LOCAL GOVERNMENT LAW

Fifth Edition

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Chapter 8

POWERS OF MUNICIPALITIES

Analysis

§ 8.1 Charter as Source of Municipal Powers: Dillon's Rule for Interpreting Charter

Quite aside from any problems of conflicts and relationships between municipalities, on the one hand, and state and federal government, on the other hand,—the question must be asked: What powers does a municipality possess, and what is the source of these powers? Basically, the answer is that a municipality has such powers as are granted by its charter—and, obviously then, the charter is the source of municipal powers.

Despite some lack of historical accuracy,[1] the theory in the United States has been that the state pre-dates the municipal corporation and that the state, in granting a charter to a municipality, thereby delegates, for purposes of local self-government, a portion of the state's powers.[2] A city charter has been said to have the force and effect of an act of the legislature[3]—and indeed, has at times been called a state, as opposed to a municipal, law.[4] The *majority* view is that a municipal charter is a *grant* of power to the locality.[5] This means that a municipality will have only those powers expressed or implied in its charter, or that somehow can be derived therefrom. It also means that in

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1 See 1 McQuillin, Municipal Corporations § 1.09 (3d rev. ed. 1999).

2 See 2A McQuillin, Municipal Corporations § 9.01 (3d rev. ed. 1996).

3 Platt v. City & County of San Francisco, 158 Cal. 74, 110 P. 304 (1910); State ex rel. Freeman v. Zimmerman, 86 Minn. 353, 90 N.W. 783 (1902); Giers Improvement Corp. v. Investment Service, 361 Mo. 504, 235 S.W.2d 355 (1950); Wiget v. City of St. Louis, 337 Mo. 799, 85 S.W.2d 1038 (1935). See Adams v. Wolff, 84 Cal.App.2d 435, 190 P.2d 665 (Dist.Ct.1948) (home-rule charter is supreme law of state with respect to government of city). Cf. L Street Investments v. Municipality of Anchorage, 307 P.3d 965 (Alaska 2013) (in interpreting municipal charters, court uses rules of statutory construction); State ex rel. Duniway v. City of Portland, 65 Or. 273, 133 P. 62 (1913) (charter adopted by city has same effect as one granted directly by legislature).

4 Ex parte Sparks, 120 Cal. 395, 52 P. 715 (1898); Mitchell v. City of St. Paul, 228 Minn. 64, 36 N.W.2d 132 (1949) (charter is comparable to a local statute); In re Addison, 385 Pa. 48, 122 A.2d 272 (1956).

5 Utley v. City of St. Petersburg, 106 Fla. 692, 144 So. 53 (1932); Philson v. City of Omaha, 167 Neb. 360, 93 N.W.2d 13 (1958); Consumers' Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N.W. 643 (1922); Harder v. City of Springfield, 192 Or. 676, 236 P.2d 432 (1951). See City of La Grande v. Municipal Court, 120 Or. 109, 251 P. 308 (1926) (municipality cannot enact legislation simply because it is not expressly forbidden). Cf. State ex rel. Ekern v. City of Milwaukee, 190 Wis. 633, 209 N.W. 860 (1926), discussing municipal power to set height limitations for buildings. See generally 2A McQuillin, Municipal Corporations §§ 9.03, 9.08 (3d rev. ed. 1996).

cases of conflict between state and local law, state law will prevail on statewide matters, local on local questions. Where there is no conflict between state and local law on a subject, both laws will stand together. And where one level of government (that is, the state *or* the locality) has enacted law on a subject but the other level hasn't, that law, if validly enacted, will govern the matter, regardless of whether the matter is of statewide concern or merely local.

But there is a *minority* view which says that, as to local affairs, a municipal charter is a *limitation* on powers and not a grant—that as to matters of local concern, a city can do anything its charter does not forbid.[6] This means that a city is, as to local matters, not dependent on any express or implied power in its charter in order to engage in a particular activity. So long as the matter is (1) local, and (2) not forbidden by the charter, the city may do whatever it wishes.

Municipal powers actually come not only from the home-rule charter itself but also from relevant state statutes or constitutional provisions, so that in a broad sense all these taken together may be considered the "charter."[7] And, of course, there are many local governments that have no home-rule document at all—most public quasi-corporations (such as counties, townships, etc.) still do not; and a great many municipal corporations do not, often not even meeting the requirements for attaining home-rule. These non-home-rule localities are then *entirely* controlled by state laws and constitutional provisions; those are their sole sources of power. These laws and provisions might, in such cases, be considered *analogous* to a city charter; but clearly, the locality then really has no charter at all—for instance, the inhabitants cannot amend the state statutes applicable to them in the same way that inhabitants of a home-rule city can amend their city charter.[8]

All cities—whether or not having home-rule—do have one thing in common: They are creatures of the law established for special purposes, and their powers must be granted by law: in the case of home-rule governments, by the home-rule charter *or* by state statutes and constitutional provisions; in the case of non-home-rule entities, by

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[6] City of Glendale v. Trondsen, 48 Cal.2d 93, 308 P.2d 1 (1957); Wiley v. City of Berkeley, 136 Cal.App.2d 10, 288 P.2d 123 (Dist.Ct.1955) (city charter silent on change in use of park land; city has power); State ex rel. McClure v. Hagerman, 155 Ohio St. 320, 98 N.E.2d 835 (1951) (city charter did not authorize or prohibit using public funds for cost of membership in municipal finance officers' association; city had power). See Domar Elec. Inc. v. City of Los Angeles, 9 Cal.4th 161, 36 Cal.Rptr.2d 521, 885 P.2d 934 (1994), on remand 41 Cal.App.4th 810, 48 Cal.Rptr.2d 822 (1995) (mere failure of city charter to grant express power to require bidders to conduct subcontractor outreach program did not render such program void); City of Marysville v. Boyd, 181 Cal.App.2d 755, 5 Cal.Rptr. 598 (Dist. Ct. 1960); D & F Sanitation Serv. v. City of Billings, 219 Mont. 437, 713 P.2d 977 (1986) (home-rule city has all local powers except those specifically prohibited; overruling prior authority); Clopton v. Madison County Comm'n, 216 Mont. 335, 701 P.2d 347 (1985) (home-rule city may exercise any power not prohibited by its charter or by state constitution or law); Kane v. City of Albuquerque, 358 P.3d 249 (N.M. 2015); Waksman v. City of Albuquerque, 102 N.M. 41, 690 P.2d 1035 (1984) (home-rule municipality need look to legislative enactments only for express limitations on its power, not for grant of power); Apodaca v. Wilson, 86 N.M. 516, 525 P.2d 876 (1974) (city charter and general state laws are limitations on, not grants of, city power; city could levy water and sewer charges though not authorized by general state law). Cf. Stennis v. City of Santa Fe, 143 N.M. 320, 176 P.3d 309 (2008) (home-rule municipalities need not look to the legislature for a grant of power to act, but need only look for limitations on their power to act).

[7] See Stason & Kauper, Municipal Corporations 105 (3d ed. 1959). Cf. 2A McQuillin, Municipal Corporations § 10.03 (3d rev. ed. 1996). On statutory grants of power, see Etter, General Grants of Municipal Power in Oregon, 26 Or.L.Rev. 141 (1947).

