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COMMENT

Stansbury v. Maupin: KENTUCKY'S REFUSAL TO RECOGNIZE LEGISLATIVE HOME RULE FOR FIRST CLASS CITIES

INTRODUCTION

Home rule for cities, although an ancient concept,¹ was not adopted in Kentucky until 1972.² In a recent decision,³ the Supreme Court of Kentucky effectively, though unintentionally, dealt a potentially fatal blow to the state's still fledgling home rule doctrine. In *Stansbury v. Maupin*, the Court held that the Board of Aldermen of the City of Louisville did not have "the authority to issue a subpoena to assist an investigation into the conduct of a mayor."⁴ In arriving at its decision, the Court determined that the state statute which expressly provided for the removal of a mayor from office⁵ did not expressly give the Board of Aldermen the power to issue subpoenas in pre-hearing investigations carried out by a committee and that this "authority to subpoena witnesses and compel them to give evidence is too powerful, and too susceptible of abuse, to be implied in the absence of utter necessity."⁶

The Court, in its reluctance to extend the right of subpoena to a local governmental unit⁷ without express au-

¹ For a discussion of the historical roots of home rule in England, see 1 C. ANTEAU, MUNICIPAL CORPORATION LAW § 3.00 (1975) [hereinafter cited as ANTEAU].

² The home rule legislation begins with a statement of legislative intent in Ky. REV. STAT. § 83.410 (1980) [hereinafter cited as KRS].

³ *Stansbury v. Maupin*, 599 S.W.2d 170 (Ky. 1980).

⁴ *Id.* at 171.

⁵ KRS § 83.660 (1980).

⁶ 599 S.W.2d at 171.

⁷ The Court commented: "It occurs to us that the various towns and cities of Kentucky have functioned for quite some time without the help of the subpoena power." *Id.* at 172.

thorization from the Legislature,⁸ completely overlooked the real issue: whether the Kentucky Home Rule Act, with its broad grant of power, empowers the Louisville Board of Aldermen to issue subpoenas. The issue arises out of the Legislature's extension to first class cities "the authority to govern themselves to the full extent required by local government."⁹ The Act further provides that a Board of Aldermen is given all the power necessary to govern a city "to the same extent and with the same force and effect as if the general assembly had granted and delegated to the legislative body of the city all of the authority and powers that are within its powers to grant to a municipal corporation as if expressly enumerated herein."¹⁰

The Court summarily dismissed the issue presented by this language. This comment will demonstrate that the Court erred in its analysis by disregarding the real source of the Board of Aldermen's right to grant the subpoena power to its committee and will suggest that in so doing it effectively emasculated the long-awaited Home Rule Act.

I. THE *Stansbury v. Maupin* PROBLEM

The events giving rise to the issues addressed by the Supreme Court in *Stansbury* were set in motion in the summer of 1978. The Board of Aldermen of the City of Louisville (Board) was concerned that the Mayor of Louisville, William B. Stansbury, had misused his office and, in particular, had misappropriated public funds for his own use.¹¹ Although the Board could have held a removal hearing pursuant to state statute,¹² the majority of its members felt that an investiga-

⁸ *Id.*

⁹ KRS § 83.410 (1980).

¹⁰ KRS § 83.520 (1980).

¹¹ Letter from Laurence J. Zielke, Director of Law, City of Louisville to Robert F. Stephens, Attorney General of Kentucky (Aug. 3, 1978) [hereinafter cited as Zielke Letter], reprinted in Op. Ky. Att'y Gen. 78-533 (unpublished, Aug. 8, 1978) [hereinafter cited as Op. Att'y Gen.].

¹² KRS § 83.660 (1980) provides:

(1) Unless otherwise provided by law, executive and ministerial officers of the city may be removed by the board of aldermen, sitting as a court, under oath, . . . in case of charges against the mayor, upon charges preferred by

tion should be made to determine the facts of the situation before they embarked upon such a drastic course of action. The Board therefore passed a resolution creating a select committee charged with investigating "all matters concerning abuses by the Office of the Mayor and possible misuses of the Office to include the spending of public funds."¹³

A. *Attorney General's Opinion*

After the Board gave first reading to the resolution, it instructed the Director of Law for the City of Louisville, Laurence J. Zielke, to determine the extent of the Board's power to issue subpoenas in furtherance of the select committee's investigation. Mr. Zielke requested an opinion on the matter from Attorney General Robert F. Stephens.¹⁴

The Attorney General's Opinion declared that the Board did not have an inherent subpoena power as a consequence of its legislative investigative capacity because such power must be specifically given by statute.¹⁵ The opinion examined that portion of the Home Rule Act expressly dealing with removal of executive and ministerial officers by the Board of Aldermen¹⁶ and determined that this legislation only authorizes the subpoena power for the Board as a necessary implication in connection with a removal hearing and does not authorize such power in connection with a prior investigative hearing.

not less than five (5) members of the board of aldermen. No alderman preferring charges shall sit as a member of the board of aldermen when it tries that charge.

Id.

¹³ Zielke Letter, *supra* note 11.

