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Constitutional Home Rule in Rhode Island

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Notes & Comments

Constitutional Home Rule in Rhode Island

[T]here is perhaps no term in the literature of political science or law which is more susceptible to misconception and variety of meaning than 'home rule.'[1]

Unfortunately, Rhode Island's Home Rule Amendment has spent most of its half-century existence nearly dormant. Like all home rule amendments,[2] Rhode Island's Home Rule Amendment purports to bestow a certain degree of independent decision-making authority upon towns and cities within the state. A properly drafted home rule amendment affirms and even supplements local authority in certain areas, while maintaining overriding state authority where appropriate. The next step, of course, is the interpretation and implementation of the amendment in a way that honors the spirit of local authority over local matters and allows for clear resolution of inevitable conflicts between local authorities and state authorities. By its very nature this second step is primarily undertaken by state courts. When properly implemented using clear rules, home rule amendments can encourage efficient governance by empowering local authorities to make decisions and legislate in areas for which they

1. Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 644 (quoting CHICAGO HOME RULE COMM'N, MODERNIZING A CITY GOVERNMENT 193 (1954)).

2. There are currently forty-two states, including Rhode Island, with some form of home rule. SANDRA M. STEVENSON, ANTINEAU ON LOCAL GOVERNMENT LAW § 21.01 (2d ed. 1997).

are most properly suited. While the Rhode Island Supreme Court was initially hostile towards the notion of home rule, it has slowly begun to embrace the implications of home rule in Rhode Island by carving out small areas of purely local concern over which home rule communities may exercise control locally. I will argue that the Rhode Island Supreme Court has made significant but slow headway in implementing the Home Rule Amendment, a trend which the court ought to continue by propounding clear rules and affirming local decisions when appropriate. The following discussion will begin with a general overview of the development of home rule in the United States in Part I. The focus will then turn to the history of home rule in the state of Rhode Island in Part II. Finally, in Part III, the discussion will turn to a more in-depth discussion of the application of Rhode Island's Home Rule Amendment as it has progressed, and as it is applied today.

I. A BRIEF HISTORY OF HOME RULE IN AMERICA

The home rule movement in the United States has its roots in the political turmoil of the late nineteenth century, when the urbanization of the American population gave rise to ever larger cities, and of course, all the complex needs that are associated with such places.[3] This is not to say, however, that local autonomy only arose as a concern in the nineteenth century. In reality, the idea that a distant state legislature would get involved in the minute details of administering municipalities is impractical on its face. Imagine a state legislature that is required to take action each and every time a town needs to buy a new fire truck, paint crosswalks, or hire a new town employee. The exigencies of day-to-day municipal operations have always required a degree of autonomy, and no state legislature would seek to usurp that autonomy in its entirety.[4] The practical need for some degree of local autonomy does nothing, however, to define the limits of either a municipality's autonomy or the state's ability to encroach upon it. The resulting uncertainty for state and municipal

3. Michael Monroe Kellogg Sebree, Comment, *One Century of Constitutional Home Rule: A Progress Report?*, 64 WASH. L. REV. 155, 156 (1989).

4. Sandalow, *supra* note 1, at 647.

relations began to come to the forefront as the American economy became more industrial and urban populations soared. State legislatures became increasingly involved in local decision-making, and states began to regulate to a degree and in ways they simply never had.[5] In the face of this tension between municipal autonomy and legislative encroachment, popular and scholarly discussion began concerning the limits of state legislative authority and the existence, if any, of local initiative.[6] It was under these conditions that Missouri became the first state to pass a constitutional home rule amendment in 1875.[7] The pressures that led Missouri and many states thereafter to adopt home rule are best understood in light of the generally accepted wisdom concerning the status of municipalities before home rule.

A. *Dillon's Rule: Municipality As Creature of the State*

By the end of the nineteenth century, a clear rule had developed concerning the limits of municipal power. This rule was, in fact, a conception of municipal state relations which had been long accepted but little noticed.[8] Named for John Dillon, a much respected legal scholar[9] who gave the rule its most recognized formulation, Dillon's Rule recognizes the often stated proposition that municipalities are mere creatures of the state. The rule as stated in Dillon's *Treatise on the Law of Municipal Corporations* is

5. *Id.* ("It was during the second half of the nineteenth century that state legislatures across the country established by usage the power which, from the beginning, they had in theory. Legislation descended into regulation of the minutest details of municipal government.").

6. Sebree, *supra* note 3, at 156-57.

7. Sandalow, *supra* note 1, at 644; Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 270 (1968).

8. Sebree, *supra* note 3, at 157.

9. John Forrest Dillon (1831-1914). Dillon was born in New York, but moved to Iowa as a child. He was awarded an M.D. in 1850, but gave up the practice of medicine in favor of law. He was elected to the Iowa Supreme Court in 1862 on which he sat for eight years, ultimately as chief justice. In 1869 he was appointed as a circuit judge for the newly created Eighth Circuit. In 1879 he resigned from the court and became a professor of law at Columbia College. He is most remembered for his monumental TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1872) which established municipal law as a separate field of study. 3 THE AMERICAN COUNCIL OF LEARNED SOCIETIES, DICTIONARY OF AMERICAN BIOGRAPHY 311 (Allen Johnson & Dumas Malone eds., 1959) (1930).

as follows:

> It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in *express words*; second, those *necessarily or fairly implied* in, or *incident* to, the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation – not simply convenient, but indispensable.[10]

Dillon's Rule is obviously one of strict construction.[11] When doubt arises concerning the boundaries of power between a state and a municipality, any conflicts will almost certainly be resolved in favor of state legislation.[12] The beauty of the rule is that it conforms to the common understanding that municipalities are inferior creatures of the state, while at the same time it recognizes the existence of very limited and derivative local authority in decision-making.[13] While the rule traces all municipal authority directly back to the state's plenary legislative powers, it succeeds in avoiding an overly simplistic view of this relationship, one which might ignore historically entrenched and necessary decision-making authority for municipalities. Municipalities can and do make decisions on their own initiative, but the authority under which such decisions are made is always granted by the state, either expressly through legislation creating and regulating the municipality, or indirectly as implied by the power expressly granted because the decision-making is "indispensable" to the purposes and objects of a municipality. In the final analysis, Dillon's Rule boils down to a rule of strict construction concerning the power of municipalities to regulate or make decisions concerning local matters.

By the end of the nineteenth century, Dillon's Rule was accepted by nearly every jurisdiction that considered the question.[14] The rule's popularity likely arose from the fact that it

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10. 1 JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 55 (1872) (emphasis in original).

11. Willard D. Lorensen, *Rethinking the West Virginia Municipal Code of 1969*, 97 W. VA. L. REV. 653, 659 (1995).

12. Gary T. Schwartz, *Reviewing and Revising Dillon's Rule*, 67 CHI.-KENT L. REV. 1025 (1991).

13. Lorensen, *supra* note 11, at 658-59.

14. 1 MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 1.40 (3d ed.

is founded on accepted principles, and is relatively straightforward in its application.[15] Any opposing view which points to some inherent local autonomy or authority ultimately suffers from uncertainty concerning limitations on municipal authority.[16] Courts almost universally opted for the certainty of the traditional rule rather than some uncertain, and perhaps even radical, notion of local autonomy.[17]

Not surprisingly, Dillon's Rule was viewed with unhappy suspicion by local politicians and citizens who viewed the interference with local decision-making as an invitation for distant state legislatures to pass self-serving regulations.[18] Whether the perception is accurate, local politicians felt that they had to protect their municipalities, both from usurpation of local initiative and from meddling outsiders who were bent on filling their own coffers through burdensome regulation.[19] The resulting movement, known as the home rule movement, had a variety of aspects, both legal and political.[20] The popular political home rule movement is beyond the scope of this Comment, except to say that the goals and rhetoric of the popular movement have often lead to confusion about exactly what is meant by "home rule" in the legal context.[21] Home rule, in its constitutional and statutory sense, refers simply to a particular system for distribution of power between local and state governmental entities, and does not necessarily suggest any sudden accretion of local authority, despite what might be suggested by the exaggerated rhetoric of the early political movement.[22] Perhaps the best way to avoid confusion concerning the ultimate legal effect of home rule is to

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1999).

15. Lorensen, *supra* note 11, at 658-59.

16. David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2277-79 (2003).

17. George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 24 STETSON L. REV. 417, 420-21 (1995).

18. Sandalow, *supra* note 1, at 648.

19. *Id.*

20. *Id.*

21. *Id.* at 651 ("Moreover, failure to keep the distinction between the two aspects of home rule clearly in view has resulted in considerable confusion as to the extent to which correctives are needed for present home rule doctrines.").

22. *Id.* at 664.

carefully consider the dual purposes of home rule as it is applied in both the historical and contemporary context.[23]

B. *The Two Distinct Functions of Home Rule*

Home rule, in the constitutional and statutory context, is frequently broken into two clearly distinguishable functions.[24] First, home rule may involve restrictions on the power of the state legislature to legislate concerning local municipal governments.[25] Second, home rule often involves a grant to municipalities of authority to act in certain very limited circumstances without prior authorization from the state legislature.[26] The logical distinction between how a state legislature may act in relation to a municipality, and how a municipality may act on its own, is extremely important in clarifying what exactly the effects of home rule will be in a particular context.

The limitation of state power in relation to municipalities most commonly takes the form of a limitation on local or special legislation.[27] This limitation means that state legislatures must limit themselves to regulations that apply equally to all towns and cities.[28] The theory is that this will prevent state legislatures from regulating within the minutia of daily municipal operations. This, of course, does nothing to prevent state legislatures from passing very specific regulations which apply alike to all cities and

23. *Id.* at 651-52 ("[E]numeration of the areas deemed not to be of statewide concern would have been far more meaningful than enumeration of subjects intended to be included within the initiative power of municipalities.").

24. Michele Timmons, Judy Grant, Teri Popp & Heidi Westby, *County Home Rules Comes to Minnesota*, 19 WM. MITCHELL L. REV. 811, 816 (1993). *Accord* STEVENSON, *supra* note 2, at § 21.02 (stating the two principle ways that home rule can be important to local governments).

