with solutions tailored to meet those local needs.”).
- 6 Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 258 (2004).
- 7 Lindsay F. Wiley, *Health Law as Social Justice*, 24 CORNELL J.L. & PUB. POL’Y 47, 101-02 (2014), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1408&context=cjlp>; see also NAT. ACADEMIES OF SCI., ENG’G, MED., COMMUNITIES IN ACTION: PATHWAYS TO HEALTH EQUITY 25 (2017); LAWRENCE O. GOSTIN & LINDSAY F. WILEY, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 189 (3d ed. 2016); Gwendolyn Blue, et al., *Justice as Parity of Participation*, 85 J. AM. PLANNING ASS’N 363 (2019), DOI: 10.1080/01944363.2019.1619476; Julie Ralston Aoki, *Focusing on Equity and Inclusion When We Work on Public Health Laws*, PUB. HEALTH L. CTR. 3 (Oct. 2018), <https://publichealthlawcenter.org/sites/default/files/resources/Focusing-on-Equity-and-Inclusion-2018.pdf>.

- 8 See generally Erika Blacksher, *Redistribution and Recognition: Pursuing Social Justice in Public Health*, 21 CAMBRIDGE Q. HEALTHCARE ETHICS 320 (2012).
- 9 DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK ix (2001).
- 10 See Cmty. Commc'ns Co. v. City of Boulder, 455 U.S. 40, 53 (1982) ("Ours is a 'dual system of government,' which has no place for sovereign cities.") (citation omitted).
- 11 Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907).
- 12 Sometimes referred to as Dillon Rule.
- 13 But see Jesse J. Richardson, *Dillon's Rule is From Mars, Home Rule is From Venus: Local Government Autonomy and the Rules of Statutory Construction*, 41 PUBLIUS: J. FEDERALISM 662, 674 (2011), <https://doi.org/10.1093/publius/pjr030> ("The identification of a state as 'Dillon's Rule' or 'home rule' lacks any relationship to local government autonomy.>").
- 14 *Principles of Home Rule for the 21st Century*, NAT'L LEAGUE OF CITIES 9-11 (Feb. 12, 2020), <https://www.nlc.org/sites/default/files/2020-02/Home%20Rule%20Principles%20ReportWEB-2.pdf>.
- 15 OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW 165 (5th ed. 2019).
- 16 See, e.g., ILL. CONST. art. VII, § 7 ("Counties and municipalities which are not home rule units shall have only powers granted to them by law....").
- 17 Dwagfys Mfg., Inc. v. City of Topeka, 443 P.3d 1052, 1057 (Kan. 2019) (stating that under the Dillon Rule doctrine, unless the state expressly grants cities the right to act, it is presumed that the state has preempted the field).
- 18 City of Montpelier v. Barnett, 49 A.3d 120 (Vt. 2012).
- 19 Cf. Micah L. Berman, *Raising the Tobacco Sales Age to 21: Surveying the Legal Landscape*, 131 PUB. HEALTH REPS. 378, 380 (2016) ("In a state such as Vermont that applies Dillon's Rule, local governments may not possess the authority to enact Tobacco 21 ordinances.") This observation was made prior to the federal government raising the minimum legal sales age (MLSA) for tobacco from 18 to 21 years. It is unclear whether that change in law affects local governments' authority to raise the MLSA, and addressing that question is beyond the scope of this publication. See Kyra A. Hill, *The New Federal Tobacco-21 Law: What it Means for State, Local, and Tribal Governments*, PUB. HEALTH L. CTR. (Jan. 15, 2020), <https://publichealthlawcenter.org/blogs/2020-01-07/new-federal-tobacco-21-law-what-it-means-state-local-and-tribal-governments>.
- 20 See U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONAL AND STATUTORY RESTRICTIONS UPON THE STRUCTURAL, FUNCTIONAL, AND PERSONNEL POWERS OF LOCAL GOVERNMENT 24 (1962) (noting that Dillon's Rule causes officials to doubt their power and stops local governmental programs from developing fully); Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 WM. & MARY L. REV. 823, 875-76 (1990) (stating that due to Dillon's Rule, localities in Virginia feel compelled to resolve uncertainties as to the existence of local authority against exercise of regulatory power).
- 21 See S. Constructors, Inc. v. Loudon Cty. Bd. of Educ., 58 S.W.3d 706, 713 (Tenn. 2001) ("[W]here the legislature grants local governments broad authority to provide for the general welfare, Dillon's Rule cannot be used to challenge the exercise of that authority as beyond the scope of the delegated power."); Cf. Weese v. Davis Cty. Comm'n, 834 P.2d 1, 5 (Utah 1992) (Stewart, J., concurring) (rejecting the use of Dillon's rule in instances when the legislature has granted counties general welfare power).
- 22 See Cty. Bd. of Arlington Cty. v. Brown, 329 S.E.2d 468, 470 (Va. 1985) ("Virginia follows Dillon's Rule of strict construction and its corollary.").