[8] Morehead v. Dyer, 518 P.2d 1105 (Okl.1973).

state statutes or constitutional provisions alone.[9] There is a famous rule of interpretation known as Dillon's Rule[10] that has traditionally been applied, and is still often used, to determine the total scope of power of local governments. This says that such governments have (1) those powers *expressly* conferred by state constitution, state statutes, and (where applicable) home-rule charter, (2) those powers necessarily or fairly *implied* in, or incident to, the powers expressly granted, and (3) those powers *essential* to the declared objects and purposes of the municipality or quasicorporation.[11] Under the

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[9] See Cripe Baking Co. v. City of Bethany, 64 F.2d 755 (8th Cir.1933); New Haven Water Co. v. City of New Haven, 152 Conn. 563, 210 A.2d 449 (1965); City of Midway v. Midway Nursing & Convalescent Center, Inc., 230 Ga. 77, 195 S.E.2d 452 (1973); Branigar v. Village of Riverdale, 396 Ill. 534, 72 N.E.2d 201 (1947); James v. City of Pittsburg, 195 Kan. 462, 407 P.2d 503 (1965); Birge v. Town of Easton, 274 Md. 635, 337 A.2d 435 (1975); Itzen & Robertson, Inc. v. Board of Health, 89 N.J.Super. 374, 215 A.2d 60 (1965), aff'd 92 N.J.Super. 241, 222 A.2d 769; Seaman v. Fedourich, 16 N.Y.2d 94, 262 N.Y.S.2d 444, 209 N.E.2d 778 (1965); High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965); Fetzer v. Minot Park District, 138 N.W.2d 601 (N.D.1965); Barnes v. City of Dayton, 216 Tenn. 400, 392 S.W.2d 813 (1965); Faulk v. City of Tyler, 389 S.W.2d 706 (Tex.Civ.App.1965), ref'd n. r. e.; State ex rel. Bowen v. Kruegel, 67 Wash.2d 673, 409 P.2d 458 (1965); Toler v. City of Huntington, 153 W.Va. 313, 168 S.E.2d 551 (1969). See generally Stevens v. City of Missoula, 205 Mont. 274, 667 P.2d 440 (1983) (powers of non-home-rule city should be liberally construed, just as are those of a home-rule city). Acts performed with no legal authority are ultra vires and totally void even if proper procedural requirements are followed. But authorized acts done without following proper procedure may be held valid where there is no fraud or collusion but only mistake. See, with good review of Washington State authorities involving state or local government, South Tacoma Way, LLC v. State of Washington, 169 Wash. 2d 118, 233 P.3d 871 (2010) (failure to notify abutting landowners of intent to sell state land did not render sale to purchaser ultra vires). See generally International Ass'n of Firefighters Local Union v. City of Cheyenne, 316 P.3d 1162 (Wyo. 2013) (city official, like city itself, has only powers expressly granted by legislature or necessarily implied in those powers granted; city council held to be only party having authority to negotiate with firefighters on wages and working conditions).

[10] Taking its name from Dillon, Municipal Corporations § 55 (1st ed. 1872). See 2A McQuillin, Municipal Corporations § 10.09 (3d rev. ed. 1996). Doubt has been expressed that the authorities cited by Dillon supported his "rule". See Mandelker, Managing Our Urban Environment 97 (2d ed. 1971). But the rule is still often cited even where no longer strictly applied.

[11] City of York, Nebraska v. Iowa-Nebraska Light & Power Co., 109 F.2d 683 (8th Cir.1940), cert. denied 309 U.S. 690, 60 S.Ct. 893, 84 L.Ed. 1032; Cincinnati, Newport & Covington Railway v. City of Cincinnati, 71 F.2d 124 (6th Cir.1934), cert. denied 293 U.S. 612, 55 S.Ct. 142, 79 L.Ed. 702 (1934); City of Osceola v. Whistle, 241 Ark. 604, 410 S.W.2d 393 (1966); Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353 (1935); Cook v. City of Delta, 100 Colo. 7, 64 P.2d 1257 (1937); Asbell v. Green, 159 Fla. 702, 32 So.2d 593 (1947); People ex rel. Schlaeger v. Bunge Bros. Coal Co., 392 Ill. 153, 64 N.E.2d 365 (1945); Southern Railway v. Harpe, 223 Ind. 124, 58 N.E.2d 346 (1944); Gritton v. City of Des Moines, 247 Iowa 326, 73 N.W.2d 813 (1955); Louisville & Nashville Railroad Co. v. City of Hazard, 304 Ky. 370, 200 S.W.2d 917 (1947); Town of Pineville v. Vandersypen, 212 La. 521, 33 So.2d 56 (1947); White v. Treasurer of Wayland, 273 Mass. 468, 173 N.E. 701 (1930); Skutt v. City of Grand Rapids, 275 Mich. 258, 266 N.W. 344 (1936); Sutton v. Fox Missouri Theatre Co., 336 S.W.2d 85 (Mo.1960); Ronnow v. City of Las Vegas, 57 Nev. 332, 65 P.2d 133 (1937); New Jersey Good Humor, Inc. v. Board of Commissioners, 124 N.J.L. 162, 11 A.2d 113 (1940); Whittaker v. Village of Franklinville, 265 N.Y. 11, 191 N.E. 716 (1934), aff'd 239 App.Div. 881, 265 N.Y.S. 977, reargument denied 266 N.Y. 505, 195 N.E. 174; Brumley v. Baxter, 225 N.C. 691, 36 S.E.2d 281 (1945); Worley v. French, 184 Okl. 116, 85 P.2d 296 (1938); Ex parte Jones, 4 Okl.Cr. 74, 109 P. 570 (1910); Pederson v. City of Portland, 144 Or. 437, 24 P.2d 1031 (1933); In re Valley Deposit & Trust Co., 311 Pa. 495, 167 A. 42 (1933); Buckhout v. City of Newport, 68 R.I. 280, 27 A.2d 317 (1942); Bean v. City of Knoxville, 180 Tenn. 448, 175 S.W.2d 954 (1943); Foster v. City of Waco, 113 Tex. 352, 255 S.W. 1104 (1923); Nance v. Mayflower Tavern, Inc., 106 Utah 517, 150 P.2d 773 (1944); Hopkins v. City of Richmond, 117 Va. 692, 86 S.E. 139 (1915); Pacific First Federal Savings & Loan Association v. Pierce County, 27 Wn.2d 347, 178 P.2d 351 (1947); Pugnier v. Ramharter, 275 Wis. 70, 81 N.W.2d 38 (1957). Cf. Miller v. Burch, 32 Tex. 208 (1869) (town ordinance authorized removal of building in which nuisance conducted; found to exceed charter powers and thus to give no protection to officers acting thereunder). The authorities supporting the basic principle have been called too numerous for citation. City of Leavenworth v. Norton, 1 Kan. 432 (1863). For a more thorough list, see 2 McQuillin, Municipal Corporations § 10.09 ns. 6, 7 (3d rev. ed. 1996). See also 1 Antieau, Municipal Corporation Law § 3.01–.13 (1998). When a power is not mentioned in the home-rule document, or when there is no such document, Dillon's Rule may be applied to relevant state statutes to determine whether a municipality has a particular power. See Development Industries, Inc. v. City of Norman, 412 P.2d 953 (Okl.1966). See generally Spitzer, "Home Rule" vs. "Dillon's Rule" for Washington's Cities, 38 Seattle U.L. Rev. 809 (2015).

above-stated majority view as to local powers,[12] a municipality will have only powers that can be found to exist under some one or more of Dillon's three-part test. Under the minority view,[13] a municipality will have only those same powers as to matters of statewide concern—but as to local matters, will have authority to do anything not forbidden by general state law or home-rule charter, and thus need not bother with Dillon's Rule as to local matters.