25. STEVENSON, *supra* note 2, at § 21.01.

26. *Id.*

27. Sandalow, *supra* note 1, at 648.

28. The circumstances under which a state legislature is prohibited from passing such local legislation vary. For instance, in many states the proscription would apply only to cities which have home rule authority. Many states, including Rhode Island, require that a municipality pass a home rule charter before being granted home rule authority. Until the town or city passes such a charter, it will have a statutory charter and is subject to special legislation concerning any and all details of its local operation. *See, e.g.*, Opinion to the House of Representatives, 87 A.2d 693, 695 (R.I. 1952).

towns.[29] Such a limitation does function, nonetheless, to provide a certain degree of restraint on the power of a state legislature to act in relation to any particular municipality.

Another common home rule limitation on the power of state legislatures is a proscription on legislation concerning form of municipal government.[30] This limitation presumably prevents a state legislature from dictating how a municipality will organize itself.[31] Unlike proscriptions on local legislation, limitations on interference with municipal form of government cannot be so clearly defined. Questions about what exactly constitutes form of government are hard to sort out, especially in the context of preemption analysis.[32] Therefore, while this protection is often included as a limitation on state legislative authority in a home rule scheme, it is less significant in terms of practical impact.

The second function of home rule, to bestow upon municipalities the authority to act in certain areas independent of state authorization, generally involves some attempt to define

29. Sandalow, *supra* note 1, at 649 (quoting McBain, *The Law and the Practice of Municipal Home Rule*). One can imagine any number situations where legislation involves details of municipal operation but applies to all towns and cities. For example, Rhode Island's general laws contain a statute requiring that tickets issued for non-moving violations in a town or city contain "the specific violation charged, the schedules of fines for the violation, the time within which the privilege of paying the fine by mail may be exercised, and the place to which the fine may be mailed." R.I. GEN. LAWS § 45-6.1-7 (2005) (originally passed as a public law in 1965).

30. *See, e.g.*, R.I. CONST. art. XIII, § 4 (1986).

31. *See* STEVENSON, *supra* note 2, at § 22.06.

32. It is often difficult to sort out whether a particular function of a municipal board or committee is attached to its form of government. In Rhode Island, for instance, the problem arises when contracting with certain local employees, especially police personnel. It is generally accepted in Rhode Island that police personnel ultimately fall under the control of the state legislature because they act under the General Assembly's broad and historic police power. Rhode Island courts have therefore generally found that the state can divest local boards of authority to regulate and contract with local police. Interpretation of conflicts in this fashion has rendered invocations of the protection against legislation concerning local form of government generally unsuccessful in Rhode Island. *See* Marro v. Gen. Treasurer of Cranston, 273 A.2d 660, 662 (R.I. 1971) ("[T]hey are officers who perform a state duty and are subject to full control by the state."). *See also* Munroe v. East Greenwich, 733 A.2d 703, 711 (R.I. 1999) ("The requirement that each city and town repose certain duties in a 'planning board' with the function of review conferred upon the zoning board of review acting as a board of appeal, does not affect the town form of government.").

exactly what authority has been granted and the manner in which it may be claimed and exercised.[33] Often, vague terms like "local matters"[34] or "local affairs"[35] are used to describe the subject matter upon which a municipality has decision-making authority. Because there is often little useful guidance concerning what might be considered a "local" concern, decisions about whether particular matters are "local" are often left to the courts.[36] For this reason, the degree to which home rule truly broadens local authority is often a question which can only be answered in time as courts develop rules and categories to tackle the difficult question of what kinds of concerns are "local" and therefore within the purview of a municipality's authority.[37]

In addition to granting initiative concerning particular matters, constitutions often establish a process by which a town may create and pass a home rule charter which spells out in greater detail the specific authority which will be exercised by the municipality.[38] In this way, home rule becomes an option in which a municipality may or may not elect to participate. Once a charter is in effect, a municipality's authority will usually be limited by its charter, in much the same way a legislature is limited by the constitution of its state.[39]

This system of limitations and empowerments is why a home rule system is attractive. The primary benefit of home rule is that it allows local government to operate independently in areas where it is best suited to innovate. By the same token, home rule acts to strictly limit local government action so that it cannot affect those outside of the local government. In addition, the residents of a town or city have the ability to create a charter which can provide limits specific to the needs and desires of a

33. Sandalow, *supra* note 1, at 648. *See also* STEVENSON, *supra* note 2, at § 21.02.

34. *See, e.g.*, R.I. CONST. art. XIII, § 1 (1986) (using the words "in all local matters").

35. Sandalow, *supra* note 1, at 660.

36. *Id.*

37. *Id.* at 661-63.

38. *See* Timmons, *supra* note 24, at 823-27.

39. Home rule analysis in any particular instance will often involve questions about the scope of authority actually granted by a municipal charter. Questions about the process by which a charter will be interpreted and expounded are beyond the scope of this Comment.

particular town. The result, when properly implemented, is more efficient government on both the local and state levels.

From here the discussion turns to the specific Rhode Island home rule provisions. Going forward, it is important to keep in mind the dual purposes of home rule: to limit legislative authority and to define municipal initiative. The distinction between what the state may do on the one hand, and what the municipality may do on the other, is always significant in attempting to understand the effect of home rule in any particular situation.

II. THE HISTORY OF RHODE ISLAND'S HOME RULE AMENDMENT

The arrival of home rule in Rhode Island cannot be adequately understood without first contemplating Rhode Island's peculiar history, before and after statehood, leading up to the 1951 passage of the Home Rule Amendment. Rhode Island's history sheds light on the particular meaning of home rule in this state, and it breathes a certain life into contemporary interpretation of home rule in Rhode Island. To that end, this section will provide a short history of the relations between town and state in Rhode Island leading up to the passage of the Home Rule Amendment, followed by a short introduction to the language of the Amendment itself.

A. *Rhode Island's Peculiar History*

"In Rhode Island the towns came first. They designed the colonial government, and altered it several times. . . ."[40] This fact, that Rhode Island was initially a loose collection of virtually independent towns, makes Rhode Island a particularly suitable setting for a discussion on the limits of local authority. This, of course, is only part of the story. The Colony of Rhode Island underwent a series of political changes as it repeatedly modified and changed royal charters, the last of which endured well after the revolution and into the nineteenth century.[41] Rhode Island's tumultuous history begins as the story of a colony slowly forming

40. SYDNEY V. JAMES, THE COLONIAL METAMORPHOSES IN RHODE ISLAND: A STUDY OF INSTITUTIONS IN CHANGE 40 (Sheila L. Kemp & Bruce C. Daniels eds., 2000).

41. WILLIAM G. MCLOUGHLIN, RHODE ISLAND: A HISTORY 127 (The States and The Nation Series ed., 1986) (1978).

from a loose association of towns and cities.[42] Ultimately, for reasons too complicated to be adequately covered here, a very powerful state legislature was formed which has, at times, been the subject of controversy and even popular revolt. The resulting historical tension in Rhode Island between a powerful state legislature and the towns that preceded its creation will be the focus of the discussion to follow.

The Colony of Rhode Island[43] began as five distinct settlements.[44] In the beginning, these towns were basically independent outposts.[45] These outposts began to rely on one another in a variety of ways, but the ultimate desire to form a colonial federation was rooted in a desire to combine forces against outsiders seeking to annex and control the region.[46] In this way, seventeenth-century Rhode Island was actually a group of fiercely independent settlements united in defense against a group of common enemies.[47] This desire to unite was not, however, expressed through any lessened desire on the part of the settlements to control their own fates.[48] Fierce independence, especially religious, was a defining characteristic of these early settlements.[49] It is difficult, perhaps unreasonable, to imagine that this historical tradition of independent self-government did

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42. *Id.* at 3. ("Its formative years, 1636 to 1690, were marked by two simultaneous struggles: the search for unity among these diverse settlements around Narragansett Bay and the resistance of settlers there to efforts by the neighboring colonies to assume authority over their land.").

43. McLoughlin says of Roger Williams' initial arrival in Bristol, "Here, on Mount Hope, Williams' friend Ousamequin (Massasoit), chief of the Wampanoags, had his winter headquarters." MCLOUGHLIN, *supra* note 41, at 8. Quite obviously, the short history presented here does not start at the beginning of civilization in what is now Rhode Island. That being said, this Comment will surely reflect to some degree the solipsistic bent of the conquerors' history.

44. MCLOUGHLIN, *supra* note 41, at 3. The settlements were Providence, Pocasset (Portsmouth), Newport, Pawtuxet, and Shawomet (Warwick).

45. JAMES, *supra* note 40, at 15 ("In the founding years, the original towns independently carried on their own disputes according to their own dynamics.").

46. *Id.* at 40-41. *See also* MCLOUGHLIN, *supra* note 41, at 27-28 ("In order to fend off the imperialistic ambitions of these aggressive neighbors, Rhode Islanders began to see the necessity of some form of union. And that required a charter from the king.").

47. JAMES, *supra* note 40, at 40-41.

48. *Id.*

49. *Id.*

not affect the way that Rhode Islanders related to Dillon's Rule and the subsequent home rule response.

Rhode Island's first charter was acquired by Roger Williams in 1644 and was granted by the English Parliament.[50] It was perhaps lucky for Roger Williams that King Charles I had been run out of London just a couple of years earlier, leaving Williams free to bargain for favorable terms with a sympathetic Parliament.[51] The terms of this first charter essentially left decisions concerning form of government to the towns themselves.[52] In fact, the charter seemed to create a kind of federation of towns, relying in large part on government by referendum.[53] It is not necessary to delve deeply into the mechanics of the government created and repeatedly modified under this initial charter, except to say that it was one clearly focused on local authority and decision-making. Again, it is hard to imagine that this early experience of a colony ruled by towns operating in nearly complete independence did not affect the way Rhode Islanders thought about Dillon's Rule and home rule.[54]

Early colonial history in Rhode Island under the charter granted in 1644 was tumultuous, which is understandable given the fiercely independent and widely varying views of its early

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50. MCLOUGHLIN, *supra* note 41, at 28.

51. *Id.* ("Being himself a Puritan . . . a friend of Oliver Cromwell, Sir Henry Vane, John Milton, and other leaders of the Puritan movement, Williams had immediate access to power that he would have lacked had the king been in charge.").

52. JAMES, *supra* note 40, at 42.

53. *See* Newport v. Horton, 41 A. 312, 313 (R.I. 1900). ("The form of government adopted under [the 1644] charter was a federation of towns rather than a colony. Legislation originated in the towns and the general assembly had simply the power of approval or veto. Local self-government was preserved to its full extent."). Consider also James' description of the system of proposing and validating legislation: "A town might propose a new law by majority vote. Then the town recorder would send a copy of it to each of the other towns to be voted upon. If a majority of the total votes cast favored the proposal, it would be declared a law until the next General Assembly (court of election), when a general vote on the proposal would be taken." JAMES, *supra* note 40, at 43.