¹⁴ *Id.*

¹⁵ As support for the proposition that the authority to issue subpoenas must be expressly granted, the Attorney General's Opinion cited 1 AM. JUR. *Administrative Law* § 91 (1962), which deals with the power of an administrative body to subpoena witnesses. Although the Board does at times take on the character of an administrative body, it was not seeking to issue this subpoena as an administrative body, but rather it was acting in its role as an investigative legislative body. That legislative bodies acting in an investigative capacity have implied subpoena powers has been recognized on the federal level for Congress since *McGrain v. Daugherty*, 273 U.S. 135 (1927). Thus the question the Attorney General should have addressed was whether the *McGrain* rationale applied to a local legislative body. The courts subsequently addressed this question, but the Attorney General inexplicably ignored it.

¹⁶ KRS § 83.660 (1980).

The opinion then concluded that the "general rule is that in absence of specific statutory authority to issue subpoenas or administer oaths, none exists."¹⁷

In analyzing the question of whether the home rule legislation gives the city the subpoena power incident to the broad delegation of power in Kentucky Revised Statutes (KRS) sections 83.410¹⁸ and 83.520,¹⁹ the opinion cited that portion of the legislation which states that the delegated powers must not be in conflict with "the statutes of the state."²⁰ It concluded that because the Legislature "also enacted a specific statute governing the investigation and removal of executive and ministerial officers pursuant to KRS § 83.360 [sic] . . . any attempt by ordinance (pursuant to home rule authority), to go beyond, be broader than, add to or modify the powers specifically given under this statute would be *in conflict* therewith and therefore invalid."²¹ Thus, the Attorney General took the position that since the state statute providing for a hearing to remove a mayor did not provide for an investigation prior to the hearing, any ordinance that authorized a subpoena power for such an investigative hearing would automatically be in conflict with the state statute.

Under the Attorney General's approach, the removal statute is to be interpreted as covering all possible aspects of the removal procedure. This implies that whenever the state legislature has enacted legislation on any aspect of a subject, the city is prohibited from enacting resolutions dealing with any other aspects of the same subject.²² In other words, resolu-

¹⁷ Op. Att'y Gen., *supra* note 11, at 3.

¹⁸ KRS § 83.410 (1980) is entitled: "Legislative finding and expression of legislative intent."

¹⁹ KRS § 83.520 (1980) is entitled: "Board of aldermen—Powers—Tax levy—Other statutory provisions."

²⁰ The opinion specifically stated: "[h]owever pursuant to KRS 83.410, it is provided that such power is given where it is not in conflict with the constitution or statutes of the state or the United States." Op. Att'y Gen., *supra* note 11, at 4.

²¹ *Id.* (emphasis added).

²² This analysis is known as the "pre-emption" doctrine or the "occupied field" approach, meaning that once the state has acted on any aspect of a subject, the city may not regulate the subject in any manner. This can lead to ridiculous results. An example given by the Oregon Supreme Court is that of fire departments. Although the state has a legitimate interest in the safety of all its citizens and can clearly regu-

tions clearly supplemental to state legislation and not in opposition to it would nonetheless be prohibited.²³ As an analysis of home rule legislation will show,²⁴ this approach is clearly inconsistent with the legislative intent to provide cities with broad delegations of power.²⁵

B. *The Path Through the Courts*

The genesis of the *Stansbury* case may be traced to Mayor Stansbury's refusal to comply with the select committee's request to produce certain materials pertaining to its investigation. The Board thereafter enacted an ordinance, over the Mayor's veto, giving the committee the power to subpoena documents and witnesses in connection "with any investigation, committee meeting or public hearing by the Board of Aldermen, or a duly constituted committee thereof . . ."²⁶ The Mayor then sought an injunction from the Jefferson Circuit Court to prevent the Board from exercising the subpoena power in its investigation.²⁷ Although the circuit court judge based his decision on the home rule legislation, he completely

late cities through fire prevention codes, under the pre-emption doctrine, because the state has instituted such regulations, the city would have no authority to prescribe even the color of the firemen's uniforms. This result is rationalized under the theory that once the state "entered the field" any action by the city would be "in conflict" with the state legislation. *City of La Grande v. Public Emp. Retirement Bd.*, 576 P.2d 1204 (Or. 1978).

²³ To preclude the adoption of a pre-emption doctrine by the courts in Iowa, the following statute was enacted: "An exercise of a city power is not inconsistent with a state law unless it is irreconcilable with the state law." IOWA CODE ANN. § 364.2(3) (1975).

²⁴ See notes 78-86 *infra* and accompanying text for an analysis of home rule legislation.

²⁵ The dangers of the pre-emption doctrine to home rule have been articulated by one commentator as follows:

Pre-emption should be upheld with caution. If a single enactment containing no expression or inference of legislative intent as to the scope of its application is held to preclude all municipal action in a particular area, the effect will be to limit severely municipal action, and will render any form of home rule worthless.

Moser, *County Home Rule—Sharing the State's Legislative Power with Maryland Counties*, 28 Md. L. Rev. 327, 351 (1968).

²⁶ 599 S.W.2d at 171.

