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REVIEWING AND REVISING DILLON'S RULE

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Clayton Gillette's article—which advances an economic analysis of Dillon's Rule—begins by referring to the tasks faced by "contemporary scholarship in local government law."[1] An initial observation is that this scholarship barely exists. During the last ten years, very few articles on questions of the law of local government have been published in the major law reviews.[2] In particular, the law-and-economics movement, which began in the early 1970s, has only rarely focused on questions of local government. The Michelman and Sandalow coursebook,[3] published in 1970, included significant passages of economic analysis. But very few scholars have subsequently followed its lead (and the coursebook itself has never been revised).

I hence commend Gillette for his willingness to subject Dillon's Rule to an economic evaluation. It makes sense to begin my commentary by clarifying what Dillon's Rule is all about. To do so, one needs to harken back to local government law at the turn of the century. At that time, cities received their lawmaking authority from state statutes—typically, a combination of statutes, each conferring on cities authority to engage in a particular activity. The message of Dillon's Rule—formulated in the late nineteenth century—was that each of these statutory grants of authority should be narrowly construed: if the grant contains an ambiguity, that ambiguity should be resolved against a finding of local government lawmaking authority. In the absence of Dillon's Rule, such ambiguities would presumably have been resolved in accordance with the more conventional maxims and techniques of statutory interpretation.[4] Dillon's Rule functioned, therefore, to significantly reduce the effective authority of local governments.

After the turn of the century, however, the home rule movement took hold. Under home rule, cities receive their authority directly from

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1. Clayton P. Gillette, *In Partial Praise of Dillon's Rule, Or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959 (1991).

2. These articles include Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930 (1988); Richard Briffault, *Our Localism* (pts. 1 & 2), 90 COLUM. L. REV. 1, 346 (1990).

3. FRANK MICHELMAN & TERRANCE SANDALOW, GOVERNMENT IN URBAN AREAS (1970).

4. Alternatively, courts could have ruled—in an even more pro-city way—that these ambiguities should be resolved in favor of city authority.

the state constitution. And what that constitution typically contains is a unitary grant drafted in broad and general terms: authority over "local affairs" or "municipal affairs." Given as a matter of legal form this single, broad grant—and given as well the whole point of home rule as a new constitutional method of allocating authority between state and local governments—Dillon's Rule has never been regarded as a principle of interpretation that applies to home rule. Terrance Sandalow's 1964 article indeed found that courts had broadly construed the constitutional grant of local initiative under home rule;[5] and an article of mine in 1973 confirmed the basic accuracy of Sandalow's finding.[6]

Dillon's Rule, then, has no particular application to home rule cities. And as Gillette acknowledges, in today's America most major cities do in fact enjoy home rule. Given the way in which home rule law draws its lines, "[n]on-home rule localities tend to be relatively small."[7] The domain of Dillon's Rule is thus now limited to these smaller localities (and also to limited-purpose special districts that are beyond the scope of home rule grants).

Having thus clarified Dillon's Rule, let me now summarize how Gillette's account proceeds. This account relies on reasoning that has become familiar in recent economic writings on the nature of government. Because of the prospect of market failure, it becomes appropriate for residents to support the creation of public agencies. But if market failure produces a call for government, the prospect of government failure suggests that government will often not perform effectively the tasks assigned to it. There are at least three ways in which government can go wrong.

One concerns externalities: the decisions of one government can impose external harms on other governments (or their residents). This, moreover, is a problem that seems especially acute for government at the local level: given the way many localities are crowded into a particular metropolitan area, local decisions are especially likely to entail external effects.[8]

Secondly, while the goal of government (economically regarded) is to maximize the aggregate welfare of all its citizens, conventional democratic practices imply that the majority can easily maximize its own wel-

5. Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for Courts*, 48 MINN. L. REV. 643 (1964).

6. Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671, 683 & n.57 (1973).

7. Gillette, *supra* note 1, at 973 n.49.

8. For discussion of this problem in the context of local ordinances that alter "private law," see Schwartz, *supra* note 6, at 758-76.

fare while giving little weight to the interests of an outvoted minority. Moreover, the dangers of majority rule may be especially prominent at the level of local government. For within a locality, there may well be a stable, homogeneous majority of a sort that can prevent social and economic minorities from taking advantage of the ordinary political processes of shifting coalitions.[9] Local government thus makes possible "the exploitation of the few by the many."[10] The enactment of rent control at the local level may be a useful indication of this phenomenon, since within a particular locality voting renters typically will hugely outnumber voting landlords.