54. As an introduction to home rule in Rhode Island, it is not necessarily the purpose of this Comment to offer a comprehensive explanation of the relationship between Rhode Island's early history and the meaning and interpretation of the Home Rule Amendment, but rather to provide a broad view of state/municipal relations in the state.

inhabitants.[55] Whether it was the weak government formed under the early charter, the restoration of Charles II to the throne in England, or yet another unknown cause is not clear; whatever the reason the colony chose to seek a second charter in 1663.[56] This second charter took a form similar to those of the surrounding colonies, with a core of magistrates and locally elected deputies who, when combined in the General Assembly, wielded a great deal of authority.[57] The result on paper was a much more powerful central government, but because of local resistance it would be many years before there were actual results.[58] Regardless, this charter granted in 1663 lasted until a new state government was organized under the constitution adopted by the people of Rhode Island in 1842.[59] Remarkably, a charter granted by Charles II over 110 years before the American Revolution was the constituting authority of Rhode Island for almost 180 years, lasting sixty-six years beyond the end of the Revolution.

The Charter of 1663, as has already been noted, did not immediately give rise to a powerful central government. In fact, the colony went through a great deal of turmoil during the forty or so years following the acquisition of the Charter of 1663.[60] At the end of the seventeenth century and into the early eighteenth century, however, the colony of Rhode Island came into its own, and during this period the towns slowly lost their autonomous influence, while the colonial government began to centralize its power by moving more and more towards the kind of powerful General Assembly that was anticipated by the Charter of 1663.[61]

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55. JAMES, *supra* note 40, at 53-54.

56. *Id.* at 48-49. It would certainly have been desirable to seek the blessing of Charles II, especially considering the tremendous border tensions during this time. The map on page 41 of McLoughlin's *Rhode Island: A History* is a good visual aid in understanding the magnitude of the various disputes.

57. *See* JAMES, *supra* note 40, at 49-50.

58. For an excellent discussion of the factors concerning early colonial ineffectiveness see the section in James' history concerning the period right after the acquisition of the charter in 1663 at pages 53-63.

59. *See* Providence v. Moulton, 160 A. 75, 77-78 (R.I. 1932).

60. JAMES, *supra* note 40, at 112.

61. *Id.* It seems relatively clear that the need for centralized authority to regulate commerce was at the heart of this change. James says of the central government: "[It] was the star performer. It recovered after 1695 and soon raced ahead. . . . It truly began to exercise the powers assigned to it by the charter. . . ." *Id.* James goes on to say of the town governments that "[t]heir

It continued to be the case at the beginning of the eighteenth century that, as Sydney James wrote in his history of Rhode Island institutions, "[c]entralized authority rested on consent rather than force."[62] In other words, the General Assembly had begun to wrest control from the towns, but it could do so only in limited ways that would avoid upsetting the delicate balance that had arisen between the towns and the colonial government.[63] It is especially interesting to note that it was during this period that the General Assembly began to grant town charters, which the towns claimed could not be infringed upon without a legal proceeding.[64] At the same time, the towns began to recognize their status in relationship to the central authority, marking the end of a period of autonomous towns and the beginning of a more unified, centralized, government while the economy became more focused on commerce and trade.[65]

The period from the Revolution into the nineteenth century represents a period of sudden economic prosperity in Rhode Island, coupled with extremely slow social and political change.[66] The result was a growing disparity between the rights of wealthier land owners and those of poor and more recently arrived immigrants.[67] These pressures, especially those associated with the limited franchise for those newly arrived, ultimately led to a popular uprising commonly referred to as Dorr's Rebellion.[68]

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business fell increasingly under regulation by colonial law, they stressed procedural formality more than before, and they began to act more like administrative arms of the central government and less like agencies of communities." *Id.* at 112-13.

62. *Id.* at 131.

63. *Id.*

64. *Id.* ("This concept of privilege, while a product of views about a hierarchy of authority, served as a barrier to unfettered central power."). It is equally interesting that these early charters often contain expressions that mirror the later formulation of Dillon's Rule. For example, the charter granted during this period to Newport gave the freemen of that town the authority to act on "'prudential affairs in passing acts and orders for the duly governing affairs *only properly needful and necessary for said town, and proper and allowable for said town.*'" *Id.* at 131 (emphasis added).

65. JAMES, *supra* note 40, at 68-69. *See also* MCLOUGHLIN, *supra* note 41, at 50-51.

66. MCLOUGHLIN, *supra* note 41, at 109.

67. *Id.* at 109-10.

68. *Id.* at 126-28. The Dorr Rebellion was the culmination of a myriad of historical factors resulting largely from the preservation of an antiquated,

Thomas Dorr's[69] attempt to supplant the then-government of Rhode Island with a newly constituted government was unsuccessful, but popular pressure ultimately resulted in the adoption of a state constitution and the formation of a state government much like the one currently in place in Rhode Island.[70] The power of the General Assembly by this period was great and the passage of the constitution in 1842 did not necessarily result in a great limitation on that power. This is the most significant aspect of this period of history for our purposes,

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inequitable, and highly centralized political system. This political system combined with rampant xenophobia would produce inevitable violent conflict. An editorial piece from the *Providence Journal* authored by Henry Anthony and William Goddard on the eve of a constitutional referendum gives a sense of the times: "Now is the time to choose between these two systems. Where will you place the great conservative check in our government? With foreigners responsible only to their priests, or with intelligent Rhode Island Farmers?" Patrick T. Conley, *The Dorr Rebellion and American Constitutional Theory: Popular Constituent Sovereignty, Political Questions, and* Luther v. Borden, *in* LIBERTY AND JUSTICE: A HISTORY OF LAW AND LAWYERS IN RHODE ISLAND, 1636-1998, 244, 251 (Patrick T. Conley ed., 1998).

69. Thomas Wilson Dorr (1805-1854). Best known as the leader of the "Dorr Rebellion," Dorr graduated from Harvard second in his class before studying law in New York. Dorr was a state legislator and state Democratic Party chairman before becoming governor under the so-called "People's Constitution." Dorr favored a system of "free suffrage" which would not withhold the vote from foreign-born residents of the state. When Democrats regained control of the General Assembly in 1935 for the first time in eighty-one years, Governor Green said this change was inspired by "the spiritual presence of the patron saint of the Democratic Party in Rhode Island – Thomas Wilson Dorr!" Patrick T. Conley, *Attorney Thomas Dorr: Rhode Island's Foremost Political Reformer, in* LIBERTY AND JUSTICE: A HISTORY OF LAW AND LAWYERS IN RHODE ISLAND, 1636-1998, *supra* note 68, at 239, 241.

70. It is interesting to note that much of the controversy concerning Dorr's Rebellion seems to have been associated with a feeling that the Charter of 1663 was deeply undemocratic. In a much studied document known as "Burke's Report to the House of Representatives," that charter is uniformly condemned: "It invested all power in the grantees, and clothed them with exclusive political as well as corporate privileges and authority; in short, it *abrogated the democratic government established by the charter of* 1643, *and created an* OLIGARCHY *in its stead* as pure in its oligarchic characteristics as any which have existed in the States of Greece, or the misnamed Italian republics of later times. And such has been the government of Rhode Island in substance, whatever may have been its ostensible form, from the acceptance of the charter of Charles II to its final death and burial in the popular movements of 1842. . . ." H.R. REP. NO. 546, at 8 (1844) (emphasis in original).

namely the General Assembly's greatly centralized authority.[71]

The emphasis on Rhode Island's general history leading up to Dorr's Rebellion is, in many respects, centrally focused on the relationship between town and state authority. At this point in the analysis, the focus on home rule is better served by a shift to a discussion of the early Rhode Island Supreme Court decisions concerning the relationship between municipal and state authority.

B. *Pre-Home Rule Cases*

Early decisions concerning state/municipal relations in Rhode Island before the passage of the Home Rule Amendment in 1951 embraced a view which was entirely consistent with Dillon's Rule. A quick look at just a few of those decisions should give an idea of how Rhode Island's history affected the judicial view of state/municipal relations, and also just how strict that view became.

One early Rhode Island Supreme Court decision, *City of Newport v. Horton*,[72] is a particularly good example of how colonial history in Rhode Island ultimately reinforced a limited understanding of local authority.[73] In *Horton*, the court was asked to decide "whether the general assembly has power to create a police commission, to be appointed by the governor, which can appoint a chief of police."[74] The City of Newport claimed that towns and villages in Rhode Island have a long history of local self-government.[75] In analyzing this claim of self-government, the court looked to the history of Rhode Island and the progression of colonial charters to support the ultimate conclusion that the City

71. The struggle for reform in Rhode Island exemplified a feeling among immigrants all over the country that equality would be achieved through political self-determination, a sentiment which in turn helped to drive the home rule movement in mostly immigrant urban areas. One Irish-American newspaper in New York City even said of the reform movement in Rhode Island: "It is our own Home Rule question." Conley, *supra* note 68, at 253.

72. 61 A. 759 (R.I. 1905).

73. 47 A. 312 (R.I. 1900). *Accord* Horton v. Newport, 61 A. 759 (R.I. 1905).

74. 47 A. at 312.

75. *Id.* at 313 (describing petitioners as claiming that local self government is "fundamental and historic" in Rhode Island).

of Newport has not retained authority over its police force.[76] The *Horton* court, however, did not make any broad claims about what local authority in fact might exist, but its reasoning seems to point to the existence of at least *some* degree of local initiative.[77]

Only thirty-two years after the decision in *Horton*, in *City of Providence v. Moulton*, the court expressed an even more limited, perhaps even extreme, view of local autonomy in Rhode Island based in large part on the state's constitutional history.[78] The court in *Moulton* affirmed state legislation creating a "Board of Public Safety" for the City of Providence which replaced certain locally appointed officials with officials appointed by the governor.[79] The court again reviewed the history of Rhode Island and came to the somewhat startling conclusion that "cities and towns have no inherent right of local government."[80] The court in that case also directly cited Dillon's Rule,[81] thus completing the shift in Rhode Island from a small federation of independent and self-governed towns to a state, like most others, in which towns are limited entirely by whatever authority the state might choose to grant them.