Under the majority view, Dillon's Rule is an exclusive enumeration of powers; no others exist.[14] Sometimes, certain matters that may be included in home-rule charters are enumerated in the state constitution[15] or a state statute.[16] But such lists are not always all-inclusive, and in any case leave considerable room for interpretation as to what powers can be inferred from those specifically stated.[17] It is generally agreed that the powers that may be granted by the home-rule charter (or for that matter, by state statute) cannot contravene provisions of the state constitution.[18]

Questions of municipal power often boil down to applications of the second part of Dillon's Rule. Express powers by themselves lead to few arguments. The "essential powers" referred to in the third portion of Dillon's Rule have not been of great importance. But what are the implied powers? Here, much room for judicial interpretation is found.

Louisiana has now squarely rejected Dillon's Rule and has held that a home-rule charter empowers a city to enforce any ordinances not inconsistent with the Louisiana Constitution. City of New Orleans v. Board of Comm'rs, 640 So.2d 237 (La.1994), noted 69 Tulane L. Rev. 809 (1995). Cf. City of Port Angeles v. Our Water-Our Choice, 170 Wash. 2d 1, 239 P.3d 589 (2010), where the majority find that a state statute grants code cities broad, though specific, powers notwithstanding Dillon's Rule. *Id.* at 596 & n.7. Sometimes Dillon's Rule is applied but not by name. See State of Arizona v. Britton, 226 Ariz. 457, 250 P.3d 234 (App. 2011), upholding a city's authority to regulate parking.

The history of Dillon's Rule and the criticisms of it are well summarized in "From Dillon's Rule to Home Rule," in Briffault & Reynolds, State and Local Government Law 266–69 (6th ed. 2004). See generally Swiney, John Forrest Dillon Goes to School: Dillon's Rule in Tennessee Ten Years After *Southern Constructors*, 79 Tenn. L. Rev. 103 (2011) (Dillon's Rule has, over prior 10 years, regained importance in Tennessee law, particularly in contractual situations where local government attempts to repudiate terms of a contract; also, Rule has been applied to a county board of education).

12 See note 5 *supra* and accompanying text.

13 See note 6 *supra* and accompanying text.

14 See City of Bessemer v. Huey, 247 Ala. 12, 22 So.2d 325 (1945); Clinton G. Cauldwell, Inc. v. Patterson, 133 Ind.App. 138, 177 N.E.2d 490 (1961); In re Public Serv. Elec. & Gas Co., 35 N.J. 358, 173 A.2d 233 (1961); Safe Way Motor Coach Co. v. City of Two Rivers, 256 Wis. 35, 39 N.W.2d 847 (1949). See City of San Antonio v. Whitten, 161 Tex. 150, 338 S.W.2d 119 (1960). Cf. Kansas Public Service Co. v. State Corporation Commission, 199 Kan. 736, 433 P.2d 572 (1967); Toms River Pub. Co. v. Borough of Manasquan, 127 N.J.Super. 176, 316 A.2d 719 (1974); Novak v. Town of Poughkeepsie, 63 Misc.2d 385, 311 N.Y.S.2d 393 (1970).

15 See Adams v. Wolff, 84 Cal.App.2d 435, 190 P.2d 665 (Dist.Ct.1948).

16 See People v. Sell, 310 Mich. 305, 17 N.W.2d 193 (1945).

17 City Commission v. Hirschman, 253 Mich. 596, 235 N.W. 265 (1931). See Sandalow, Limits of Municipal Power Under Home Rule: A Role for the Courts, 48 Minn. L.Rev. 643 (1964).

18 See Georgia Power Co. v. City of Decatur, 281 U.S. 505, 50 S.Ct. 369, 74 L.Ed. 999 (1930); Laird Norton Yards v. City of Rochester, 117 Minn. 114, 134 N.W. 644 (1912). Cf. In re Cloherty, 2 Wash. 137, 27 P. 1064 (1891). But occasionally, even a matter covered by the state constitution may be found of purely local concern, such as the use of partisan primaries for the election of officers; in such a case, the city law will prevail over that of the state. See State ex rel. Short v. Callahan, 96 Okl. 276, 221 P. 718 (1923).

§ 8.2 Interpreting Municipal Charters—Implied Powers: Generalizations and Trends

The area of municipal activity touching on the prevention, detection, and punishment of crime is one in which Dillon's Rule has often received a rather strict application. It has been reasoned that crime control is basically a function of the state, not of any locality or subdivision of the state, and thus that delegations of powers and duties to municipalities in this area will not be readily assumed.[19] Thus, unless there is express authority in its home-rule document or a relevant statute, a city has often been held to lack authority to offer a reward for the apprehension or conviction of a criminal suspect.[20] An occasional exception has been recognized in situations of arson, which is sometimes treated as a matter of special local concern.[21]

Where—as is common—power is expressly conferred on a city to preserve the public peace, this implies the authority to employ a regular police force, but not, in the absence of exceptional circumstances, to hire private detectives.[22] However, where there is adequate reason to suspect covert criminal activities, circumstances may warrant an inference of power to allow city officials to hire detectives as needed;[23] and power may be implied on the city's part to appoint investigative committees to look into such alleged activities.[24]

Strict construction of Dillon's Rule, while still encountered as to some matters, has been the subject of criticism;[25] and as to some municipal activities, the trend is

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[19] See City of Los Angeles v. Gurdane, 59 F.2d 161 (9th Cir.1932); Brite v. Siskiyou County, 21 Cal.App.2d 233, 68 P.2d 1007 (Dist.Ct.1937) (county had no authority to offer reward); Griffin v. City of Los Angeles, 134 Cal.App. 763, 26 P.2d 655 (Dist.Ct.1933); Hanger v. City of Des Moines, 52 Iowa 193, 2 N.W. 1105 (1879); Patton v. Stephens, 77 Ky. (14 Bush) 324 (1878) (embezzlement of city funds); Madry v. Town of Scotland Neck, 214 N.C. 461, 199 S.E. 618 (1938). Authority to offer rewards is sometimes granted municipalities or counties by state statute. See People ex rel. Attorney General v. Holly, 119 Mich. 637, 78 N.W. 665 (1899); Lewis v. Petroleum County, 92 Mont. 563, 17 P.2d 60 (1932).

[20] Crofut v. City of Danbury, 65 Conn. 294, 32 A. 365 (1894) (no power to offer reward for detection of an "incendiary"); Hanger v. City of Des Moines, *supra* note 19; Abel v. Pembroke, 61 N.H. 357 (1881); City of Winchester v. Redmond, 93 Va. 711, 25 S.E. 1001 (1896); Butler v. City of Milwaukee, 15 Wis. 493 (1862). Cf. Murphy v. City of Jacksonville, 18 Fla. 318 (1881).

[21] See Shaub v. City of Lancaster, 156 Pa. 362, 26 A. 1067 (1893); Choice v. City of Dallas, 210 S.W. 753 (Tex.Civ.App.1919), both finding authority to offer a reward for the apprehension of an arsonist. See generally 67 Am.Jur.2d Rewards § 8 (1985).

[22] See Bridgeman v. Derby, 104 Conn. 1, 132 A. 25 (1926) (no implied power in city attorney, though might be found in council); Flannagan v. Buxton, 145 Wis. 81, 129 N.W. 642 (1911). Cf. Chapman v. City of Fullerton, 90 Cal.App. 463, 265 P. 1035 (Dist.Ct.1928); State ex rel. Crouse v. Holdren, 128 W.Va. 365, 36 S.E.2d 481 (1945). See generally Annot., Power of Municipal Corporation or Authorities to Employ Detective, 45 A.L.R. 737 (1926).