Finally, there is a public choice problem, identified by writers like Mancur Olson.[11] This is the problem that can be referred to as the Law of Small Numbers. The smaller the number of firms or persons within a particular industry or interest group, the more effectively that industry or interest group can lobby for the adoption of measures that will provide its members with economic advantages. Meanwhile, the diffused majority, unable to overcome basic free-rider problems, may be unable to mount a politically effective defense. This problem, Gillette suggests, becomes especially pronounced at the level of local government, since local interest groups may contain an especially small number of members, each of whom can easily monitor the others' conduct. My colleague, John Wiley, has recently discussed the Law of Small Numbers at the local level, and has relied on it in order to recommend how courts should interpret the "state action" doctrine of federal antitrust law.[12] According to Wiley, local ordinances that restrain trade should be held to entail an antitrust violation if they are substantively inefficient and if they also are perceived by the judiciary to be the consequence of producer capture. In discussing Dillon's Rule, Gillette comes up with a somewhat similar evaluation: a primary factor in determining the application of Dillon's Rule should be whether the local initiative has been produced by what Gillette calls "one-sided lobbying."

Exactly what, however, is the nature of Gillette's evaluation of Dillon's Rule? Is this a claim about what Judge Dillon himself had in mind when he originally formulated his Rule? Not really. While Gillette indicates that Dillon's understanding of his Rule is in a way "entirely consistent" with Gillette's own evaluation, Gillette is generally careful in

9. *See* Note, *City Government in the State Courts*, 78 HARV. L. REV. 1596 (1965).

10. Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. CAL. L. REV. 1293, 1311-12 (1988).

11. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1971).

12. John S. Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986).

making clear that he is not providing an explication of the Rule's original intent.[13] Rather, he provides what he calls an "ex post justification" for the Rule.[14] That is, Gillette is trying to explain the pattern of results that courts have reached in administering the Rule over the last century. This is an explanation that could both justify these results and explicate the intuitions on which judges have relied.[15]

To adequately prove such an ex post justification would be, however, a daunting task. The scholar attempting this proof would need to read and evaluate a century's worth of judicial opinions applying the Rule. Alternatively, that scholar would need to review a subset of all Dillon's Rule opinions—a subset identified in accordance with a fair-minded methodology. Yet these are tasks that Gillette does not really undertake. Indeed, it seems not unfair to observe that Gillette offers almost no proof for the retrospective interpretation of Dillon's Rule that he suggests. The Dillon's Rule case that he discusses at greatest length is *Early Estates, Inc. v. Housing Board of Review of Providence*.[16] Yet as Gillette acknowledges, *Early Estates* is a case that does *not* comply with his interpretation, since the Providence housing requirements considered in that case do not seem to have been the consequence of one-sided lobbying. Early on in his article,[17] Gillette identifies recent judicial opinions in Virginia and Massachusetts that relied on Dillon's Rule in order to respectively invalidate an ordinance mandating bottle deposits[18] and a regulation restricting the sale of condominium units.[19] But Gillette does not make claims that these regulations were the product of one-sided lobbying, and it is difficult to see how such claims could be persuasively presented. Indeed, given the background provided by the Massachusetts court,[20] the condominium regulation seems to be a good example of the excesses made possible by rent control programs supported by a local tenant majority.

To be sure, in his article's last full section, Gillette does discuss several cases which supposedly show Dillon's Rule being applied in ways that fit his interpretation. In two of these cases, however, the immediate issue was the authority of one local government to delegate decisionmaking power to another locality.[21] Yet clearly the problem of delegation

13. Gillette, *supra* note 1, at 990 n.96.
14. *Id.*
15. *Id.* at 1000.
16. 174 A.2d 117 (R.I. 1961).
17. Gillette, *supra* note 1, at 964-65.
18. Tabler v. Board of Supervisors, 269 S.E.2d 358 (Va. 1980).
19. Steinbergh v. Rent Control Bd., 546 N.E.2d 169 (Mass. 1989).
20. *Id.* at 171-73.
21. Gillette, *supra* note 1, at 1002-08 & n.132.

raises distinctive issues of legitimacy and accountability that can provide a special reason for insisting on clarity in state statutes relied on as sources for local lawmaking authority.