²⁷ *Stansbury v. Maupin*, No. 78-CI-07451 (Jeff. Cir. Ct. Sept. 18, 1978) (order granting temporary injunction).

misinterpreted this legislation. In fact, as one commentator later observed, the judge "totally missed the point of home rule."²⁸ The judge also looked to the legislation on removal to determine whether it expressly or impliedly granted the subpoena power. The judge found neither an express nor an implied grant and concluded that the Board did not have the authority to confer the power upon the select committee.²⁹ The circuit judge, just as the Attorney General had previously done, gave no weight to the statutory language granting the Board all powers the Legislature could grant to a municipal corporation "*as if expressly enumerated herein.*"³⁰

On appeal by the Board, the circuit court's decision was reversed in part by the Court of Appeals of Kentucky.³¹ The appellate court reversed the lower court judgment only insofar as it enjoined the further expenditure of public funds for the purpose of conducting the Stansbury probe.³² In so doing the Kentucky Court of Appeals avoided the home rule issue altogether.³³

When the case finally reached the Supreme Court of Ken-

²⁸ LEGISLATIVE RESEARCH COMMISSION, INFORMATIONAL BULLETIN NO. 138, THE NEW MUNICIPAL LAW: KENTUCKY'S CITIES UNDER HOME RULE 22 (1981) [hereinafter cited as LRC INFO. BULL. No. 138].

²⁹ Stansbury v. Maupin, No. 78-CI-07451 (Jeff. Cir. Ct., Nov. 21, 1978).

³⁰ KRS § 83.520 (1980) (emphasis added).

³¹ Maupin v. Stansbury, 575 S.W.2d 695 (Ky. Ct. App. 1978).

³² *Id.* at 697. The court of appeals refused to disturb the lower court's injunction in regard to the issuance of any subpoena. *Id.* That the Board does possess the subpoena power as a necessary concomitant of the investigatory and removal powers granted by the Legislature is, however, implicit in the court's reasoning. *See id.* at 699.

The United States Supreme Court recognized that Congress possesses the subpoena power as a necessary implication of its power to investigate for legislative purposes in *McGrain*. See note 15 *supra* for a discussion of this principle.

That state legislatures have a similar investigative capacity and thus a similar need for the subpoena power has been recognized by state courts. *See, e.g.,* Attorney General v. Brissenden, 171 N.E. 82 (Mass. 1930) (sustaining legislative investigation into the awarding of pensions in Boston police department); *Hodde v. Superior Court*, 244 P.2d 668 (Wash. 1952) (sustaining subpoena of police captain to appear before a committee of the Washington State Legislative Council). For an exhaustive history of legislative investigations, see *Eggers v. Kenny*, 104 A.2d 10 (N.J. 1954).

³³ The court of appeals noted in passing that "although we express no opinion as to the merits of this case, we do believe the uncontroverted allegations of this complaint raise serious questions as to the scope of Kentucky's Home Rule Act, K.R.S. 83.410 *et seq.*" 575 S.W.2d at 699.

tucky, the lower court decisions provided the groundwork for that Court's misinterpretation of the problem. To better understand why the Supreme Court's reasoning is erroneous, a clear understanding of the nature and purpose of the home rule concept is essential.

II. THE CONCEPT OF HOME RULE

Although the concept of home rule has existed in the United States for many decades,³⁴ it only recently became law in Kentucky.³⁵ One would think that since Kentucky has been relatively slow in adopting home rule, the experiences of the many states with long histories of home rule would serve as guidelines for the interpretation of Kentucky's home rule statute. Unfortunately, this guidance is not available, for home rule has evolved from different constitutional and/or legislative sources in the various states. This fact, coupled with divergent treatment within the various state courts, has resulted in no two states treating home rule identically.³⁶ However, the experiences of other states can still be of some help in trying to define the purpose and scope of home rule as intended by the Kentucky Legislature.

A. *Historical Background of Home Rule*

Cities³⁷ have historically been viewed as creatures of the

³⁴ Missouri enacted the first home rule constitutional amendment in 1875. Mo. CONST. art. IX, § 16 (1875). Under the present Missouri constitution this provision is art. VI, § 19 (1945). For a discussion of the development of home rule in Missouri, see Westbrook, *Municipal Home Rule: An Evaluation of the Missouri Experience*, 33 Mo. L. REV. 45 (1968).

³⁵ Cities of the first class, those cities with a population of 100,000 or more, were given home rule powers by the General Assembly in 1972. See KRS § 83.410 (1980). For a review of the historical route to home rule in Kentucky, see LRC INFO. BULL. No. 138, *supra* note 28.

³⁶ As one commentator notes: "[T]here is perhaps no term in the literature of political science or law which is more susceptible to misconception and variety of meanings than 'home rule.'" Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 644 (1964).

³⁷ Cities are also called municipal corporations. Generally "municipal corporation" is a term referring to "the traditional forms of local government having general power over a locality, such as cities." ANTIEAU, *supra* note 1, at § 1.00. It has also been applied, however, to "entities of local government organized not only for gen-

state,³⁸ deriving their existence from the grace of the state. With their existence dependent upon the state, it necessarily followed that all of the cities' powers originated from the state.³⁹ This notion resulted in a situation in which a city was powerless to take any form of action not expressly authorized by specific state legislation.⁴⁰ Because of increasing urbanization throughout the United States, problems arising from this historical concept were inevitable. Each time a new problem arose, no matter how urgent, the city government was compelled to go to the state legislature and request enabling legislation prior to taking action.⁴¹ Not surprisingly, many states saw the need to give at least the larger cities within their boundaries a greater measure of self-control.