[23] See State ex rel. Balser v. Bowen, 111 Ohio St. 561, 146 N.E. 108 (1924). Cf. Bridgeman v. Derby, *supra* note 22. See generally Annot., Power of Municipal Corporation or Authorities to Employ Detective, *supra* note 22. See also National Council of Railway Patrolmen's Unions v. Sealy, 152 F.2d 500 (5th Cir.1945) (special police officer has same authority as regular officer; federal regulation would usually not cover).

[24] Du Bois v. Gibbons, 2 Ill.2d 392, 118 N.E.2d 295 (1954). See Eggers v. Kenny, 15 N.J. 107, 104 A.2d 10 (1954).

[25] See Winter, Municipal Home Rule, A Progress Report?, 36 Neb.L.Rev. 447 (1957). An Iowa statute attempts largely to eliminate Dillon's Rule, providing instead that a city shall have the powers needed for protection of its property and inhabitants and for the preservation of peace and good order where not inconsistent with state statutes. Iowa Code Ann. § 368.2. See Richardson v. City of Jefferson, 257 Iowa 709, 134 N.W.2d 528 (1965); Wilson v. City of Council Bluffs, 253 Iowa 162, 110 N.W.2d 569 (1961) (upholding power to require fluoridation of municipal water supply). Cf. Iowa City v. Muscatine Development Co., 258 Iowa 1024, 141 N.W.2d 585 (1966), saying that even the earlier rule of strict construction of municipal powers applied only to the determination of whether a power was granted, not to the method of exercising powers.

increasingly to find implied power. For instance, older cases held that express authorization was needed for a city to employ legal counsel.[26] But in more recent times, most cases have inferred, from general grants of power to manage city affairs, etc., the authority to hire attorneys, as reasonably needed, to draft documents for the city and represent it in litigation.[27] The modern tendency is to say that such authority is necessarily incidental to the capacity to sue and be sued and that the power is one that *should* be found unless expressly forbidden. Most larger municipalities now employ a full-time city attorney who, with his staff, handles regular legal matters and ordinary litigation; but special counsel may also be hired to assist the regular staff when special circumstances warrant.[28] Thus, where the permanent city attorney is ill, absent, or disqualified, implied power in the city is readily found to employ persons to render temporary legal services.[29]

Even without express authorization, a city has been found to have power to employ counsel to handle the municipality's legal interests in another state;[30] or to employ an attorney on a contingent fee basis;[31] or to hire an attorney to represent the city in litigation in which its rights are involved although the city is not itself a party, as where the city's right to license liquor sales is called into question.[32] And where suits are filed against municipal officers for acts done in discharge of their official duties, the city has implied authority to provide those officers with legal counsel.[33] Ordinarily, however,

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[26] See City of Birmingham v. Wilkinson, 239 Ala. 199, 194 So. 548 (1940).

[27] Dianis v. Waenke, 29 Ill.App.3d 133, 330 N.E.2d 302 (1975) (implied authority to employ village attorney; state statute did not establish an exclusive method); Vicksburg Waterworks Co. v. Mayor of Vicksburg, 99 Miss. 132, 54 So. 852 (1911); Meeske v. Baumann, 122 Neb. 786, 241 N.W. 550 (1932); Cahn v. Town of Huntington, 29 N.Y.2d 451, 328 N.Y.S.2d 672, 278 N.E.2d 908 (1972) (express *or* implied authority needed to employ attorney); Fleischmann v. Graves, 118 Misc. 214, 193 N.Y.S. 816 (1922), aff'd without opinion 202 App.Div. 825, 194 N.Y.S. 934, aff'd 235 N.Y. 84, 138 N.E. 745; Treeman v. City of Perry, 11 Okl. 66, 65 P. 923 (1901); Cheesebrew v. Point Pleasant, 71 W.Va. 199, 76 S.E. 424 (1912). Cf. City of Moorhead v. Murphy, 94 Minn. 123, 102 N.W. 219 (1905); McClintic v. Cavender, 75 W.Va. 36, 83 S.E. 78 (1914). But cf. Pechous v. Slawko, 64 Ill.2d 576, 2 Ill.Dec. 701, 357 N.E.2d 1144 (1976) (under statute, *council* in city manager government has no authority to appoint and remove city attorney—any such power is in manager). See generally Annot., Power of Municipal Corporation to Employ Attorney, 83 A.L.R. 135 (1933).

[28] See State ex rel. Burmedez v. Heath, 20 La.Ann. 172 (1868); City Council v. Sakai, 58 Hawaii 390, 570 P.2d 565 (1977); Village of Farmingdale v. Karp, 54 Misc.2d 714, 283 N.Y.S.2d 267 (1967) (village board had implied power to employ and pay additional legal counsel as needed); Cheesebrew v. Point Pleasant, *supra* note 27.

[29] See Meeske v. Baumann, *supra* note 27; City of South Houston v. Sears, 488 S.W.2d 169 (Tex.Civ.App.1972) (city's corporate counsel could secure special counsel when needed); Wiley v. City of Seattle, 7 Wash. 576, 35 P. 415 (1894) (emergency warranted mayor's employing special counsel, though council action usually required). Cf. Turner v. Cook, 502 S.W.2d 824 (Tex. Civ.App.1973) (county commissioners' court could employ private counsel to assist county attorney in defending suit).

[30] City of Memphis v. Adams, 56 Tenn. (9 Heisk.) 518 (1872).

[31] Miles v. Cheyenne County, 96 Neb. 703, 148 N.W. 959 (1914); Town of Mannford v. Watson, 394 P.2d 506 (Okl.1964). But cf. Darnell v. City of Broken Bow, 139 Neb. 844, 299 N.W. 274 (1941) (contract to pay attorney percentage of all delinquent taxes collected, or of taxes collected on property that had escaped assessment, may be void as against public policy). See generally Annot., Validity of Contract Between Governmental Unit and Attorney Which Makes Compensation Contingent Upon Results Accomplished, 136 A.L.R. 101 (1942).

[32] Cheesebrew v. Point Pleasant, *supra* note 27. But cf. City of Purcell v. Wadlington, 43 Okl. 728, 144 P. 380 (1914), where it was held the city could not employ an attorney to appear before the state Corporation Commission to resist an application of the telephone company to raise its rates. In State ex rel. Steilacoom Town Council v. Volkmer, 73 Wash.App. 89, 867 P.2d 678 (1994), it was held the town council lacked legal authority to hire private legal counsel to represent it in a dispute with the mayor over a variance issue where no reason was shown that the town attorney was unable to represent the council.

[33] See Cullen v. Town of Carthage, 103 Ind. 196, 2 N.E. 571 (1885); State ex rel. Crow v. City of St. Louis, 174 Mo. 125, 73 S.W. 623 (1903); Errington v. Mansfield Township Board of Education, 100 N.J.Super.

expenses incurred in defending, even successfully, against *criminal* charges are considered to be for private purposes; and in the absence of express authorization, public money cannot be used to cover these.[34] There is some contrary authority, however, where clearly groundless or frivolous charges have been brought against public officers.[35] Where a lawsuit is brought over who is entitled to a municipal office, the view has been taken that a city has implied authority to utilize a city attorney's services and spend public funds in the matter if, but only if, the city can be shown to have an interest in the litigation so that any expenditures are for the public benefit.[36]

Other areas in which there is a trend toward more easily inferring municipal power are the employment of lobbyists; advertisement and promotion of the city to attract business and tourism; and activities of an educational, cultural, or recreational nature. Thus, some older cases took the view that, without express provision in its home-rule document or state law, the city could not employ a lobbyist to represent the city before the state legislature and could not otherwise spend public money to obtain favorable legislation.[37] But Connecticut has long taken a contrary view;[38] many cities now employ lobbyists not only in their respective state capitals but also in Washington, D.C.; and the trend seems to be toward inferring from the municipality's powers in connection with general welfare or other matters, authority to employ lobbyists.[39]

130, 241 A.2d 271 (1968) (allegedly libelous resolution passed by board; under statute, members who were individually sued could recover legal expenses); State ex rel. Bradley v. Council of Hammonton, 38 N.J.L. 430 (1876). Cf. City of Birmingham v. Wilkinson, *supra* note 26. See generally Annot., Payment of Attorneys' Services in Defending Action Brought Against Officials Individually as Within Power or Obligation of Public Body, 47 A.L.R.5th 553 (1997); Annot., Power of Municipal Corporation to Employ Attorney, 83 A.L.R. 135, 139 (1933).