Gillette also discusses several recent impact-fee cases in order to provide support for his account of Dillon's Rule in operation. As Gillette's review of these cases reveals, however, none of them turns out to raise a true Dillon's Rule issue of original local authority. Rather, these cases concern the extent to which state legislation should be regarded as preempting the field, and the extent to which local governments can adopt measures that are able to supersede conflicting state statutes.[22] Furthermore, the particular problem entailed by impact fees seems far more nearly a problem of externalities than a problem of one-sided lobbying. For these fees are typically (and correctly) evaluated as an effort by all current local residents to impose costs on those who might seek to enter the locality in the future.

Gillette's claim that his Dillon's Rule theory provides an account of how that Rule has been administered over the last century is thus to a rather surprising extent lacking in evidence that might provide it with support. Let me suggest, then, a somewhat different way of understanding what Gillette might really have in mind when he refers to a "justification" for Dillon's Rule. Forget about the past century, and whatever applications of Dillon's Rule it has witnessed. Gillette's real purpose may well be to specify how judges ought to administer Dillon's Rule. Understood in this way, Gillette's argument is not a positive claim about what has happened in the past but rather a normative recommendation as to what should happen in the future.

Let me proceed, then, to consider Gillette's account of Dillon's Rule at this normative level. As reviewed by Gillette, the Rule continues to come into play only if there is some genuine ambiguity in a state statute conferring powers on local governments.[23] Gillette argues, however, that judges should not resolve *all* such ambiguities against local authority. Rather, in these cases involving ambiguous statutes, courts should rule

22. *Id.* at 1002-05. On the basic distinction between local *authority* under home rule and local *autonomy* under home rule, see Schwartz, *supra* note 6, at 676-77.

23. And Gillette does seem to believe that this is a meaningful precondition. That is, while some statutory grants of authority are ambiguous, other grants are clear enough to escape the clutches of Dillon's-Rule review. To this extent, Gillette seems not to accept the CLS-associated view that essentially *all* legal questions (including questions of statutory interpretation) can properly be regarded as indeterminate and manipulable. Gillette does not discuss how easy or difficult it would be for courts in particular cases to draw the line between ambiguous and non-ambiguous statutory grants. In this regard, consider all the difficulties that have arisen as courts have applied the deference doctrine of Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

against local authority if but only if they perceive that the local ordinance in question was the consequence of one-sided lobbying.

In considering this proposed revision of Dillon's Rule, I cannot say that I find it especially attractive. First of all, there is the problem of its relative unimportance, given the point (mentioned above) that Dillon's Rule tends to apply only to smaller localities. Secondly, while not denying the reality of the problem of one-sided lobbying at the local level, I am inclined to regard this problem as far less serious for local governments than the problem of externalities. Yet Gillette's account of Dillon's Rule offers no remedy for this problem. Furthermore, even as a solution to the specific problem of one-sided lobbying, the Gillette revision of Dillon's Rule seems both underinclusive and overinclusive. It is underinclusive in that an ordinance—even if undeniably the product of one-sided lobbying—would remain free of judicial review if the statutory authorization for the ordinance is sufficiently clear: only a step-one finding of statutory ambiguity gives rise to a step-two inquiry into the lobbying process. Moreover, the Gillette version of Dillon's Rule is overinclusive in that it could tie up in delay-producing litigation large numbers of ordinances which in truth are the product of entirely legitimate lobbying processes. Gillette denies that he is opposed to local innovation as such.[24] Still, it is obvious that the burden of Dillon's Rule (as revised by Gillette) would fall most heavily on innovative measures.

To repeat, as a response to the prospect of one-sided lobbying, Gillette's revision of Dillon's Rule is both underinclusive and overinclusive. In this regard, Gillette defends his version of the Rule by stating or claiming that "municipal entrance into a novel activity, not expressly within the realm of activities considered by the legislature, may signal that a discrete group has prevailed on city officials to grant an idiosyncratic benefit."[25] But this claim seems bland and weak. To make the case on behalf of his version of Dillon's Rule, Gillette needs to present much more by way of either evidence or argument in order to establish, first of all, that there is *some* correlation between novel activities and one-sided lobbying, and secondly that this correlation is *strong* enough to justify the weight that Gillette would place on the fact of novelty.