In 1875, Missouri became the first state to adopt a constitutional amendment providing for home rule.⁴² Most states have followed Missouri's lead by effecting some degree of home rule.⁴³ The two basic means of establishing home rule are self-executing constitutional provisions and legislative provisions passed by a legislature pursuant to a constitutional

eral, but even for special purposes." *Id.* Thus counties and sewer districts may also be referred to as municipal corporations. Throughout this comment, however, "cities" and "municipal corporations" are used interchangeably.

³⁸ For a detailed discussion of the creature theory, see B. HODES, *LAW AND THE MODERN CITY* 33-51 (1937).

³⁹ The creature theory was expressed by Judge Dillon in this manner:

The true view is this: Municipal corporations owe their origin to, and derive their powers and rights wholly from the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may also abridge and control.

City of Clinton v. Cedar Rapids, 24 Iowa 455, 475 (1868).

⁴⁰ This principle is called the Dillon Rule. See note 73 *infra* and accompanying text for a more detailed discussion of this rule.

⁴¹ See B. HODES, *supra* note 38, wherein the author explains the need for home rule for Chicago in 1937. Hodes points out the absurdity of a requirement of a grant of express authority from a state legislature in order for a city to act on new issues by citing New York City as a prime example. At that time, the population of the city was 7,154,000, while the population of the entire state of New York was only 12,965,000. Even so, the system required the city to request express authority from the state when faced with new issues. *Id.* at 17.

⁴² See note 34 *supra* for citations to the pertinent Missouri constitutional provisions.

⁴³ See Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1 n.9 (1975) [hereinafter cited as Vanlandingham].

provision.⁴⁴

Normally under the self-executing constitutional provisions, the constitution specifically gives cities the right to draw up their own charters independent of any specific enabling legislation.⁴⁵ In states without self-executing provisions,⁴⁶ the source of the city's power for home rule is an enabling act⁴⁷ passed by the state legislature pursuant to a constitutional provision⁴⁸ allowing the legislature to make provisions for city government. It is this type of home rule legislation that is the basis for home rule in Kentucky.⁴⁹ Thus, it is the Kentucky home rule statute that must be examined whenever any question arises as to the scope of the first class city government's power.⁵⁰

The home rule provision, regardless of whether it is self-executing or legislative, may take two basic forms. The first form, the *imperium in imperio* [hereinafter *imperio*] doctrine, developed from the 1875 Missouri home rule provision which provided that the city's charter must be "consistent with and subject to the constitution and laws of the State."⁵¹ This was

⁴⁴ ANTEAU, *supra* note 1, at § 3.01.

⁴⁵ Arizona, California, Colorado, Idaho, Missouri, Nebraska, Ohio, Oklahoma, Tennessee, Utah, Washington, and Wisconsin have self-executing constitutional provisions. *Id.*

⁴⁶ *E.g.*, Georgia, Michigan, New Hampshire, New York, Pennsylvania, and West Virginia. *Id.* at § 3.10.

⁴⁷ For example, Michigan's enabling legislation reads:
Each city may in its charter provide:

. . . .

For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state.

MICH. COMP. LAWS § 117.4j (1967).

⁴⁸ KY. CONST. § 156 provides that the General Assembly shall have plenary power over Kentucky cities. See LRC INFO. BULL. No. 138, *supra* note 28, at 26-33 for a detailed discussion of constitutional provisions affecting Kentucky cities.

⁴⁹ The Kentucky home rule legislation is contained in KRS chapter 83 beginning with § 83.410.

⁵⁰ KY. CONST. § 156 classifies first class cities as those with populations of 100,000 or more. At present, Louisville is Kentucky's only first class city.

⁵¹ Vanlandingham, *supra* note 43, at 1 n.1 (quoting Mo. CONST. art. IX, § 16

interpreted as meaning that the city had complete discretion as to local matters, but that when state concerns were involved, state law would supersede any local law. Likewise, when purely local concerns were involved, local law would supersede state law. Under this system the judiciary must necessarily play an important role, since it will frequently be called upon to specify whether a particular function is local or state in nature.⁵²

The second form is often referred to as the NLC model, because the National League of Cities originally proposed this model for constitutional amendments or home rule legislation. It provides a city with all powers that the legislature is capable of granting, except for those specifically withheld. The model begins:

A municipal corporation which adopts a home rule charter may exercise any power or perform any function which the legislature has power to devolve upon a non-home rule charter municipal corporation by its home rule charter, is not denied to all home rule charter municipal corporations by statute, and is within such limitations as may be established by statute.⁵³

Thus, under this form, a city is presumed to have a power if the legislature had authority to give the city the power and did not expressly withhold it.⁵⁴

B. *Home Rule in Kentucky*

States have adopted several variations of both of these

(1875)).

⁵² *Id.* See also LRC INFO. BULL. No. 138, *supra* note 28, at 16.