[34] See City of Birmingham v. Wilkinson, *supra* note 26. Cf. Thorndike v. Inhabitants of Camden, 82 Me. 39, 19 A. 95 (1889); Roberts v. City of St. Louis, 242 S.W.2d 293 (Mo.App.1951); Chapman v. City of New York, 168 N.Y. 80, 61 N.E. 108 (1901). See generally 56 Am.Jur.2d Municipal Corporations § 208 (1971).

[35] See City of Birmingham v. Wilkinson, *supra* note 26. Statutes, or provisions in home-rule charters, sometimes specifically authorize the use of public funds to pay expenses incurred by municipal officers in the defense of criminal charges, or in defending against attempts to remove them from office; and the constitutionality of these has usually been upheld. See Deuel v. Gaynor, 141 App.Div. 630, 126 N.Y.S. 112 (1910); Kane v. McClellan, 110 App.Div. 44, 96 N.Y.S. 806 (1905).

[36] See Estes v. City of North Miami Beach, 227 So.2d 33 (Fla.1969) (council could hire special legal counsel where losing candidate sued council members individually). Cf. Maricopa County v. Biaett, 21 Ariz.App. 286, 518 P.2d 1003 (1974) (county recorder could hire attorney, and charge the county with the expense, where recorder himself was suing county board of supervisors, charging them with usurping his office).

[37] Valentine v. Robertson, 300 F. 521 (9th Cir.1924); Minot v. Inhabitants of West Roxbury, 112 Mass. 1 (1873) (legislation would have brought about territorial changes in municipality). Cf. State ex rel. Port of Seattle v. Superior Court, 93 Wash. 267, 160 P. 755 (1916) (municipality could not spend public funds to influence passage of referendum nullifying state's debt limitation law).

[38] See Farrel v. Town of Derby, 58 Conn. 234, 20 A. 460 (1889) (counsel employed to oppose division of town).

[39] See Powell v. City & County of San Francisco, 62 Cal.App.2d 291, 144 P.2d 617 (Dist.Ct.1944) (payment to delegation sent to Congress to lobby); Meehan v. Parsons, 271 Ill. 546, 111 N.E. 529 (1916) (reimbursement to mayor for lobbying); Reilly v. Ozzard, 33 N.J. 529, 166 A.2d 360 (1960) (local government has right to lobby as to legislation affecting its interests, but this is not part of municipal attorney's job). Cf. City Affairs Committee v. Board of Commissioners, 134 N.J.L. 180, 46 A.2d 425 (Err. & App.1946); In re Carrick, 127 N.J.L. 316, 22 A.2d 561 (1941), both upholding the power of a municipality to advertise for or against legislation. See also Annot., Right of Political Division to Challenge Acts or Proceedings by Which its Boundaries or Limits Are Affected, 86 A.L.R. 1367, 1369 (1933), noting the split of authority as to employing lobbyists to defeat legislation that would change municipal boundaries. As to state and municipal regulation of lobbying, see Fischer & Gullahorn, The Advent of State and Local Lobby Regulations and the Legal and Ethical Considerations for Attorneys, 3 St. Mary's J. Legal Malpractice & Ethics 32 (2013).

Some authorization in home-rule document or statutes has been held necessary to a municipality's making expenditures for advertising or promotion of the locality,[40] and courts have sometimes refused to infer this power from provisions concerning the general welfare or the general power to tax.[41] But it has been indicated that the power to advertise the city might be inferred from charter provisions authorizing ordinances or expenditures for purposes of trade or commerce.[42]

Since home-rule charters or state statutes usually contain some reference to municipal action for public health or education, courts have long been able to find authority in the city to provide exhibits at fairs or expositions,[43] and increasingly have inferred the power to spend for various educational and recreational purposes, such as providing parks,[44] golf

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[40] Loeb v. City of Jacksonville, 101 Fla. 429, 134 So. 205 (1931); Moreland v. City of San Antonio, 116 S.W.2d 823 (Tex.Civ.App.1938), error ref'd. See Annot., Power of Municipality to Make Expenditures for Advertising or Other Forms of Publicity, 79 A.L.R. 466 (1932). Calling attention to the advantages of a community, for purposes of trade, tourism, etc., has been called a public purpose for which express authorization of the use of public funds *may* be given. See Anderson v. City of San Antonio, 123 Tex. 163, 67 S.W.2d 1036 (1934) (but no *implied* power found); Davis v. City of Taylor, 123 Tex. 39, 67 S.W.2d 1033 (1934).

[41] Anderson v. City of San Antonio and Davis v. City of Taylor, *supra* note 40.

[42] See Sacramento Chamber of Commerce v. Stephens, 212 Cal. 607, 299 P. 728 (1931) (construction and leasing of convention facilities); Ruggeri v. City of St. Louis, 441 S.W.2d 361 (Mo.1969) (city could establish convention-and-tourism bureau, financing it by tax on receipts of hotels, motels, and restaurants).

[43] See Daggett v. Colgan, 92 Cal. 53, 28 P. 51 (1891); Norman v. Kentucky Board of Managers, 93 Ky. 537, 20 S.W. 901 (1892); State ex rel. Douglas County v. Cornell, 53 Neb. 556, 74 N.W. 59 (1898); Capen v. City of Portland, 112 Or. 14, 228 P. 105 (1924).

[44] Booth v. City of Minneapolis, 163 Minn. 223, 203 N.W. 625 (1925). See Board of Assessors v. Cunningham Foundation, 305 Mass. 411, 26 N.E.2d 335 (1940) (corporation to beautify town could own park partly in that town and partly in another); Vrooman v. City of St. Louis, 337 Mo. 933, 88 S.W.2d 189 (1935) (city contribution for park was for public purpose; was statutory authorization). See generally 59 Am.Jur.2d Parks, Squares, and Playgrounds §§ 5–6 (1971). Where the state specifically authorizes or requires the municipality to levy taxes for park purposes, the state action may be invalidated as in conflict with state constitutional provisions forbidding state taxation for local or municipal purposes. See State ex rel. Gerry v. Edwards, 42 Mont. 135, 111 P. 734 (1910). See generally Chapter 5 *supra*. The creation of Druid Hill Park in Baltimore has been noted as involving several aspects of the police power: the fostering of community among an increasingly heterogeneous urban population; the increase in land value of the surrounding area; the providing of open recreation space removed from the bulk of the urban population; and the providing of an area for shaping perception and defining hopes for urban development. See Schley, Landscape and Politics: The Creation of Baltimore's Druid Hill Park, 1860, 103 Md. Historical Mag. 292 (Fall 2008). A monument within a city park has also been recognized as serving a public purpose. See Pleasant Grove City v. Summum, 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009), well discussed in Casenote, Constitutional Law—The First Amendment—The City Exercised Government Speech by Allowing Placement of a Donated Permanent Monument in a Public Park and Therefore Was Not Subject to Strict Scrutiny Under the Free Speech Clause, 40 Cumb. L. Rev. 965 (2009–10). But see the cases on possible violations of church/state separation in notes 47–49 *infra*. As to Confederate monuments on public property, see Brophy, Reforming a Historical Narrative, 1 Lex 24 (Drexel Univ. School of Law (Fall, 2018), saying there are reasons to keep such monuments but also reasons to take them down. *Id.* at 27.