C. *The Passage of the Amendment*

The Home Rule Amendment was one of a small number of amendments put forward at the limited constitutional convention of 1951.[82] While the political forces that led to the ultimate

76. *Id.* at 313-14 ("We do not find that the history of legislation in this State shows that the clause relating to the powers 'retained by the people' necessarily implies that the General Assembly has no right to pass a law affecting a particular town or city.").

77. *Id.* at 314. ("Towns and cities are recognized in the constitution, and doubtless they have rights which cannot be infringed. What the full limit and scope of those rights may be cannot be determined in the decision of this case.").

78. 160 A. 75, 75 (R.I. 1932).

79. *Id.* at 75-77.

80. *Id.* at 78. The court points in large part to the tremendous authority that the 1663 charter placed in the state government, but pays little or no regard to what actual authority the state wielded under that instrument, or the slow progression of state/municipal relations. *Id.*

81. *Id.* at 79. *Cf.* Nixon v. Malloy, 161 A. 135 (R.I. 1932) (holding that city of Central Falls had no authority over its board of canvassers being strictly limited by the authority granted by the General Assembly).

82. *Proceedings of the Limited Constitutional Convention of the State of Rhode Island* (Rhode Island Secretary of State) (1951).

drafting of the amendment are complicated enough to justify a study in themselves, it is clear that the amendment was popular.[83] In fact, any minor dissention appearing in the record originated with forces complaining that the version of the amendment put forth at the convention was not adequate.[84] This suggestion seems to have met with little acceptance[85] and the resolution passed unanimously with 170 ayes.[86]

The Home Rule Amendment was Article XXVII of the amendments to the Rhode Island Constitution until 1986.[87] The plenary constitutional convention of 1986 overhauled the then-existing constitution and removed the Home Rule Amendment to Article XIII, where it remains today.[88]

D. *The Text of Rhode Island's Home Rule Amendment*

The following is excerpted from the 2005 version of the Rhode Island Constitution.[89] Only those sections of most relevance to the discussion at hand have been included.

§ 1. Intent of article

> It is the intention of this article to grant and confirm to the people of every city and town in this state the right of self government in all local matters.

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83. The motion to pass the resolution pertaining to the Home Rule Amendment was seconded by no less than thirteen delegates to the convention. *Id.* at 125-26.

84. "Mr. Harold R. Smith, Cranston: . . .I sincerely believe that the amendment offered by the Governor's conferees does not go far enough and that the people of Rhode Island would like to have a more liberal home rule amendment. . ." *Id.* at 128. The most serious issue of contention appears to have been the power of cities to levy and collect taxes. *Id.* at 130.

85. Mr. Smith, see *supra* note 84, seems to have been the butt of some humor concerning his passionate views on home rule. "This humor that I hear does not bother me. My resolution relative to home rule is a product of many, many years of research and study by hundreds of capable, responsible people throughout this country." *Id.* at 129.

86. *Id.* at 131. Apparently Mr. Smith was willing to take what he could get.

87. *In re* Advisory Opinion to the House of Representatives, 628 A.2d 537, 538 (R.I. 1993).

88. *Id.*

89. R.I. CONST. art. XIII, §§ 1-11 (1986).

§ 2. Local legislative powers

Every city and town shall have the power at any time to adopt a charter, amend its charter, enact and amend local laws relating to its property, affairs and government not inconsistent with this Constitution and laws enacted by the general assembly in conformity with the powers reserved to the general assembly.

§ 4. Powers of general assembly over cities and towns

The general assembly shall have the power to act in relation to the property, affairs and government of any city or town by general laws which shall apply alike to all cities and towns, but which shall not affect the form of government of any city or town. The general assembly shall also have the power to act in relation to the property, affairs and government of a particular city or town provided that such legislative action shall become effective only upon approval by a majority of the qualified electors of the said city or town voting at a general or special election, except that in the case of acts involving the imposition of a tax or the expenditure of money by a town the same shall provide for the submission thereof to those electors in said town qualified to vote upon a proposition to impose a tax or for the expenditure of money.

§ 5. Local taxing and borrowing powers

Nothing contained in this article shall be deemed to grant to any city or town the power to levy, assess and collect taxes or to borrow money, except as authorized by the general assembly.

§ 7. Adoption of charters

Within one year from the date of the election of the charter commission the charter framed by the commission shall be submitted to the legislative body of the city or town which body shall provide for publication of said charter and shall provide for the submission of said charter to the electors of a city or town qualified to

vote for general state officers at the general election next succeeding thirty days from the date of the submission of the charter by the charter commission. If said charter is approved by a majority of said electors voting thereon, it shall become effective upon the date fixed therein.

§ 8. Amendments to charters

The legislative body of any city or town may propose amendments to a charter which amendments shall be submitted for approval in the same manner as provided in this article for the adoption of a charter except that the same may be submitted at a special election, and provided further that in the case of a town, amendments concerning a proposition to impose a tax or for the expenditure of money, shall be submitted at a special or regular financial town meeting.

§ 11. Judicial powers unaffected by article

The judicial powers of the state shall not be diminished by the provisions of this article.

III. APPLICATION OF RHODE ISLAND'S HOME RULE AMENDMENT

A. *Early Decisions Restricting Home Rule Initiative*

The 1951 passage of the Home Rule Amendment in Rhode Island was attended shortly thereafter by confusion and concern about the ultimate effect of the Amendment. The General Assembly was unclear about what authority it retained, what authority was granted to home rule municipalities, and ultimately what sort of state legislation concerning municipalities would or would not be upheld by the courts.[90] The General Assembly almost

90. It is interesting to note that the General Assembly seems to have recognized immediately that the Home Rule Amendment simply could not be interpreted without aid from the judiciary because it lacked guidelines as to what matters are appropriate for local action. In short order, the Rhode Island Supreme Court made the prominent judicial role explicit, "Instead [the Home Rule Amendment] leaves to the courts the responsibility of resolving the conflicts where the state and municipality have each legislated on the same subject matter." Marro v. Gen. Treasurer of Cranston, 273 A.2d 660,

immediately propounded questions to the Rhode Island Supreme Court in an attempt to clear up uncertainty, and then propounded another set of questions to the Supreme Court a year later.[91]

The first *Opinion to the House of Representatives*[92] was sent to the House of Representatives in April of 1952. The questions sent to the court, of which there were two, were extremely broad.[93] As a result, the advisory opinion is so general that it provides little guidance concerning the change wrought by the Amendment. It would seem that the General Assembly was so nervous about the limits of its authority and the degree to which it had been deprived of authority that it simply could not wait for practical questions to arise.

This advisory opinion does, however, serve to reinforce a couple of points. First, it emphasizes a clear distinction between municipalities before and after they pass a home rule charter, making clear that the provisions of the Home Rule Amendment do not result in any automatic change in the status of Rhode Island municipalities.[94] Second, the opinion makes clear that once a home rule charter has been adopted, the General Assembly may act in certain areas of local concern only in either of two ways: (1) by a general act that applies equally to all towns and cities, or (2) by a special act directed to a particular town or city *which is*

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662 (R.I. 1971).

91. Opinion to the House of Representatives, 96 A.2d 627 (R.I. 1953); Opinion to the House of Representatives, 87 A.2d 693 (R.I. 1952).

92. 87 A.2d 693 (R.I. 1952).

93.

> 1. In the light of Article XXVIII of the articles of amendment to the constitution of the state would it be a valid exercise of the legislative power if the general assembly should provide
>
> (a) for the tenure of office of any employee, elected or appointed, of any city or town;
>
> (b) for the fixing of the time of the holding of any town meeting;
>
> (c) for the fixing of the time of the beginning and the end of the fiscal year of any city or town;
>
> (d) for the regulation of the use of parking meter devices in any city or town?
>
> 2. Is a law incorporating a city or town enacted before the adoption of Article XXVIII of the articles of amendment to the constitution of the state a 'charter' subject to the provisions of said Article XXVIII?

Id. at 695.

94. *Id.* at 695-96; *see also* Capone v. Nunes, 132 A.2d 80, 82 (R.I. 1957).

approved by the majority of the qualified electors of that town or city.[95] Because the advisory opinion primarily concerned the General Assembly's authority after the Home Rule Amendment, the court emphasized limitations on special legislation rather than defining what matters will be considered local concerns for the purpose of home rule authority. The court emphasized the power retained by the General Assembly, noting that the only absolute restriction that the Home Rule Amendment places on legislative authority is a prohibition on legislation that might affect the form of a municipal government.[96]

By April of 1953, the General Assembly was focusing in on the reservation of power to the General Assembly concerning municipal elections, and the resulting *Opinion to the House of Representatives* further set the tone for early judicial interpretation of home rule in Rhode Island.[97] The opinion was in response to fifteen questions propounded by the House of Representatives,[98] which the court broke into three general

95. *Opinion to the House*, 87 A.2d at 696-97.

96. *Id.* at 696.

97. 96 A.2d at 627.

98. The questions propounded are far too voluminous to be included here in their entirety. The drafters apparently forgot the first rule of good writing – know thy audience. The following excerpt more than suffices to capture the tone:

> 1. Are provisions for non-partisan nominations or elections or elections by ballots bearing no party designations in a charter duly adopted by the qualified electors of a city in accordance with the provisions of Article XXVIII of the Amendments to the Constitution, in conflict with, repugnant to, or inconsistent with the provisions of Section 4 of said Article XXVIII of the Amendments to the Constitution reserving to the General Assembly the power to legislate in matters not affecting the form of government of any city?
>
> 2. Are provisions for non-partisan nominations or elections or elections by ballots bearing no party designations in a duly adopted charter in conflict with the provisions of Section 7 of Article XXIX of the Amendments to the Constitution providing that the General Assembly shall have full power to prescribe the manner of conducting elections?
>
> 3. If either or both of the above questions are answered in the affirmative, and such charter provides that if any part thereof is held to be unconstitutional, it shall not affect the validity of the remainder, are nomination and elections in the city adopting the charter to be made and held in accordance with the law applicable prior to the adoption of the charter?

categories: (1) the validity of any home rule charter requirement that town nominations and elections be nonpartisan, (2) the validity of any home rule charter provision setting the times for holding municipal general elections, and finally (3) the validity of a home rule charter provision specifying the number of signatures necessary on municipal nominating papers.[99] The court answered all three categories of questions by affirming the post-home-rule plenary power of the General Assembly concerning the conduct of all elections, including municipal general elections.[100] The opinion based its conclusion on two primary foundations. First, the court pointed to the "long history of the general assembly's exclusive authority over the conduct of elections, which was expressly reaffirmed by article XXIX of amendments."[101] Second, the court

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> 6. If a duly adopted charter provides for holding municipal general elections at times other than those fixed by acts of the General Assembly applicable to that city, is such charter provision in violation of or inconsistent with the provisions of Section 4 of Article XXVIII of the amendments to the Constitution reserving to the General Assembly the power to legislate in matters not affecting the form of government of any city? * * *
>
> 14. Are provisions in a duly adopted charter prescribing criminal penalties for violation of prohibitions in said charter in conflict with the provisions of Section 4 of Article XXVIII of the Amendments to the Constitution reserving in the General Assembly the power to legislate in matters not affecting the form of government of any city?
>
> 15. Are provisions in a duly adopted charter prohibiting a resident of that city holding office in or being employed by the State or Federal government, except notaries public and members of the militia or armed forces, from making any contract with the city or sharing in the profits of any person or corporation making any contract with the city in conflict with the provisions of
>
> (a) Section 4 of Article XXVIII of the Amendments to the Constitution reserving to the General Assembly the power to legislate in matters not affecting the form of government of any city?
>
> (b) the privileges and immunities clause of Article XIV of the Amendments to the Constitution of the United States?