⁵³ AMERICAN MUNICIPAL LEAGUE, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE 19 (1953).

⁵⁴ See, e.g., ALASKA CONST. art. X, § 11 (providing that a home rule city can "exercise all legislative powers not prohibited by law or by charter"); MONT. CONST. art. XI, § 6 (providing that a home rule city can "exercise any power not prohibited by this constitution, law, or charter"); N. MEX. CONST. art. X, § 6D (providing that a home rule city can "exercise all legislative powers and perform all functions not expressly denied by general law or charter"); PA. CONST. art 9, § 2 (providing that a home rule city can "exercise any power or perform any function not denied"). See also Vanlandingham, *supra* note 43, at 8 n.19.

forms,⁵⁵ and some states have incorporated both forms into their home rule provisions. Kentucky has followed this latter course and combined the two forms in its Home Rule Act. The *imperio* provision appears in KRS section 83.410, which gives first class cities "the authority to govern themselves to the full extent required by local government and not in conflict with the constitution or laws of this state or by [sic] the United States."⁵⁶ The NLC type provision appears in KRS section 83.520, wherein the Board is given powers to govern the city

to the same extent and with the same force and effect as if the general assembly had granted and delegated to the legislative body of the city all of the authority and powers that are within its powers to grant to a municipal corporation as if expressly enumerated herein.⁵⁷

Therefore, when a problem arises in Kentucky involving the power of a first class city, there are two primary questions that must be analyzed. First, in regard to the *imperio* provision, it must be determined whether the problem is purely a local matter or whether it is one of statewide concern.⁵⁸ Second, in regard to the provision based on the NLC model, it must be determined whether the power that the city wishes to exercise is expressly *prohibited* by a state statute.⁵⁹ If the

⁵⁵ Arizona, California, Colorado, New York, Ohio, Oklahoma, and Oregon are states where *imperio* home rule has been "at least moderately successful." Vanlandingham, *supra* note 43, at 27. Alaska, Massachusetts, New Mexico, and Pennsylvania are operating under NLC model provisions. *Id.* at 9.

⁵⁶ KRS § 83.410 (1980).

⁵⁷ KRS § 83.520 (1980).

⁵⁸ See C. RHYNE, MUNICIPAL LAW, § 403 (1957) for a categorization of certain subjects as either municipal or state affairs. For example, opening and maintaining streets, administration of local health affairs, and assessment and collection of street paving costs have been held to be purely municipal affairs, while administration of justice, creation of general legal rights, and administration of police and pension funds have been held to be state affairs.

⁵⁹ This principle is widely recognized by courts in other states. See, e.g., Bechtel v. City of Des Moines, 225 N.W.2d 326, 329 (Iowa 1975) (citing a recent amendment to the constitution: "The rule . . . that a municipal corporation possesses . . . only those powers granted in express words is not a part of the law of this state"); Corpus Christi v. Continental Bus Sys., Inc., 445 S.W.2d 12, 16 (Tex. Civ. App. 1969) ("home rule cities look to the acts of the legislature not for grants of power . . . but only for limitations on their powers"); Beardsley v. City of Darlington, 111 N.W.2d 184, 186-

matter is strictly local in nature and if the state legislature has not expressly forbidden the city from exercising the power, then the city has the power, and there is no need for further analysis.⁶⁰

III. THE *Stansbury* DECISION: WHERE THE SUPREME COURT WENT WRONG

On appeal of the *Stansbury* case to the Supreme Court of Kentucky,⁶¹ that Court held that the Board did not possess the subpoena power. The Court viewed the case as presenting two questions: (1) whether a legislative body has the subpoena power as a necessary implication of its investigative authority and (2) whether the subpoena power was a necessary implication incident to the specific state statute providing for removal of the mayor by the Board. Like the court of appeals, the Supreme Court gave cursory attention to the home rule question and merely noted in one sentence: "We agree with the Court of Appeals that KRS § 83.520, the city 'home rule' act, does not include [the subpoena power]."⁶²

The Supreme Court obviously was quite concerned with what it thought to be the crucial issue: *implying* the subpoena power. It viewed the subpoena power as an awesome tool and expressed great concern that such a powerful instrument should ever be obtained without express legislative authorization.⁶³

87 (Wis. 1961) (holding that a city's powers "shall be limited only by express language").

⁶⁰ Ohio has adopted this test for analyzing its cities' home rule problems: The proper approach, therefore, to a municipal authority problem is not to determine whether such is authorized by statute, but rather to proceed on the basis that the function is authorized by the Home Rule Amendment and then determine whether such function can be restricted by the state Legislature and, if so, whether the Legislature has in fact restricted the manner in which such function can be carried out.

DiBella v. Village of Ontario, 212 N.E.2d 679, 682 (Ohio 1965).

⁶¹ 599 S.W.2d at 170.

⁶² *Id.* at 172.

⁶³ The Court eloquently stated its concern:

The authority to subpoena witnesses and compel them to give evidence is too powerful, and too susceptible of abuse to be implied in the absence of utter necessity. It is a tool of inquisition, short only of the rack and screw.