On the importance of London's Hyde Park to the history of public parks, see Foreman, Park of Ages, 82 American Scholar 44 (Summer, 2013). On the importance and future of zoos, see Worland, The Future of Zoos, Time magazine, Feb. 22–March 6, 2017, at 52, discussing the possibility that some zoos will turn into "unzoos," in which the animals are given space to roam and humans are brought into their world. *Id.* at 57. On the effects of the U.S. civil rights movement of the 1940s and 1950s on public parks and sports facilities, see Patenaude, Playing Fair: The Fight for Interracial Athletics in Baltimore, 107 Md. Historical Mag. 175 (Summer 2012) (all public parks and playgrounds in Baltimore were integrated in 1955). On the 21st century popularity of public parks, see Davidson, The People, Travel and Leisure magazine, Sept., 2016, at 107 saying "We're living in a new golden age of urban green spaces." *Id.* See generally Lange, Play Ground—How a Dutch Landscape Architect Is Reinventing the Park, The New Yorker, May 16, 2016, at 8; Otterbourg, Urban Parks, Nat'l Geographic, April, 2016, at 8 (with a history of city parks around the world). See also Morath, A Park for Everyone: The National Park Service in Urban America, 56 Nat. Resources J. 1 (2016).

course[45] and public concerts.[46] Two qualifications should be recognized, however: (1) Basic constitutional limitations must be obeyed; and thus displays in city parks and buildings may sometimes be ruled to violate the constitutional rule on separation of church and state.[47] The U.S. Supreme Court has, however, upheld a city's construction

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[45] State v. North Palm Beach, 133 So.2d 641 (Fla.1961); Booth v. City of Minneapolis, *supra* note 44 (power to establish parks includes power to establish golf courses). Cf. Capen v. City of Portland, *supra* note 43 (golf course found to be within statutory authority on public utilities). But see Bradentown v. State, 88 Fla. 381, 102 So. 556 (1924), where the court refused to infer the power to establish golf courses from the powers expressly given in the particular charter. Cf. City of Daytona Beach v. King, 132 Fla. 273, 181 So. 1 (1938). See generally Annot., Power of Municipal Corporation to Establish and Maintain Golf Course, 36 A.L.R. 1301 (1925). See also Annot., Power of County or Municipality to Exempt from Taxation or Otherwise Aid or Subsidize Private Enterprises Conducted for Recreational, Exhibition, or Entertainment Purposes, 116 A.L.R. 889 (1938). As to other sports and entertainment facilities, see Panel Discussion, Constructing and Operating Sports and Entertainment Facilities, 19 Seton Hall J. Sports & Entertainment L. 382 (2009). See generally Note, Playing a Man Down: Professional Sports and Stadium Finances—How Leagues and Franchises Extract Favorable Terms From American Cities, 59 Boston Coll. L. Rev. 281 (2018). See also Comment, Going for It on Fourth and Long: Gambling Public Funds on a New Vikings Stadium, 7 U. St. Thomas J.L. & Pub. Pol'y 240 (2013).

[46] See City of Tombstone v. Macia, 30 Ariz. 218, 245 P. 677 (1926) (dictum); Egan v. City & County of San Francisco, 165 Cal. 576, 133 P. 294 (1913); Green v. Thomas, 37 Ohio App. 489, 175 N.E. 226 (1930), petition in error dism'd, 123 Ohio St. 669, 177 N.E. 766. Cf. Lewis v. La Guardia, 172 Misc. 82, 14 N.Y.S.2d 463 (1939), aff'd without opinion 258 App.Div. 713, 14 N.Y.S.2d 991, aff'd 282 N.Y. 757, 27 N.E.2d 44 (municipal radio station); Meyer v. City of Cleveland, 35 Ohio App. 20, 171 N.E. 606 (1930). See generally Annots., Scope and Effect of Express Constitutional Provisions Prohibiting Legislature from Imposing Taxes for County or Corporate Purposes, or Providing that the Legislature May Invest Power to Levy Such Taxes in the Local Authorities, 106 A.L.R. 906, 918 (1937), 46 A.L.R. 609, 709 (1927) (on public buildings, etc.).

While implied power to provide certain cultural and educational activities may be found, the function of educating children and other students is basically one that resides in the state, and municipalities have only such authority in this matter as the state delegates. See Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), cert. denied 414 U.S. 976, 94 S.Ct. 292, 38 L.Ed.2d 219, reh. supplemented 69 N.J. 133, 351 A.2d 713 (municipality has no implied power to tax for education). Cf. Moses Lake School District v. Big Bend Community College, 81 Wn.2d 551, 503 P.2d 86 (1972), appeal dism'd 412 U.S. 934, 93 S.Ct. 2776, 37 L.Ed.2d 393. As to public libraries and the effects thereon of modern technology, see Note, An American Tragedy: E-books, Licenses, and the End of Public Lending Libraries?, 66 Vand. L. Rev. 615 (2013). See generally Symposium, The Future of Libraries in the Digital Age, 13 J. L. & Pol'y for the Information Socy. 1–332 (2015), particularly Garner, Public Libraries in the Community, *id.* at 1; and Lawson, The Role of the Public Library in Today's World, *id.* at 29.

[47] Lowe v. City of Eugene, 254 Or. 518, 463 P.2d 360 (1969), appeal dism'd and cert. denied 397 U.S. 591, 1042, 90 S.Ct. 1366, 25 L.Ed.2d 597 reh. denied 398 U.S. 944, 90 S.Ct. 1838, 26 L.Ed.2d 283 (1970) (Latin cross in city park ordered removed). Cf. Fox v. City of Los Angeles, 22 Cal.3d 792, 150 Cal.Rptr. 867, 587 P.2d 663 (1978) (city could not display lighted cross on city hall). But see Meyer v. Oklahoma City, 496 P.2d 789 (Okl.1972), cert. denied 409 U.S. 980, 93 S.Ct. 314, 34 L.Ed.2d 244 (cross in secular environment—on fair grounds—could be maintained with city money). Cf. Paul v. Dade County, 202 So.2d 833 (Fla. Dist.App.1967), cert. denied 207 So.2d 690, cert. denied 390 U.S. 1041, 88 S.Ct. 1636, 20 L.Ed.2d 304 (cross on courthouse, but no public funds involved); Eugene Sand & Gravel, Inc. v. City of Eugene, 276 Or. 1007, 558 P.2d 338 (1976), cert. denied 434 U.S. 876, 98 S.Ct. 226, 54 L.Ed.2d 155 (display of cross as veterans war memorial does not violate establishment-of-religion clause). The *Eugene Sand & Gravel* case is a later development in the dispute dealt with in the *Lowe v. City of Eugene* case *supra*.