Id. at 627-29.

99. *Id.* at 629.

100. *Id.* at 630.

101. *Id.* The court will always strictly construe the Home Rule Amendment if a conflict arises with any other constitutionally reserved authority. *See* Royal v. Barry, 160 A.2d 572, 575 (R.I. 1960) ("Article XII of the constitution expressly and affirmatively reserves to the legislature sole responsibility in the field of education and nothing contained in article XXVIII is in derogation thereof.").

narrowly interpreted any control over elections granted to municipalities under the Home Rule Amendment, stating that such authority is "expressly limited to 'the nomination and election of a charter commission.'"[102] The reasoning seems to have derived in part from a certain deference towards the General Assembly's historic and broad plenary authority, as discussed *supra* in Part IIA. Significantly, the court's reasoning further suggests that Dillon's Rule, with its strict derivative understanding of municipal authority, partially survives in Rhode Island's post-home-rule jurisprudence.[103] This is not to say that the 1953 advisory opinion explicitly refers to Dillon's Rule. Rather, it adopts the view that the language in the Amendment must be strictly construed to avoid infringing on the reserved powers, namely the power to control elections, of the General Assembly.[104] While it may be possible to view this opinion as narrowly focused on municipal general elections, a cautious and restrictive understanding of the Amendment continued to be a hallmark of early Rhode Island Supreme Court decisions concerning home rule.

The Rhode Island Supreme Court's strict limitation on home rule power early on is exemplified by the case of *Newport Amusement Co. v. Maher*,[105] in which the court held that home rule municipalities do not have even limited licensing authority for local businesses.[106] The court in that case ruled on a local ordinance in the city of Newport which purported to require that all businesses obtain a license from the city before providing coin-

102. *Opinion to the House*, 96 A.2d at 630-31.

103. *See* Wood v. Peckham, 98 A.2d 669, 670 (R.I. 1953) (declaring in the same year as the advisory opinion of 1953, "It is declared to be a fundamental principle that municipal ordinances are inferior in status and subordinate to the laws of the state."). *See also* State v. Pascale, 134 A.2d 149, 151-52 (R.I. 1957) (citing *Wood* in striking down a conviction for a traffic violation differing slightly from the state penalty for the same offense); Bertrand v. Di Carlo, 304 A.2d 658, 659-60 (R.I. 1973) ("It is a well-settled rule that cities and towns have no power to enact ordinances except those powers from time to time delegated to them by the Legislature. And it is a fundamental rule of construction that such powers, being delegated, should be strictly construed.").

104. *Opinion to the House*, 96 A.2d at 630-31.

105. 166 A.2d 216 (R.I. 1960).

106. *Id.* at 218.

operated jukeboxes or games to the public.[107] The court rejected the city's authority to enact this or any licensing regime. Such a broad judicially-created prohibition on licensing of local businesses by home rule municipalities grew out of an interpretation of Rhode Island's Home Rule Amendment that was significantly narrower than that of any other home rule jurisdiction at the time.[108] The court in *Newport Amusement Co.* reasoned that if licensing of jukeboxes, or any other kind of licensing, was considered to be a local matter for purposes of home rule, then "home rule municipalities would be authorized not only to enact licensing laws for their localities inconsistent with those enacted by the legislature on the same matters for the rest of the state, but also to enact such laws whether the legislature had ever done so previously on the same subjects or not."[109]

By employing reasoning that seemed driven by a broad misunderstanding of the purpose and effect of home rule, the court held that licensing "is the exclusive prerogative of the legislature except where it has expressly conferred such power upon a city or town."[110] The court here appeared not to consider the possibility that the Home Rule Amendment was in fact intended to confer upon municipalities a certain limited ability to enact regulations *not inconsistent* with those enacted by the General Assembly. In other words, a municipality might be granted the authority to pass its own jukebox licensing ordinances so long as they did not interfere with any such provisions already in place under state licensing authority. If the General Assembly saw fit to regulate jukeboxes, it could subsequently preempt municipal licensing with its own state jukebox licensing provisions, an outcome which fits

107. *Id.* at 217.

108. Sandalow, *supra* note 1, at 684. ("A recent Rhode Island decision holds, contrary to every other case in which the issue has been presented, that a home rule municipality does not possess licensing power.") The reasoning in *Newport Amusement Co.* ran counter to generally accepted notions of home rule, even as they were expressed by Rhode Islanders. For instance, Robert P. Bolan writing for the Bureau of Government Research at the University of Rhode Island in the same year as the *Newport Amusement Co.* decision writes that "[t]he legislature of a home rule city is the successor to the state legislature in exercising certain powers within its own territory." ROBERT P. BOLAN, FUNDAMENTALS OF HOME RULE 12 (University of Rhode Island Bureau of Government Research 1960).

109. *Newport Amusement Co.*, 166 A.2d at 219.

110. *Id.* at 220.

with both the spirit and the language of the Home Rule Amendment.[111] Having missed this possible *via media*, and out of a fear that home rule might allow municipalities to run amok, the court in this decision adopts an analysis that strictly limits home rule authority to avoid "a grant of plenary power to enact licensing laws without regard to the will of the legislature. . . ."[112] Early decisions in the vein of *Newport Amusement Co.* by the Rhode Island Supreme Court ushered in a period of very limited authority for municipalities under the Rhode Island Home Rule Amendment.

As for the limitations that home rule placed on the General Assembly's power to legislate concerning home rule municipalities, it is hard to know exactly why, but the Rhode Island Supreme Court did not have many opportunities to take up the issue of special legislation in its early home rule decisions. It did, on occasion, emphasize that the General Assembly retained nearly complete authority to regulate in areas of local concern, so long as such legislation was general or specific in nature but submitted to the qualified voters of the specific municipality in question.[113] Early on, however, the court either did not see fit to, or did not have the opportunity to confront special state legislation in an area of local concern which did not meet the requirements of the Home Rule Amendment. This might be explained, in part, by the fact that municipalities had not yet truly come to understand the significance of the Home Rule Amendment's prohibition on special legislation, or it might even be that the General Assembly was especially cautious about obeying the limits of that Amendment. In any case, the majority of home rule cases which came before the court up until the late 1980s had the court either

111. See Section IIIC1 for a discussion of the distinction between home rule and preemption analysis. The rule in *Newport Amusement Co.* stands today. *See* Amico's Inc. v. Mattos, 789 A.2d 899, 903 (R.I. 2002) ("[T]he General Assembly retains exclusive power over the licensing of Rhode Island businesses."). *See also* Nugent v. East Providence, 238 A.2d 758 (R.I. 1968) (holding that East Providence may not license and regulate cable television); State v. Krzak, 196 A.2d 417 (R.I. 1964).

112. *Newport Amusement Co.*, 166 A.2d at 219.

113. *See, e.g.*, Bertrand v. Di Carlo, 304 A.2d 658, 659-60 (R.I. 1973). *Accord* Providence Lodge No. 3 FOP v. Providence, 730 A.2d 17, 19-20 (R.I. 1999); Marran v. Baird, 635 A.2d 1174, 1178 (R.I. 1994); Mongony v. Bevilacqua, 432 A.2d 661, 664 (R.I. 1981).

invalidating an action by a municipality as not within that municipality's home rule province, or finding that a law enacted by the General Assembly was properly general, thus preempting any conflicting municipal ordinances regardless of the validity of the ordinance under a home rule charter.[114]

As a result of the Rhode Island Supreme Court's narrow interpretation of home rule and a dearth of cases invalidating state legislation on home rule grounds, any commentator looking at the status of home rule in Rhode Island before the late 1980s would have been hard-pressed to point out exactly how the Home Rule Amendment had affected municipal initiative, if at all. It is important to note that this does not mean that changes were not afoot, or that the growing number of municipalities that chose to pass a home rule charter were not exercising their newfound authority, but rather that the extent of that authority could not easily be determined by looking at the case law.

B. *Recent Developments In the Case Law*

The Rhode Island Supreme Court's attitude towards home rule in Rhode Island saw significant development toward a broader view of the authority granted to home rule municipalities beginning in the late 1980s. In 1989, the court published two opinions of significance which made strides in clarifying both the limitation on special legislation by the General Assembly and the proper status of municipal home rule initiative. Then, a year later, the court again invalidated state legislation concerning a home rule municipality as failing to meet the requirements under the Home Rule Amendment for passage of special legislation. Finally, and perhaps most significantly, the court in 1993 issued an advisory opinion affirming municipal authority over local voting districts that clearly established the existence of meaningful home rule initiative under the Amendment. This string of cases, one could argue, establishes a limited but significant movement in the direction of greater recognition for municipal initiative and away from the influence of Dillon's Rule, as exemplified by earlier home rule decisions in Rhode Island.

The first of these relatively recent decisions, *Bruckshaw v.*

114. *See supra* note 103.