23 Va. Code § 15.2-1102 states:

A municipal corporation shall have and may exercise all powers which it now has or which may hereafter be conferred upon or delegated to it under the Constitution and laws of the Commonwealth and all other powers pertinent to the conduct of the affairs and functions of the municipal government, the exercise of which is not expressly prohibited by the Constitution and the general laws of the Commonwealth, and which are necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof, and the enumeration of specific powers shall not be construed or held to be exclusive or as a limitation upon any general grant of power, but shall be construed and held to be in addition to any general grant of power. VA. CODE ANN. § 15.2-1102 (2019).

24 See generally VA. CODE ANN. § 15.2-1100 *et seq.* (2019) (Uniform Charter Powers).

25 VA. CODE ANN. § 15.2-1102 (2019). See also *City Council of City of Richmond v. Wilder*, 74 Va. Cir. 382, 2007 WL 5971774, at *7 (Va. Cir. Ct. 2007) (“The fundamental premise underlying the Dillon Rule and the Virginia Uniform Charter Powers Act is that not all powers of a City, exercised by a City’s governing body, need be expressly set forth in the City’s Charter.”).

26 See *Alford v. City of Newport News*, 260 S.E.2d 241, 243 (Va. 1979) (finding that it was within the city’s police power to adopt a smoke-free ordinance to abate the dangers of smoking which the city found to be injurious to public health). The smoke-free ordinance, however, was found to be unconstitutional on other grounds. *Id.*

27 RICHARD BRIFFAULT ET AL., *THE NEW PREEMPTION READER 4* (2019); JOHN MARTINEZ, *LOCAL GOVERNMENT LAW* § 4:2 (2d ed. 2012).

28 BRIFFAULT ET AL., *supra* note 27, at 4.

29 See, e.g., *State Bldg. & Constr. Trades Council v. City of Vista*, 279 P.3d 1022, 1026 (Cal. 2012) (“Charter cities are specifically authorized by our state Constitution to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs.”).

30 STEVENSON, *supra* note 1, at § 21.01; see *Dwagfys Mfg., Inc. v. City of Topeka*, 443 P.3d 1052, 1056 (Kan. 2019) (“Following the [Kansas home rule] amendment, cities no longer had to rely on the Legislature to specifically authorize the exercise of a particular power or action via statute.”); see also *Mo. Pet Breeders Ass’n v. Cty. of Cook*, 106 F. Supp. 3d 908, 916 (N.D. Ill. 2015); *S. Constructors, Inc. v. Loudon Cty. Bd. of Educ.*, 58 S.W.3d 706, 713 (Tenn. 2001) (stating that home rule authority requires broad interpretation to accomplish its purposes); *Classy Cycles, Inc. v. Panama City Beach*, 2019 WL 5945495, at *4 (Fla. Dist. Ct. App. Nov. 13, 2019) (“[U]nder modern home rule power, municipalities have broad authority to regulate activities impacting public health, safety, and welfare so long as such regulations are not arbitrary or unreasonable.”); *Hartman v. City of Allentown*, 880 A.2d 737, 742 (Pa. Commw. Ct. 2005) (noting that the transfer of authority to a local government gives the local government broad power).