In Salazar v. Buona, 559 U.S. 700, 130 S.Ct. 1803, 176 L.Ed.2d 634 (2010), plaintiff had obtained an injunction prohibiting the U.S. Government, on Establishment Clause grounds, from permitting display on public land of a Latin cross honoring fallen soldiers in World War I. A federal statute was enacted, after the injunction was entered, authorizing transfer of the land and cross to a private party. The Supreme Court remanded, finding the district court had failed to consider the context in which the statute was enacted and the reasons for its passage and had failed to acknowledge the statute's significance as a substantial change in circumstances bearing on the propriety of the injunction. Compare American Atheists, Inc. v. Duncan, 616 F.3d 1145 (10th Cir. 2010) (privately funded crosses on public land as memorials to fallen state highway officers held to violate Establishment Clause). See generally Note, A Cross to Bear: The Need to Weigh Context in Determining the Constitutionality of Religious Symbols on Public Land, 7 U. Maryland L. J. Race, Religion, Gender & Class 377 (2008). See also Dolan, The Cross National Memorial: At the Intersection of Speech and Religion, 61 Case Res. L. Rev. 117 (2011).

of a Christmas display, including a nativity scene, in a park, where there was no surreptitious effort to express governmental advocacy of a particular religious message, there were legitimate secular purposes for the scene, and any benefit to religion was indirect, remote and incidental.[48] On the other hand, a public school's exclusion of a

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As to *hilltop* crosses, see generally Comment, A Cross-Examination of the Establishment Clause and Boise's Table Rock Cross, 45 Idaho L. Rev. 651 (2009); Comment, Mt. Soledad in the Supreme Court's Crosshairs: Why Legislative Recognition Should Be Considered in Public Displays of Religion, 40 McGeorge L. Rev. 973 (2009). As to *roadside* crosses, see Note, Courts Mistakenly Cross-Out Memorials: Why the Establishment Clause Is Not Violated by Roadside Crosses, 39 Hofstra L. Rev. 723 (2011). See generally Reid, Private Memorials on Public Space: Roadside Crosses at the Intersection of the Free Speech Clause and the Establishment Clause, 92 Neb. L. Rev. 124 (2013). See also, as to possible changes in attitude and in the law regarding religious symbols, Comment, An Inconsistent Truth: The Various Establishment Clause Tests as Applied in the Context of Public Displays of (Allegedly) "Religious" Symbols and Their Applicability Today, 34 N. Ill. U.L. Rev. 431 (2014).

In Friedman v. Board of County Comm'rs, 781 F.2d 777 (10th Cir.1985), cert. denied 476 U.S. 1169, 106 S.Ct. 2890, 90 L.Ed.2d 978 (1986), a county government's use of a seal—used on documents, stationery, motor vehicles, etc.—bearing a Latin cross and the Spanish motto "con esta vencemos" was held to convey the impression of an endorsement of Christianity and thus to violate the Establishment Clause. The court noted that, unlike a seasonal display, use of the seal pervaded the daily lives of residents and conveyed the impression that county officers might not provide even-handed treatment. Accord, Robinson v. City of Edmond, 68 F.3d 1226 (10th Cir.1995), cert. denied 517 U.S. 1201, 116 S.Ct. 1702, 134 L.Ed.2d 801 (1996) (city seal violated Establishment Clause due to Christian cross). But see Murray v. City of Austin, 744 F.Supp. 771 (W.D.Tex.1990), aff'd in part, vac'd in part 947 F.2d 147 (5th Cir.1991), cert. denied 505 U.S. 1219, 112 S.Ct. 3028, 120 L.Ed.2d 899 (1992) (city's seal, containing depiction of a Latin cross, held not to violate constitution). See generally Spain, The Flags and Seals of Texas, 33 S. Tex. L. Rev. 215 (1992); Comment, Under Seal But Not Under Law, *In re City of Houston*'s Effect on Municipal Insignias, 20 Marq. Intellectual Property L. Rev. 137 (2016). See also Patrick, Church, State and Charter: Canada's Hidden Establishment Clause, 14 Tulsa J. Comp. & Int'l L. 25 (2006).

[48] Lynch v. Donnelly, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984), reh. denied 466 U.S. 994, 104 S.Ct. 2376, 80 L.Ed.2d 848 (1984) (no violation of Establishment Clause; park was owned by a nonprofit corporation). In McCreary v. Stone, 739 F.2d 716 (2d Cir.1984), aff'd by equally divided Court sub nom. Board of Trustees of Scarsdale v. McCreary, 471 U.S. 83, 105 S.Ct. 1859, 85 L.Ed.2d 63 (1985), a village's neutral accommodation to permit display of a creche in a village park during the Christmas season was held not a violation of the Establishment Clause. But cf. American Civil Liberties Union v. City of Birmingham, 588 F.Supp. 1337 (E.D.Mich.1984), judgment aff'd 791 F.2d 1561 (6th Cir.1986), cert. denied 479 U.S. 939, 107 S.Ct. 421, 93 L.Ed.2d 371 (1986), where a nativity scene on public property was found violative of the Establishment Clause, no secular purpose being shown. The Supreme Court's decisions on nativity scenes are sometimes referred to as establishing a "reindeer rule": a partially religious scene on public property is constitutional so long as it also contains secular objects, such as a Santa's house and reindeer, but otherwise is unlawful. See "Is the Court Hostile to Religion?," Time magazine, July 17, 1989, at 80. Cf. Chabad-Lubavitch of Vermont v. City of Burlington, 936 F.2d 109 (2d Cir.1991), cert. denied 505 U.S. 1218, 112 S.Ct. 3026, 120 L.Ed.2d 897 (1992) (Chanukah menorah in city park would violate Establishment Clause); American Jewish Congress v. City of Chicago, 827 F.2d 120 (7th Cir.1987) (nativity scene inside city's government center would violate Establishment Clause); Burelle v. City of Nashua, 599 F.Supp. 792 (D.N.H.1984) (nativity scene with no secular purpose would violate Establishment Clause). But cf. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (permitting private party to erect Latin cross on state capitol grounds lawful); Lubavitch Chabad House v. City of Chicago, 917 F.2d 341 (7th Cir.1990) (Christmas trees in city airport lawful); Doe v. City of Clawson, 915 F.2d 244 (6th Cir.1990) (creche in Christmas display on city hall lawn lawful). See generally Comment, Private Religious Displays in Public Fora, 61 U. Chi. L. Rev. 253 (1994); Comment, Government, the Holiday Season, and the Establishment Clause: A Perspective on the Issues, 20 Stetson L. Rev. 217 (1990). On the constitutionality of governmental observances of Good Friday, see Note, The Constitutionality of the Good Friday Holiday, 73 N.Y.U.L. Rev. 193 (1998).

As to the posting of the Ten Commandments on public land or facilities, compare McCreary County v. American Civil Liberties Union, 545 U.S. 844, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005) (posting of Ten Commandments at courthouses violated First Amendment; counties' purpose was to emphasize and celebrate the Commandments' religious message), with Van Orden v. Perry, 545 U.S. 677, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005) (monument inscribed with Ten Commandments on grounds of Texas State Capitol did not violate First Amendment; display simply acknowledged religion's historical role in American life). Accord with *Van Orden*, Red Rivers Freethinkers v. City of Fargo, 764 F.3d 948 (8th Cir.2014) (ordinance allowing Ten Commandments monument to remain on civic plaza, but disallowing further monuments of any kind to be erected in the future, does not violate Establishment Clause); ACLU v. Grayson County, 591 F.3d 837 (6th. Cir.2010) (historical display which includes copy of Ten Commandments does not violate Establishment

children's Christian club from meeting after hours at the school, based on its religious nature, was held unconstitutional viewpoint discrimination.[49] (2) It has been held, often partly on the basis of state constitutional prohibitions of municipal aid to private groups,