The Court concluded that the subpoena power could not be implied incident to the Board's legislative investigatory functions, even in light of the principles set forth by the United States Supreme Court in *McGrain v. Daugherty*.⁶⁴ In *McGrain*, the Court recognized the right of Congressional committees to use subpoenas as a necessary implication following from the need to investigate in order to obtain sufficient information to legislate intelligently. The same logic has been applied to cases involving the extension of the subpoena power to state legislative bodies.⁶⁵ The Court of Appeals of Kentucky was apparently willing to extend this line of reasoning to the next lowest legislative level and to allow the legislative body of a first class city to exercise the subpoena power as a necessary implication of its power to investigate.⁶⁶ The Kentucky Supreme Court, however, was unwilling to make this extension,⁶⁷ noting that "it is a far cry from the halls of Congress to town council."⁶⁸

Even in the hands of a grand jury it can be and sometimes is used in a manner so oppressive as to seem inconsistent with the high value of individual liberty which is traditional in this country. Certainly it has no justifiable basis as an instrument to build a case of civil misconduct.

Id. at 171.

⁶⁴ See note 15 *supra* for a discussion of the role of *McGrain* at the federal level.

⁶⁵ See note 32 *supra* for a discussion of the applicability of the *McGrain* rationale to state legislative bodies.

⁶⁶ *Maupin v. Stansbury*, 575 S.W.2d at 695. See note 32 *supra* for a discussion of the court of appeals decision.

⁶⁷ Justice Clayton indicated in his dissent that he was willing to extend the *McGrain* principle to a local government legislative body. 599 S.W.2d at 172 (Clayton, J., dissenting).

⁶⁸ *Id.* Although the Kentucky Court expressed doubt as to the wisdom of allowing a local legislative body to possess the subpoena power, this power has been exercised in similar circumstances by legislative investigating committees. See, e.g., *Eggers v. Kenny*, 104 A.2d at 10 (upholding a subpoena issued by investigating committee of Board of Commissioners of New Jersey in the investigation of a fellow commissioner); *Wintermute v. Ellenstein*, 187 A. 764 (N.J. 1936) (upholding subpoena issued by investigating committee of Board of Commissioners of City of Newark to the city prosecutor); *LaGuardia v. Smith*, 288 N.Y. 1 (1942) (holding mayor not immune under a separation of powers theory from a subpoena *duces tecum* issued by investigative committee of a city council); *Herlands v. Surpluss*, 16 N.Y.S.2d 454, *aff'd*, 26 N.E.2d 800 (N.Y. 1940) (upholding a subpoena procured under the city charter, not under the existing statutory authority, by a special committee of the city council to investigate administration of relief funds); *Leahy v. City of Knoxville*, 245 S.W.2d 772 (Tenn. 1952) (upholding subpoena *duces tecum* issued by city council in

The Court recognized only one other way that the Board might possess the subpoena power—as a necessary implication of the need to carry out an expressed power. In this connection, it examined the removal statute, KRS section 83.660, and determined that the subpoena power might be implied for the actual removal proceedings but not for a pre-removal investigation (presumably because such a pre-removal investigation is not expressly mentioned in the statute).⁶⁹

A. *The Court's Adherence to Tradition: The Dillon Rule*

The Court showed its lack of understanding of the concept of home rule by justifying its refusal to extend the *McGrain* principle to a city board of aldermen with the statement that “[t]he powers of a city have generally been confined to those expressly delegated to it by the General Assembly.”⁷⁰ Although this is a valid statement in regard to a non-home rule city, it has no place in an analysis of a home rule city

relation to an investigation of city employees).

Although these cases are instances in which there was express statutory authority for the subpoena power exercised by the legislative investigating committee, they are evidence that such committees have valid needs for the subpoena power. They also demonstrate that the courts in these states were not overly fearful that a local body would necessarily abuse the power. In fact, the *Wintermute* court indicated its feeling that such powers were necessary when it stated:

This, however, is a case where those charged with the administration of the affairs of the city of Newark desire to question, under oath, a deputy commissioner with respect to his official conduct in a public office. To deny such power would be to deny to the municipality good government.

187 A. at 765.

The same New Jersey court, in the *Eggers* case, stated its reason for not fearing the abuse of the subpoena power by a local government as follows: “It may be assumed that where a municipal investigating body is acting in bad faith or without any legitimate public ends it will judicially be considered as exceeding its delegated statutory functions; our courts have unhesitatingly struck down arbitrary use of municipal power in innumerable fields.” 104 A.2d at 19.

⁶⁹ 599 S.W.2d at 172.

⁷⁰ *Id.* In support of this conclusion, the Court cited the pre-home rule case of *Griffin v. City of Paducah*, 382 S.W.2d 402 (Ky. 1964). The Court in this instance should have heeded a warning of the Ohio courts in regard to using old non-home rule cases as support for home rule problems. One Ohio court noted that “[f]requently a court decision, like the light from a star that no longer exists, still appears, but time has removed the justification for its existence as a source of authority.” *DiBella v. Village of Ontario*, 212 N.E.2d at 682.

problem.⁷¹ The Court's position is not surprising, however, since this is the rule of law that prevailed in regard to all cities prior to the enactment of home rule. It has apparently been firmly etched into the minds of the Kentucky judiciary as the proper disposition of these types of cases.⁷²

The rule of law that has been historically applied in construing conflicts between non-home rule municipal corporations and state legislatures (and which some courts mistakenly still apply to home rule cities) was first enunciated in 1868 in Iowa by Judge Dillon and is commonly referred to as the Dillon Rule. It stipulates that:

[a] municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the power.⁷³

When the Dillon Rule is adhered to, the city must go to the legislature each time it faces a new problem.⁷⁴ It is precisely to avoid this situation that home rule laws are enacted.