31 See, e.g., IND. CODE § 36-1-3-3(a) (2020) (“The rule of law that any doubt as to the existence of a power of a unit shall be resolved against its existence is abrogated.”).

32 Illinois, for example, has some home rule localities, while others remain under Dillon’s Rule. Nevada has adopted a modified version of Dillon’s Rule.

33 *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002); see also *Palm v. 2800 Lake Shore Drive Condo. Ass’n*, 988 N.E.2d 75, 81 (Ill. 2013) (“If the legislature intends to limit or deny the exercise of home rule powers, the statute must contain an express statement to that effect.”).

34 Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2011 (2018).

35 443 P.3d 1052 (Kan. 2019).

- 36 *Houston Ass'n of Alcoholic Beverage Permit Holders v. City of Houston*, 508 F. Supp. 2d 576, 583 (S.D. Tex. 2007).A
- 37 TEX. ALCO. BEV. CODE ANN. § 109.57(a) (2019).
- 38 *Houston Ass'n of Alcoholic Beverage Permit Holders*, 508 F. Supp. 2d 576 at 583.
- 39 Public Health Law Center, *Preemption: The Biggest Challenge to Tobacco Control* (2014), <https://www.publichealthlawcenter.org/sites/default/files/resources/tlc-fs-preemption-tobacco-control-challenge-2014.pdf>; see generally BRIFFAULT ET AL., *supra* note 27.
- 40 Briffault et al., *supra* note 27, at 11.
- 41 See generally Public Health Law Center, *Untangling the Preemption Doctrine in Tobacco Control* (2018), <https://www.publichealthlawcenter.org/sites/default/files/resources/Untangling-the-Preemption-Doctrine-in-Tobacco-Control-2018.pdf>.
- 42 See, e.g., IOWA CONST. art. III, § 38A (“Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government. . . .”); OHIO CONST. art. XVIII, § 3 (“Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”); ME. REV. STAT. ANN. tit. 30-A, § 3001 (2019) (“Any municipality ... may exercise any power or function ... which is not denied either expressly or by clear implication. . . .”).
- 43 *Iwan Ries & Co. v. City of Chicago*, 2019 IL 124469U, ¶ 54, 2019 WL 6907322, at *7.
- 44 *Id.* at *9 (Theis, J., dissenting) (interpreting the Illinois Municipal Code as limiting the type of jurisdiction that is preempted from imposing additional tax, not the type of tobacco product that can be taxed).
- 45 *RPF Oil Co. v. Genesee Cty.*, No. 344735, 2019 WL 6499471 (Mich. Ct. App. Dec. 3, 2019).
- 46 MICH. COMP. LAWS § 722.52 (1) (2020).
- 47 *RPF Oil Co.*, 2019 WL 6499471, at *3.
- 48 *Id.* at *2.
- 49 *K & W Auto. v. Town of Barrington*, No. 2018-250-Appeal, 2020 WL 501698 (R.I. Jan. 31, 2020).
- 50 *Id.* at *4. The Court’s reasoning under the first variable goes against the central ideas of decentralizing police powers vis-à-vis achieving health equity. As noted above, it is impossible for state governments to adopt laws and policies that satisfactorily and equitably address the unique needs of their diverse localities, which is why states grant their localities powers of self-government to address their unique needs. In this case, the court simply concluded that uniform regulation is desirable without showing that the Rhode Island legislature expressed intent to displace local regulation of tobacco products.
- 51 *Id.* at *5.
- 52 See *Principles of Home Rule for the 21st Century*, *supra* note 13, at 15 (noting that at least 25 states preempt local minimum wage laws).
- 53 BRIFFAULT ET AL., *supra* note 27, at 11-12.
- 54 See generally Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469 (2018).
- 55 The publication can be accessed at <https://www.supportdemocracy.org/homerule2020>.