Paolino,[115] emphasizes the limitation that the Home Rule Amendment places on special legislation as well as the existence of local concerns over which municipalities may exercise their initiative. The underlying dispute in *Bruckshaw* involved the passage of a public law by the General Assembly entitled "An Act Relating To the Retirement Of Employees Of The City Of Providence," which purported to allow certain Providence city employees to pay into the Providence employee retirement system and thereby "buy back credits toward retirement."[116] The city refused to accept applications under this provision, and one of the affected employees filed for declaratory relief, hoping to force the city to comply with the legislation.[117] The city counterclaimed seeking declaratory relief and a finding that the public law was invalid, apparently on a theory that it was a violation of the Home Rule Amendment.[118] In affirming the city's victory in the superior court, the Rhode Island Supreme Court found both that the pension plan was a "local matter" and that the public law modifying it was special legislation that had not been submitted to the voters of Providence.[119] The court in *Bruckshaw* therefore held that "the 1985 Retirement Act is invalid and unenforceable."[120] The decision in *Bruckshaw* was primarily significant because the court addressed the Home Rule Amendment's prohibition on special legislation directly, invalidating an act passed by the General Assembly because it was special legislation which conflicted with a local home rule ordinance not approved by local voters.[121] In addition, while the court did not directly address the initiative power of home rule municipalities, it did point out that administration of an employee pension plan was at least one "local concern" over which a home rule municipality may exercise control.[122] The decision in *Bruckshaw* primarily reinforced a city's power to resist special legislation, but it can also be seen as the first in a series of decisions which give teeth to the Home Rule

115. 557 A.2d 1221, 1223 (R.I. 1989).
116. *Id.* at 1222.
117. *Id.*
118. *Id.*
119. *Id.* at 1223.
120. *Id.* at 1224.
121. *Id.* at 1223.
122. *Id.*

Amendment.

The second decision in this line of cases, *Westerly Residents for Thoughtful Development, Inc. v. Brancato*,[123] reinforced the power of home rule municipalities to act in areas of local concern under the Home Rule Amendment. In that case, a citizens' group seeking to prevent expansion of the local sewer system claimed that the legislation giving the town authority to expand the sewer system was a violation of the non-delegation doctrine and a violation of the Home Rule Amendment because the provisions were not submitted to the voters of Westerly.[124] The Rhode Island Supreme Court turned the argument on its head, holding that the Westerly home rule charter itself gave the town the power to expand its own sewer district because "[w]hether a sewer line is installed on a particular street in the town of Westerly is not of concern to all the residents of the State of Rhode Island but is of concern to the residents of the town of Westerly."[125] The court, citing *Bruckshaw*, reasoned that because the regulation of sewer lines is a "purely local function," and because the town of Westerly has a valid home rule charter, that "Westerly's power to expand and maintain the sewer system is inherent in its home rule charter."[126] The court simply did not reach the constitutionality of the state legislation, which was not necessary to grant Westerly's municipal government authority over the Westerly sewer system in the first place.[127] In addition, the court in *Brancato* gave some guidance as to what concerns might be considered purely local by noting that such concerns will "directly affect" only the residents of the locality in question, which was also true for the municipal pension plan in *Bruckshaw*.[128] The decision in *Brancato* helps to define the boundaries of home rule initiative and to expand upon the notion of local concerns employed in *Bruckshaw*.

A year later, the court again struck down special legislation in *McCarthy v. Johnson*,[129] in which the General Assembly passed legislation extending the notice requirement for a particular

123. 565 A.2d 1662 (R.I. 1989).
124. *Id.* at 1263.
125. *Id.* at 1264.
126. *Id.*
127. *Id.*
128. *Id.*
129. 574 A.2d 1229 (R.I. 1990).

personal injury claim against the City of Newport.[130] A general law applicable to all towns and cities in Rhode Island requires that a claimant, in order to preserve a claim against a city, give notice to the city within sixty days of the accident.[131] The plaintiff in *McCarthy*, who had been injured by a low-hanging branch in the City of Newport, took eighteen months to give notice to the city.[132] In response, the General Assembly passed legislation specific to McCarthy's claim allowing her an extended notice period.[133] The Rhode Island Supreme Court in *McCarthy* soundly rejected the plaintiff's argument that extension of notice falls under the General Assembly's unquestioned authority to confer jurisdiction, instead finding that the act in question was "legislation directed at a single home-rule community which benefits a single party."[134] The court reasoned that the special legislation in that case could not be distinguished from the special legislation concerning the municipal pension plan in *Bruckshaw*, and was therefore invalid.[135] The decision in *McCarthy* is important because it carries forward the enforcement of the Home Rule proscription on special legislation begun in *Bruckshaw,* and it does so strongly: "This court has recognized that except as limited by the Constitution of the United States and the Constitution of the State of Rhode Island, the powers of the General Assembly are plenary and unlimited. . . . However, we are firmly of the opinion that article XIII, section 4, is such a limitation."[136]

The Rhode Island Supreme Court confirmed both the power granted to home rule municipalities and the firm limitation that the Home Rule Amendment places on special legislation in an advisory opinion to the House of Representatives in 1993.[137] The

130. *Id.* at 1229-30.
131. *Id.* at 1230.
132. *Id.* at 1229.
133. *Id.* at 1229-30.
134. *Id.* at 1232.
135. *Id.* at 1231.
136. *Id.* at 1232. (citations omitted).
137. *In re* Advisory Opinion to the House of Representatives, 628 A.2d 537, 537 (R.I. 1993). This case comes a year after the important decision in *East Greenwich v. O'Neil* discussed *infra* in Part IIIC2. *O'Neil* is important in developing an analysis of what concerns are local, and so in that sense the decision in *O'Neil* is also recognition of local initiative.

questions propounded to the court in that case involved a plan by the House of Representatives to adjust the local voting districts in the town of Lincoln and remove the then current office holders.[138]

The questions propounded actually concerned the constitutionality of the proposed legislation under the Fourteenth Amendment to the Federal Constitution.[139] The court, however, refused to address the constitutionality of the apportionment plan under the Federal Constitution, and instead chose to invalidate the proposed legislation as a violation of the Home Rule Amendment.[140] In so doing, the court cited its decisions in both *McCarthy* and *Bruckshaw* for the proposition that an act pertaining to only one home rule town or city requires the approval of a majority of the electors of that city.[141] The proposed legislation, the court reasoned, applied only to the town of Lincoln and had not been approved by the voters of Lincoln, and therefore was invalid.[142]

The court, however, did not stop with the proposed legislation. It went on to state that the *original* act by the General Assembly, passed in 1978, that purported to create the then existing voting districts was an "unnecessary, meaningless exercise since the reapportionment plan was enacted locally."[143] In other words, the municipal voting districts in the town of Lincoln exist by virtue of local authority granted under the Home Rule Amendment, and any attempt by the General Assembly, past or present, to directly interfere with those voting districts would be abortive.

The court went on to distinguish the issue of reapportionment

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138. The questions were as follows:

> 1. Is the proposed amendment regarding the members of the school committee and water board violative of section 1 of article XIV of the amendments [to] the United States Constitution?
>
> 2. Is the proposed amendment regarding the budget board violative of section 1 of article XIV of the amendments [to] the United States Constitution?
>
> 3. Is the proposed amendment regarding the Democratic and Republican district committees violative of section 1 of article XIV of the amendments [to] the United States Constitution?

Id. at 538.

139. *Id.*

140. *Id.*

141. *Id.* at 539.

142. *Id.*

143. *Id.*

from the procedural issues presented in the 1953 advisory opinion, holding that local districting is "a matter of local interest reserved by article 13, section 2, to the local government."[144] While the General Assembly may control procedural matters, such as the dates and times for general municipal elections, special legislation concerning apportionment enters into an area where the General Assembly "retains no authority."[145] The court here drew on the opinions in *McCarthy* and *Bruckshaw* to create a firm boundary for the powers of the General Assembly when it comes to special legislation. In addition, though this was an advisory opinion to the House concerning limitations on its authority, the court also strongly affirmed municipal authority over apportionment for municipal elections, yet another local concern.[146]

This discussion of cases leading up to and including the 1993 advisory opinion is not offered as an exhaustive discussion of cases concerning home rule during that period, but rather to demonstrate a trend towards a more generous acceptance of the implications of the Home Rule Amendment for towns and cities in Rhode Island. As the court has developed a more nuanced understanding of the concept of home rule, and as the case law has slowly developed, the court has moved away from the almost fearful analysis of *Newport Amusement Co.* to embrace a limited but robust understanding of home rule in Rhode Island. The result has not been a complete destruction of the legislature's authority, as it was preserved under Dillon's Rule, but rather a limited redistribution of authority between the state and home rule municipalities in a strictly limited number of areas. The next section will move from the Rhode Island Supreme Court's slow acceptance of home rule to a general overview of home rule rubric as applied by the court today.

C. *Present Day Home Rule Analysis*

The purpose of this section is to consider exactly how the Rhode Island Supreme Court goes about analyzing problems and conflicts involving home rule powers and limitations. Such problems will generally arise in one of two contexts: either (1)

144. *Id.*
145. *Id.*
146. *Id.*

some third party, such as a local resident or industry opposed to local regulation, will challenge a local ordinance as outside of the home rule authority of that municipality;[147] or (2) the municipality itself or some party negatively affected by state legislation will challenge the validity of that legislation claiming that it is prohibited under the Home Rule Amendment's proscription of special legislation. In the former circumstance, the question concerns the limits of authority granted to home rule communities that have adopted a valid home rule charter. In the latter circumstance, the question concerns the limitations that the Home Rule Amendment places on the General Assembly. Before considering the approach that the Rhode Island Supreme Court takes in analyzing these two circumstances, an important distinction between home rule and preemption must be drawn.

1. *Distinguishing Home Rule and Preemption*

Confusion often arises in Rhode Island between home rule analysis and preemption analysis.[148] It is important to highlight the relationship between the two concepts to avoid confusion. While this Comment is not intended as an exhaustive discussion of preemption, no discussion of home rule is complete without at least some discussion of preemption.[149] Preemption occurs when a valid state statute conflicts with a local ordinance.[150] In such a circumstance a state statute will preempt the local ordinance, rendering it ineffective.[151] In addition, there may be certain areas

147. This is distinct from the issue of whether a municipality has exceeded the authority granted to it under its own home rule charter. A city's home rule charter may, of its own right, place limitations on a municipal government. The issue addressed in this section is whether a municipality has exceeded the authority granted it by the Home Rule Amendment. A home rule charter, of course, cannot grant a municipality powers exceeding those granted to it by the Home Rule Amendment, and so a municipality acting within the limits of its charter could conceivably still exceed its home rule authority.