The Kentucky Supreme Court's unwillingness to accept a change in the traditional manner of dealing with local governments can be seen in the recent case of *Fiscal Court v. City of*

⁷¹ See notes 55-60 *supra* and accompanying text for a discussion of the Kentucky statutory provisions.

⁷² The Kentucky Court reaffirmed this long-held rule in regard to non-home rule cities as recently as 1976 in *Bowling Green v. Gasoline Marketers, Inc.*, 539 S.W.2d 281 (Ky. 1976). There it held that "[a] municipal corporation possesses no powers except those expressly granted or those essential to the accomplishment of its declared objectives and purposes." *Id.* at 284.

⁷³ *Merriam v. Moody's Ex'rs*, 25 Iowa 163, 170 (1868), *quoted in* *Bechtel v. City of Des Moines*, 225 N.W.2d at 328.

⁷⁴ Hodes capsulizes the Dillon Rule by observing that "two salient principles are invoked to restrict cities—the principle of express authority from the state, and the canon of strict construction against the city." B. HODES, *supra* note 38, at 44. *See also* Comment, *The Dillon Rule—A Limit on Local Government Powers*, 41 Mo. L. Rev. 546 (1976).

Louisville,⁷⁵ which called upon the Court to interpret home rule legislation for counties. In finding that the General Assembly had made an overly broad delegation of powers to the counties and that the act was therefore unconstitutional, the Court based its decision on the determination that "[t]radition establishes that county government in Kentucky is based on the premise that all power exercised by the fiscal court must be expressly delegated to it by statute."⁷⁶ Although the Court's frankness is commendable, tradition can no longer serve as a rational basis for decisions in the area of local government.⁷⁷ The Legislature abandoned this tradition when it enacted the Home Rule Act for first class cities. It is time for the courts to do likewise.

It is quite clear that in *Stansbury*, the Court was motivated by an overriding concern over the subpoena power's susceptibility to abuse. Its decision therefore reflected a policy determination that the state legislature should have to delegate the power of subpoena expressly.⁷⁸ Although the Court's concern regarding the casual extension of the subpoena power can be readily appreciated, it resulted in the complete neglect of the home rule question, which should have been the starting point for the entire analysis.⁷⁹ In so doing, the Court restrained the scope of the subpoena power, while establishing choking precedent for one of the most important pieces of legislation for local governments in Kentucky.

⁷⁵ 559 S.W.2d 478 (Ky. 1977).

⁷⁶ *Id.* at 481.

⁷⁷ Reverence for tradition was strongly renounced as a basis for legal decisions by Justice Holmes in 1897:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

O. W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 187 (1920).

⁷⁸ The Kentucky Court would have been well-advised to follow the course enunciated by the Oregon Supreme Court in considering the home rule question. That court declared that "the court's decision must be derived from a constitutional standard, not from the court's own view of competing public policies." *City of La Grande v. Public Emp. Retirement Bd.*, 576 P.2d at 1210.

⁷⁹ See note 58 *supra* and accompanying text for a relevant discussion.

B. *The Proper Analysis Under the Home Rule Act*

In order to evaluate the scope of home rule legislation properly, the circumstances giving rise to the need for such legislation must be kept in mind. Case law in states with histories of home rule reflects that the underlying reason for home rule is to alleviate burdens placed on the city and the legislature by a system that requires specific enabling legislation in order for urban governments properly to address new or unique problems.⁸⁰ The real thrust of most home rule provisions is, therefore, to make the city as completely independent as possible in regard to purely local matters.⁸¹ It is this central purpose of the legislation that must always be the starting point for an analysis of home rule legislation, and it is this purpose that the Kentucky courts have thus far ignored in their decisions.

The Kentucky General Assembly obviously was aware of the underlying purpose of the Act, as evidenced by the language of the Act itself. KRS section 83.410 provides:

(1) This chapter is intended by the general assembly of the commonwealth of Kentucky to grant to citizens living within a city of the first class the authority to govern themselves to the *full extent required* by local government

. . . .
(3) The provisions of this chapter shall be *broadly construed*

. . . .
(4) The powers herein granted are based upon a legislative finding that the urban crisis cannot be solved by actions of the general assembly alone, and that the most effective agency for the solution of these problems is the government of a city of the first class. This legislative finding is based

⁸⁰ See, e.g., *Mollner v. City of Omaha*, 98 N.W.2d 33, 36 (Neb. 1959) (declaring that reason for home rule is "to render such cities as nearly independent as possible of state legislation"); *City of La Grande v. Public Emp. Retirement Bd.*, 576 P.2d at 1208 (declaring object of home rule to be "to allow the people of the locality to decide upon the organization of their government . . . without having to obtain statutory authorization from the legislature"). See also Fordham, *Ohio Constitutional Revision—What of Local Government?* 33 OHIO ST. L.J. 575, 579-80 (1972).