Put to one side, however, all the problems involved in the "statutory ambiguity" trigger for the inquiry into local lobbying that Gillette recommends. Would it be wise for the judiciary to undertake such inquiries? In my judgment, the answer is no. For I doubt the ability of judges

24. Gillette, *supra* note 1, at 985.
25. *Id.* at 984-85.

— and in particular, trial-court judges at the local level — to render the kinds of evaluations that Gillette's revision of Dillon's Rule has in mind.[26] Indeed, evaluations of the processes of lobbying are difficult enough even for scholars to undertake: historians are still arguing about who gored whose ox in the enactment of the Interstate Commerce Act of 1887. Gillette himself comes to certain conclusions about the Providence lobbying that may have produced the ordinance in the *Early Estates* case. He reaches his conclusions, however, only after going through a several-page analysis of the political process that likely generated the ordinance.[27] And despite Gillette's own intellectual acumen, his analysis seems doubtful at key points. It assumes, for example, that landlords in Providence are "likely small in number" and therefore in a good position to engage in one-sided lobbying.[28] Now Providence has a population of about 200,000. While I have no contacts in Providence, I *do* have contacts in Santa Monica, a California city of about 100,000. And what I learn is that in Santa Monica there currently are about 3500 landlords.[29] To be sure, most of these landlords are "small," while only a few of them are "large." But this observation highlights the likelihood of divergences of interest among landlords themselves—divergences that would make it difficult for landlords to join together in a lobbying effort. Moreover, the Providence ordinance dealt with in *Early Estates* required lighting in public spaces and also certain hot-water-line connections. Rental units not already complying with these requirements would tend to be "older" rather than "newer," and probably located in lower-rent areas. Here too, then, the Providence ordinance does not enable landlords to provide a united front. Moreover, as Gillette observes, to understand the lobbying in Providence one needs to consider the issue of "incidence": which set of parties will *ultimately* bear the costs that the ordinance *originally* imposes? Incidence is, however, a difficult issue. Gillette relies on a thoughtful article by Richard Craswell.[30] That article emphasizes that assessments of incidence frequently depend on the magnitude of the benefits that the regulation in question provides. But to ask courts—in the setting of a challenge to that regulation—to measure the exact extent of the regulation's benefits seems like a doubtful practice. Of course, from

26. This, of course, is also a key problem with the Wiley proposal. *See supra* text accompanying note 12.

27. Gillette, *supra* note 1, at 986-89.

28. *Id.* at 988.

29. The number of rental units in Santa Monica is about 28,000. It may be that the 3500 figure includes all the members of marriages and partnerships that own particular units.

30. Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361 (1991).

the perspective of the lobbying process, the relevant question would apparently be what beliefs the interest groups themselves hold about incidence. But to confound the question of *actual* incidence by requiring consideration of mere *perceptions* of incidence would make a judicial inquiry into the lobbying process even more perplexing.

My position, then, is that it is a bad idea for judges to formally consider the question of lobbying in particular cases. To wind up my comment, let me provide further support for this position by making two general points. One is practical, the other in a sense intellectual. The practical point is this. If the nature of lobbying is the formal issue that the judge would need to address in order to apply Dillon's Rule, then judges considering challenges to new ordinances would evidently be required to open the record to extensive testimony about the lobbying process that gave rise to the ordinance. This evidence would of course not be limited to the official legislative history; rather, courts evidently would need to consider all claims as to who met with whom and who persuaded whom at the time the ordinance was under consideration.[31] As a practical matter, to open up the record in this way seems like a clear institutional mistake. The second problem concerns the intellectual aptitude of judges. It's not just that most judges are not as smart as Gillette is. It's also that most judges do not even share the economically-minded intellectual frame of reference that Gillette himself takes for granted. Those judges might well be willing to disparage real-estate developers as "special interests." But this kind of "bad-guy good-guy" evaluation is not at all what Gillette has in mind. In fact, his article considers developers in two local political settings. In one setting, Gillette perceives that developers will be effective in engaging in one-sided lobbying.[32] In the other setting, however, Gillette's assumption is that developers will be unable to mount an effective lobbying effort.[33] Yet the distinctions on which Gillette here relies are of a sort that would probably elude the attention of judges who have not immersed themselves in the economists' public-choice literature.[34]

31. In order to affirm that an ordinance was the product of one-sided lobbying, judges would need to find not only that one-sided lobbying occurred, but also that this lobbying was the "cause" of the adoption of the ordinance.

32. Gillette, *supra* note 1, at 979.

33. *Id.* at 1005.

34. The Craswell discussion of incidence emphasizes how deeply counterintuitive assessments of incidence can turn out to be; the economist's sophistication is often needed to offset common-sense understandings. Craswell, *supra* note 30, at 372, 398. But the counterintuitive sophistication of the economist is not what one can expect even in generally intelligent common-law judges.