148. "The dueling issues of local authority and state preeminence often intersect because home rule requires an analysis of whether the issue is of local concern, whereas preemption requires an analysis of whether the issue is implicitly reserved within the state's sole domain." Amico's v. Mattos, 789 A.2d 899, 908 (R.I. 2002).

149. *See, e.g.*, Thomas S. Smith, *No Home on the Range for Home Rule*, 31 LAND & WATER L. REV. 791, 800-01 (1996).

150. *Id.* at 800.

151. 56 AM. JUR. 2D *Municipal Corporations, Counties, and Other Political*

of regulation which are entirely occupied by the state, and in which a municipality may not regulate. This second form of preemption, where a state legislature "occupies the field" in a particular area of regulation without necessarily stating its intention to do so, will be referred to hereinafter as "implied preemption."[152] There are two important distinctions to keep in mind concerning the relationship between these two forms of preemption and home rule in Rhode Island.

First, the only absolute limitation on preemption under the Home Rule Amendment is that no state legislation may modify a municipality's form of government.[153] Home rule protects local ordinances against preemption only in the sense that it renders special legislation invalid if it is not in conformity with the provisions of the Amendment.[154] The key to home rule, therefore, lies in the limitation on the power of the General Assembly to legislate, and therefore in the validity of state legislation. *Valid* state legislation will *always* preempt a conflicting local ordinance.[155]

Second, concerning implied preemption, the legislature cannot occupy the field in an area of local concern.[156] The two are necessarily and mutually exclusive. The flip side of this relationship is that a municipal ordinance which is impliedly preempted cannot be protected from preemption by the Home Rule Amendment. Put simply, a court may decide either (a) that a

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Subdivisions § 111 (2004).

152. *Id.* § 113 (discussing "matters of statewide concern" upon which a municipality may not legislate). The relationship between home rule and preemption is highly complex. For instance, treatises often make general statements about the limitations on judicial interpretation in areas of "mixed state and local concern," but such statements are often inapplicable in Rhode Island. *Compare id.* § 114 ("[A]bsent a specific limitation or declaration by the legislature to the contrary, [constitutional home rule] is intended to diminish . . . [preemption] by a judicial interpretation of an unexpressed legislative intent."), *with* East Greenwich v. O'Neil, 617 A.2d 104, 109 (R.I. 1992) ("We have long recognized the doctrine of implied pre-emption and do not require a clear statement by the Legislature of its intention to pre-empt local legislation.").

153. R.I. CONST. art. XIII, § 4 (1986).

154. Judith A. Stoll, Note, *Home Rule and the Sherman Act After* Boulder: *Cities Between a Rock and a Hard Place*, 49 BROOK. L. REV. 259, 263-65 (1983).

155. *Id.* at 264-65.

156. East Greenwich v. O'Neil, 617 A.2d 104, 109 (R.I. 1992).

matter is of local concern and thus the state has not occupied the field concerning that particular matter, or, in the converse, (b) that the state has occupied the field and thus the particular matter cannot be of local concern.[157] This relationship is merely a function of the definition of "local concern." Confusion arises because the case law does not always keep this distinction clear.[158] Strictly speaking, a home rule amendment which is impliedly preempted was not valid in the first place. Ultimately, it makes little difference in the implied preemption context whether we say (inaccurately) that a home rule ordinance is preempted because the state occupies the field, or if we say (accurately) that the ordinance does not regulate a local concern and therefore is outside the power granted by the Home Rule Amendment, so long as the distinction between preemption and home rule remains generally clear.[159]

Combining these two distinctions, it should be clear that preemption and home rule often arise in the same context.[160] They are not, however, the same kind of inquiry. Preemption concerns the supremacy of valid state legislation, while home rule concerns a particular constitutional limitation on state legislation in the face of constitutionally-created municipal initiative.[161] These are important distinctions to keep in mind when considering how courts will respond to conflicts between municipal and state legislation.[162]

2. *Municipal Powers: What Concerns Are Local Concerns?*

Home rule analysis concerning the validity of municipal and state legislation often begins with the same question: what matters are of purely local concern?[163] This is partly because home rule initiative has been granted to municipalities in areas where the General Assembly later chooses to pass some form of special legislation. The result is that the analysis of the two issues

157. *Id.*
158. *Id.* at 111.
159. Warren v. Thornton-Whitehouse, 740 A.2d 1255, 1261 (1999).
160. Amico's v. Mattos, 789 A.2d 899, 908 (R.I. 2002).
161. *Id.*
162. *Id.*
163. *See id.; accord* East Greenwich v. O'Neil, 617 A.2d 104, 109 (R.I. 1992).

begins with the same question: Is the challenged legislation regulating in an area of concern over which home rule municipalities have been granted local initiative?[164] In the case of municipal regulation, this is really the ultimate question, while in the case of challenged state legislation it is one in a series of questions.[165] An analysis of the validity of state legislation challenged under the Home Rule Amendment has at least one remaining step. This is so because special state legislation is valid so long as it conforms to the powers retained by the General Assembly under the state's constitution, and because the Home Rule Amendment limits, but does not prohibit, special legislation.[166] The key is that authority is *granted* to a municipality, either by the constitution or the General Assembly, while it is *reserved* to the General Assembly.[167] This is a significant distinction to keep in mind when considering how the Supreme Court of Rhode Island is likely to rule on a particular home rule conflict.

The first step, and often the primary concern, in all home rule analyses in Rhode Island is the determination of whether a particular concern is purely local. As Parts IIA and IIB of this Comment make clear, the development of this question in Rhode Island has been tentative, if not almost glacial, in its pace. It has not been fruitless by any means, however, as the Rhode Island Supreme Court has developed rules over time which were finally combined into a single analysis in *Town of East Greenwich v. O'Neil*.[168] The underlying dispute in *O'Neil* concerned a local ordinance passed by East Greenwich, a home rule municipality, which prohibited the construction of high voltage transmission

164. *See* Amico's, 789 A.2d at 908.
165. *Id.*
166. *Id.* at 904.
167. This interpretation might, at first glance, appear to be the same as the conclusion reached under Dillon's Rule. It is similar in so far as it reinforces the notion that a municipality is merely a creature of the state. It is different, however, because the Home Rule Amendment does grant initiative authority to home rule municipalities. Home rule municipalities are not limited in their authority by necessity or specific grant, as they would be under Dillon's Rule, but rather limited to an entire class of concerns, namely those that are purely local.
168. 617 A.2d 104 (R.I. 1992).

lines.[169] The city cited health concerns surrounding electromagnetic emissions from high voltage power lines in support of the ordinance, which created a three-year moratorium on construction of such lines.[170] The Rhode Island Supreme Court invalidated the ordinance because regulation of electric transmission lines is clearly a field which has been occupied by the state legislature.[171] In reaching its decision, the court formulated a rubric which I will refer to as the *O'Neil* test. The three-part *O'Neil* test is intended to "more clearly discern[]" what the court refers to as the "local-general equation."[172] In the words of the court, the three steps are as follows:

> First, when it appears that uniform regulation throughout the state is necessary or desirable, the matter is likely to be within the state's domain.
>
> Second, whether a particular matter is traditionally within the historical domain of one entity is a substantial consideration.
>
> Third, and most critical, if the action of a municipality has a significant effect upon people outside the home rule town or city, the matter is apt to be deemed one of statewide concern.[173]

Each of these steps was derived from general home rule principles as they have been interpreted in Rhode Island, and each requires further discussion.[174]

The first prong involves the desirability of uniform regulation throughout the state in certain limited areas.[175] In many ways, this prong was covered by the discussion *supra* concerning the

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169. *Id.* at 106.
170. *Id.*
171. *Id.* at 112.
172. *Id.* at 111.
173. *Id.* (citations omitted).
174. Interestingly, the Court cites, but then spends little time discussing the development of Rhode Island's case law. In addition, the court only cites a treatise in support of the first prong. One reason might lie in the Court's recognition that the case law leading up to *O'Neil* is confusing, which it points out when it states that "the local-general equation may be more clearly discerned." Concern about the clarity of past decisions might well explain any reluctance on the Court's part to discuss previous decisions. *Id.*
175. *Id.*

distinction between preemption and home rule.[176] In essence, the court was merely stating that a local concern cannot be one which is occupied by the state. Considering, however, that the court, in *Newport Amusement Co.*, at the inception of home rule in Rhode Island appeared convinced that the state occupied virtually every conceivable field of regulation, this is an important prong in home rule analysis in Rhode Island.[177] Since *O'Neil*, the court has been circumspect about declaring any particular field to be one in which statewide uniformity is desirable; this is despite the fact that the court in *O'Neil* did find that regulation of public utilities was an area in which uniform statewide regulation is desirable.[178] Following *O'Neil*, most decisions concerning uniform regulation have involved relatively clear cases, such as child support[179] or regulation of tidal wetlands.[180] In less clear cases, the court has generally based its ultimate conclusion on a variety of foundations.[181] Ultimately, the court will inquire into the quality of the thing being regulated to decide if statewide uniformity is especially desirable.[182] For instance, the court is quite likely to find that regulation of agriculture to prevent pollution of waterways is an area that cannot be effectively regulated without statewide uniformity, while the court is unlikely to find that effective regulation of parking on municipal streets requires a

176. *See supra* Part IIIC1.

177. Newport Amusement Co. v. Maher, 166 A.2d 216, 219 (R.I. 1960).

178. *See* East Greenwich v. Narragansett Electric Co., 651 A.2d 725, 729 (R.I. 1994) (citing *O'Neil* for the proposition that public utilities are an area of statewide concern).

179. Duke v. Duke, 675 A.2d 822, 823-24 (R.I. 1996) ("Child support is a statewide concern that a municipal ordinance may not impede or frustrate in its implementation.").

180. *Warren*, 740 A.2d at 1259 ("Under the public-trust doctrine, 'the state holds title to all land below the high water mark in a proprietary capacity for the benefit of the public.'" (citations omitted)).

181. *See generally* Marran v. Baird 635 A.2d 1174 (R.I. 1994) (upholding state legislation allowing the director of the State Department of Administration to appoint a "budget and review commission" to oversee municipal financial policy if a town's bonds are lowered to junk status).