⁸¹ See *State v. City of Lincoln*, 288 N.W. 499 (Neb. 1939) (holding that the legislature cannot affect powers of a home rule city in regard to matters of purely local concern).

upon hearings held by the general assembly and the conclusion of its members that conditions found in cities of the first class are sufficiently different from those found in other cities to necessitate this grant of authority and *complete home rule*.⁸²

If the Supreme Court had not adhered to the tradition embodied in the Dillon Rule and had instead taken heed of the legislative language,⁸³ its analysis in *Stansbury* would necessarily have been vastly different. A proper analysis under the Kentucky Home Rule Act requires analysis of both the *imperio* and the NLC model characteristics of the Act. To satisfy the standard imposed under the *imperio* doctrine, the first question to be addressed is whether the matter in question is of purely local concern.⁸⁴ There can be little doubt that the removal of a mayor is exactly the kind of problem in which the state has no discernible interest. The members of the General Assembly who live in Paducah or Pikeville surely should have little, if any, input into the removal of a Louisville city official. Furthermore, the removal of such an official will have virtually no impact on the citizens of Paducah and Pikeville. It is therefore evident that this is precisely the type of problem that the Home Rule Act was designed to leave to local governments.⁸⁵

The next analytical step, in recognition of the NLC-type provision in the Kentucky Home Rule Act, is the determination of whether there is any state legislation expressly *prohibiting* the local government from having this power.⁸⁶ This is the point of the analysis at which the courts and the Attorney General, in their adherence to the traditional analysis, are in error. Rather than determining whether the power is expressly

⁸² KRS § 83.410 (1980) (emphasis added).

⁸³ See notes 68-72 *supra* and accompanying text for a relevant discussion.

⁸⁴ See notes 51-52 *supra* and accompanying text for a discussion of the *imperio* doctrine. See also ANTIEAU, *supra* note 1, at § 3.22.

⁸⁵ The structure of municipal government is generally considered a matter of local concern. Matters relating to public health and safety, however, are generally considered matters of statewide concern. See generally 2 E. McQUILLEN, *THE LAW OF MUNICIPAL CORPORATIONS* § 4.29 (3d ed. 1979).

⁸⁶ See notes 53-54 & 57-60 *supra* and accompanying text for a discussion of NLC-type provisions.

granted,⁸⁷ the courts should be determining whether the power is expressly *prohibited*. The answer in this case is obviously a negative one, since there is no legislation addressing the Board's right to the power of subpoena.

Thus, the proper conclusion under the home rule analysis is that since it is a purely local matter that is not expressly prohibited by a state statute, it is a power that the local government enjoys under the Home Rule Act. In contrast to the Supreme Court's analysis, if the Legislature does not want the city to possess this power, it can expressly legislate to that effect. The Court's fear of setting precedent that would allow the subpoena power to be obtained by implication was misplaced in this instance. A proper analysis and understanding of the Home Rule Act would have clearly established the source of the city's power as arising from the Home Rule Act, and there would have been no need for concern about setting precedent for an implied power.⁸⁸

CONCLUSION

The problems of governing a large urban area are too complex today to tie first class cities to ancient rules of construction and methods of dealing with their problems. Nineteenth century concepts do not adequately address twentieth century problems. No longer should a first class city government be tied to the apron strings of the state legislature. No longer should the Dillon Rule be treated as if engraved in

⁸⁷ The Wisconsin Supreme Court, called upon to interpret home rule legislation similar to Kentucky's, declared that a home rule city's powers "shall be limited only by express language. Since the enactment of ch. 62, Stats., such cities possess all powers not denied them by the statutes or the constitution. Instead of the powers being specified, as formerly, the limitations are now enumerated." *Beardsley v. City of Darlington*, 111 N.W.2d at 186-87.

The Texas Supreme Court has aptly noted in this regard that "[a]lthough the broad powers granted to home rule cities by the Constitution, Article XI, Section 5, Vernon's Ann. St., may be limited by acts of the Legislature, it seems that should the Legislature decide to exercise that authority, its intention to do so should appear with *unmistakable clarity*. *City of Sweetwater v. Geron*, 380 S.W.2d 550 (Tex. 1964) (emphasis added).

⁸⁸ The language of the Act in KRS § 83.520 giving the city all the power the legislature could give it "as if expressly enumerated herein" is a direct grant and should in no way be considered an implied grant within the *McGrain* analysis.

stone. The General Assembly took a giant step forward by enacting the 1972 Home Rule Act. Unfortunately, the Supreme Court counteracted this enlightened approach by its giant step backwards in the *Stansbury* decision. Kentucky's first class cities have been given an opportunity by the Legislature to shoulder the responsibility for their own fates. This opportunity has been gravely threatened by judicial decisions that are contrary to the Legislature's intent in enacting the Kentucky Home Rule Act. The courts are doing the cities and the state a disservice by refusing to allow them to take advantage of this opportunity.

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