182. *See, e.g.*, Coastal Recycling v. Connors, 854 A.2d 711, 715 (R.I. 2004) (Chief Justice Williams writing for the court in *Coastal* rejected an argument that the state occupied the field of regulation for municipal contracts. "Such an interpretation is at odds with the Home Rule amendment of the Rhode Island Constitution. . .[t]hus, we must read the towns ordinance in pari materia with [state legislation]."

uniform statewide policy. In between the extremes the court would be required to make a case-by-case determination.

The second prong of the *O'Neil* test requires the court to look at the traditional distribution of power between the state and municipal governments, and to give deference to that traditional scheme.[183] This prong is essentially a way to avoid sudden change in the distribution of power. The *O'Neil* court cited cases from the early years of Rhode Island home rule to support the need for this particular prong, the latest one being from 1971, and included the 1953 advisory opinion to the House.[184] This prong preserves the *status quo* in areas such as licensing and authority over police personnel.[185] Regardless of the reasoning in any particular case establishing a precedent, the court is apt to preserve the historical balance between state and municipal governments, or to at least proceed cautiously in changing that balance. The danger, of course, is that this particular prong will be used to preserve the strictures of Dillon's Rule based on its historical acceptance. As for whether this concern is warranted, only time will tell.[186]

The final prong in the *O'Neil* test, and the one the court refers to as the "most critical," involves the fundamental limitation of home rule authority to a single municipality's property and affairs.[187] This prong stands in opposition to the second prong in that it actually recognizes a relatively broad area of authority, namely anything that does not affect people outside of the home rule town or city. In fact, the court cited three cases in support of this prong, all of which come from the later, more generous period in the court's home rule analysis as discussed in Part IIIB.[188] The tension between this prong and the second prong might not present itself clearly at first glance since the third prong is

183. East Greenwich v. O'Neil, 617 A.2d 104, 111 (R.I. 1992).

184. *Id.* The court cites the following cases: Marro v. Gen. Treasurer of the City of Cranston, 273 A.2d 660, 662 (R.I. 1971); Nugent v. East Providence, 238 A.2d 758, 761-63 (R.I. 1968); Opinion to the House of Representatives, 96 A.2d 627, 630 (1953).

185. *See, e.g., Marran*, 635 A.2d at 1179 ("The aggregate indebtedness of a city or town has been historically regulated by statutes of general applicability.").

186. If Rhode Island's past is any gauge, only a great deal of time will tell.

187. *O'Neil*, 617 A.2d at 111.

188. *Id.* The court cited the following cases in support of the third prong: *McCarthy* 574 A.2d at 1231; *Brancato*, 565 A.2d at 1264; and *Bruckshaw*, 557 A.2d at 1223.

presented in terms of a limitation on the authority of home rule municipalities, but the limitation stated in the third prong is really just part of the definition of home rule. Of course, a home rule municipality may not regulate in a way that affects people outside of the home rule community; otherwise the issue would not be a local concern by definition. This supposed limitation might actually support an expansion of home rule authority, over time, by reinforcing the fundamental home rule notion that a municipal government has the authority to act on its own initiative, so long as such action affects only the residents of that home rule community. It is perhaps telling that the court pointed to this as the "most critical" prong of the three, especially given the cases cited in support of this particular prong.[189]

The establishment of the *O'Neil* test is by far the most significant development in Rhode Island's recent home rule jurisprudence. *O'Neil* establishes the local-general equation as the centerpiece of home rule analysis in Rhode Island, and it provides a definite starting point for home rule municipalities in determining what the limits of their authority under the Home Rule Amendment are likely to be.[190] It also provides a starting point for the General Assembly in determining what limitations the Home Rule Amendment places on its authority to legislate concerning home rule municipalities.[191] The next sub-section will discuss determination of the validity of state legislation under the Home Rule Amendment.

3. *Restrictions on State Legislation*

As discussed above, the Home Rule Amendment acts as a limitation on the General Assembly's otherwise plenary authority.[192] Setting aside for the moment the absolute proscription of legislation affecting form of municipal government, the validity of state legislation in Rhode Island under the Home Rule Amendment depends upon three interrelated factors: (1) the status of the municipality, (2) the type of legislation, general or specific, and (3) the procedure by which legislation has been

189. *Id.*
190. *Id.*
191. *Id.*
192. *See* text accompanying note 121 *supra*.

passed.[193] The first of these is a threshold question which determines whether the Home Rule Amendment limitations are relevant, the second is very much related to the local-general equation raised in the previous section, and the final factor will only be relevant if the legislation in question is special legislation relating to a home rule community. The following discussion will therefore address each factor in order.

The Home Rule Amendment only restricts state legislation as it relates to towns and cities which have adopted a home rule charter, referred to in this Comment as "home rule municipalities."[194] The Home Rule Amendment places no restrictions on special legislation relating to municipalities which have no home rule charter.[195] These communities are still subject to the will of the legislature and receive all their authority from the General Assembly.[196] Dillon's Rule, with its strict interpretation of municipal authority, applies in full force to these communities.[197]

The second factor involves determining whether a particular instance of legislation is to be considered special or general. This question is of great significance, since the state retains nearly complete power to legislate by general legislation.[198] The Home Rule Amendment does not restrict this power, except as it relates to form of government.[199] The process for determining whether

193. Opinion to the House of Representatives, 87 A.2d 693, 695-96 (R.I. 1952).

194. *See* Capone v. Nunes, 132 A.2d 80, 82 (R.I. 1957). *Accord Opinion to the House*, 87 A.2d at 695 ("Generally speaking, unless a charter is submitted to and is adopted by the qualified electors of a city or town in accordance with the provisions of the home rule amendment, article XXXVIII, such city or town retains the same status relative to the general assembly as that which it had prior to the adoption of said amendment.").

195. *See Capone*, 132 A.2d at 82.

196. *See id.*

197. *See id.*

198. *See* Mongony v. Bevilacqua, 432 A.2d 661, 664 (R.I. 1981) ("[A] state law of general character and statewide application is paramount to any local or municipal ordinance inconsistent therewith."). It again becomes clear why the distinction between preemption and home rule becomes difficult. This proposition concerning a general law of statewide character is perhaps more significant in terms of preemption, but it also holds a kernel of truth for home rule analysis in that preemption applies despite the existence of home rule. In other words, the Home Rule Amendment does not prevent state legislation from preempting valid home rule ordinances in this instance.

199. *Opinion to the House of Representatives*, 87 A.2d at 695-96.

legislation is general or specific is basically two-fold. First, legislation will usually only be considered special legislation if it actually encroaches on an area of purely local concern in a particular home rule community.[200] The basic idea is that the Home Rule Amendment only grants local authority in areas of purely local concern, and, as such, the Amendment is not implicated if the state has not interfered in such concerns.[201] Second, legislation regulating in an area that might otherwise be of purely local concern will not be considered special legislation if it "shall apply alike to all cities and towns."[202] This determination is relatively straightforward: either the legislation in question affects all towns and cities alike, or it does not. Legislation will therefore be considered special legislation only if it regulates in an area of purely local concern and does not apply alike to all towns and cities in Rhode Island.[203] If, at the end of this analysis, the legislation in question is general and does not affect form of government, then it is valid.

The final factor in determining the validity of state legislation under the Home Rule Amendment will only be reached if the legislation is special legislation under the second factor. If it is special legislation, it can still be valid if it is submitted to and ratified by a majority of the qualified electors of the town or city to which it applies.[204] This provision allows the General Assembly to act as a catalyst for local initiatives, forcing a vote on issues on which the local government has not acted. This device is most frequently employed to ratify special legislation waiving the state legislative cap on damages in tort suits against municipalities, and it has been employed with very limited success.[205]

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200. *See, e.g.*, Royal v. Barry, 160 A.2d 572, 575-76 (R.I. 1960).

201. *Id.*

202. Bruckshaw v. Paolino, 557 A.2d 1221, 1223 (R.I. 1989) (quoting article XIII section 4 of the Rhode Island Constitution).

203. It is worth noting that the relationship between municipal home rule authority and the limitations on state legislation is not symmetrical. Home rule never grants a Rhode Island municipality the authority to pass ordinances in areas of statewide concern, while the General Assembly can legislate in areas of purely local concern, so long as it does so with a general law of uniform statewide application. This is yet another example of the close relationship between home rule and preemption in Rhode Island.

204. *See, e.g.*, McCarthy v. Johnson, 574 A.2d 1229, 1232 (R.I. 1990). *Accord Bruckshaw*, 557 A.2d at 1223; *Opinion to the House*, 87 A.2d at 696.

205. *See, e.g.*, *McCarthy*, 574 A.2d at 1232.

IV. CONCLUSION

Rhode Island's courts and legislatures have been slow to recognize the benefits in efficient and effective government that the Home Rule Amendment has to offer. This is not surprising when one considers the power that such a historically unified and powerful General Assembly stands to lose. Yet the overwhelming logic of allowing local authorities the ability to make decisions affecting only their constituents cannot be ignored. This is probably why Rhode Island's half-century experiment with constitutional home rule has been marked by reluctant but persistent acceptance of local initiative. Beginning with near rejection of home rule in *Newport Amusement Co.* and progressing to the court's much broader conception of home rule in *O'Neil*, the Rhode Island Supreme Court has begun to develop an analysis which can allow for the realization of much broader municipal authority. If this trend is to continue, the Rhode Island Supreme Court must continue to act as an independent arbiter in clashes between state and local power to ensure that the spirit of home rule is not hobbled by the desire to preserve historically entrenched power.[206]

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206. A recent supreme court decision in a case challenging authority granted by a charter to a town council to reject or accept decisions made under state legislation, suggests that home rule will continue its slow progression forward using the *O'Neil* test as a guide:

> Coastal contends the Legislature intended to occupy the field by creating a uniform system to award municipal contracts. Such an interpretation strips town councils throughout the state of any opportunity to review major decisions that will cost their municipality a significant amount of money. Such an interpretation is at odds with the Home Rule amendment of the Rhode Island Constitution, which confers "the right of self government in all local matters." R.I. Const. art. 13, sec. 1. Nothing in [the law in question] proscribes the town councils from reviewing a decision made by a purchasing agent in accordance with the statute. Thus, we must read the town's ordinance and charter in pari materia with [that law].

Coastal Recycling v. Connors, 854 A.2d 711, 715 (R.I. 2004). *See also supra* note 182.

Taking a broader historical view, this slow progression of home rule is probably just a reluctant recognition of a persistent fact of Rhode Island's history, that the towns came first.

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