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Clause). See Finkelman, The Ten Commandments on the Courthouse Lawn and Elsewhere, 73 Fordham L. Rev. 1477 (2005); Note, Context Is King: A Perception-Based Test for Evaluating Government Displays of the Ten Commandments, 51 Vill. L. Rev. 379 (2006). Compare Irons, Curing a Monumental Error: The Presumptive Unconstitutionality of Ten Commandments Displays, 63 Okla. L. Rev. 1 (2010), arguing that any permanent display of the Ten Commandments on public property is presumptively unconstitutional as a violation of the Establishment Clause. See generally Summum v. Pleasant Grove City, 345 P.3d 1188 (Utah 2015) (religious liberty clause of Utah Constitution did not require city to install a second religious monument in a public park where a Ten Commandments monument was already situated); Sinsheimer, The Ten Commandments as a Secular Historic Artifact or Sacred Religious Text: Using *Modrovick v. Allegheny County* to Illustrate How Words Create Reality, 5 U. Md. L.J. Race, Religion, Gender & Class 325 (2005). See also Abbott, Chemerinsky, Manion, Sekulow & Van Alstyne, An Analysis of the Ten Commandments Cases, 14 Wm. & Mary Bill of Rts. J. i, 1–72 (series of articles); Note, Passive Acknowledgment or Active Promotion of Religion? Neutrality and the Ten Commandments, 2010 B.Y.U.L. Rev. 3. As to what is a lack of neutrality and a favoring of religion, see Freedom From Religion Foundation, Inc. v. City of Warren, 707 F.3d 686 (6th Cir.2013) (city's decision to exclude sign saying "religion is but myth and superstition" from its holiday display, and mayor's letter defending the exclusion, do not violate Establishment Clause or free speech rights; city's civic center held not a public forum).

A number of cases applying the doctrine of church-state separation have involved the public schools. See Board of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) (statute creating special school district including only the property owned and inhabited by practitioners of strict form of Judaism violated Establishment Clause); School Dist. of City of Grand Rapids v. Ball, 473, U.S. 373, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985) (school district's shared time and community education programs, which provided classes to nonpublic school students at public expense in classrooms located in and leased from nonpublic schools, had primary effect of advancing religion and therefore violated Establishment Clause). But see Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (public schools could send their teachers into parochial schools to provide remedial education to disadvantaged children; no violation of Establishment Clause, overruling prior authority); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (allowing church access to school premises to exhibit film on family and child-rearing issues would not violate Establishment Clause; school district violated free speech clause when it denied church such access). Cf. Mitchell v. Helms, 530 U.S. 793, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (state and federal aid programs could be applied to parochial schools). See generally Comment, Montana's Constitutional Prohibition on Aid to Sectarian Schools: "Badge of Bigotry" or National Model for the Separation of Church and State?, 77 Mont. L. Rev. 41 (2016). For discussion of the *Kiryas Joel* case *supra*, see Failer, The Draw and Drawbacks of Religious Enclaves in a Constitutional Democracy: Hasidic Public Schools in Kiryas Joel, 72 Ind. L.J. 383 (1997); Greene, *Kiryas Joel* and Two Mistakes About Equality, 96 Colum. L. Rev. 1 (1996); Note, The Curious Case of *Kiryas Joel*, 63 U. Cinc. L. Rev. 1947 (1995). For proceedings after the U.S. Supreme Court decision in the *Kiryas Joel* case, see Grumet v. Cuomo, 90 N.Y.2d 57, 659 N.Y.S.2d 173, 681 N.E.2d 340 (N.Y.Ct. App.1997) (statute allowing Kiryas Joel to form own school district invalidated). For discussion of the *Agostini* case *supra* and its place in the law, see Lugg, Providing Title I Services on Parochial School Grounds: *Aguilar v. Felton* Is No Longer the Law, 31 Urban Law. 2149 (1999). As to the ongoing controversy about prayer in the public schools, see Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (student-led, student-initiated prayers before public-school football games violated Establishment Clause; with review of authorities). See generally, noting the Supreme Court's tendency toward applying a neutrality standard in Establishment Clause cases, Note, Life Without *Lemon*: The Status of Establishment Clause Jurisprudence After *Rosenberger v. University of Virginia*, 17 N. Ill. U.L. Rev. 123 (1996).

[49] Good News Club v. Milford Central School, 533 U.S. 98, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001). See Schweitzer, The Supreme Court Rules in Favor of Religious Club's Right to Meet on Public School Premises: Is This "Good News" for First Amendment Rights?, 18 Touro L. Rev. 127 (2001). The Court in the *Good News* case, *supra*, found no violation of the Establishment Clause in allowing groups presenting any viewpoints to use the public facilities, even though only groups presenting a religious viewpoint had opted to take advantage of the facilities at a particular time. Cf. Zelman v. Simmons-Harris, 536 U.S. 639, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (school voucher program, enacted for valid secular purpose of providing educational assistance to poor children in failing public school system, did not violate Establishment Clause, even though majority of participating students had enrolled in religious affiliated schools; program was in all respects neutral toward religion). See generally Comment, "No Christian Child Left Behind": The Supreme Court's Jurisprudence in Establishment Clause Cases Involving Schoolchildren, 42 Houston L. Rev. 197 (2005). See also Note, The Future of the *Lemon* Test: A Sweeter Alternative for Establishment Clause Analysis, 40 Ga. L. Rev. 1171 (2006).

that a city may not aid or subsidize private enterprises conducting fairs or exhibitions or providing cultural facilities such as museums.[50] Increasingly, though, this second qualification is being narrowed or terminated, and it has often now been held that the city has implied authority to spend for cultural purposes if there is public benefit even if the agency operating the facility is private.[51]

Celebration of historic events and of holidays has long been recognized as of public benefit, and a proper municipal activity where specifically authorized.[52] Here too, the trend is to say that a municipality has *implied* authority to spend public money for fireworks, various displays, entertainment, and other things reasonably necessary for celebration of an appropriate occasion.[53]

A final area in which powers of municipalities are increasingly inferred is that of procuring insurance. It has been held that from the power to hire and pay employees may be inferred the power to enter into group insurance arrangements for their benefit;[54] from the power to own property may be inferred the power to take out insurance to cover possible damage to, or destruction of, the property;[55] and from the power to engage in

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[50] See City of Daytona Beach v. King, *supra* note 45. Cf. Meriwether v. Garrett, 102 U.S. 472, 513, 26 L.Ed. 197 (1880). See generally Annot., Power of County or Municipality to Exempt from Taxation or Otherwise Aid or Subsidize Private Enterprises Conducted for Recreational, Exhibition, or Entertainment Purposes, 116 A.L.R. 889, 894–98 (1938). As to museums, see also Comment, Museums and the Tax Collector: The Tax Treatment of Museums at the Federal, State, and Local Level, 15 U. Pa. J. Bus. L. 877 (2013).

[51] See McGuire v. City of Cincinnati, 22 O.O. 334, 40 N.E.2d 435 (1941), appeal dism'd 139 Ohio St. 218, 38 N.E.2d 1023 (city operated zoo through nonprofit corporation). See generally Annot., Power of County or Municipality, *supra* note 50, at 891–94, 897–98.

[52] See Annot., Use of Public Funds or Exercise of Taxing Power to Promote Patriotism, 30 A.L.R. 1035, 1039–43 (1924). Cf. State ex rel. American Legion 1941 Convention Corp. v. Smith, 235 Wis. 443, 293 N.W. 161 (1940) (state appropriation to American Legion national convention upheld; patriotic purpose). But cf. Southern Railway Co. v. Claiborne County, 157 Tenn. 71, 291 S.W. 837 (1927) (statute authorizing county to appropriate money for war memorial didn't authorize borrowing for this purpose). See also Hutcheson v. Atherton, 44 N.M. 144, 99 P.2d 462 (1940), striking down a statute authorizing public indebtedness for buildings, etc., to be used for commemoration of 400th anniversary of exploration of state.

[53] Stegmaier v. Goeringer, 218 Pa. 499, 67 A. 782 (1907). Cf. State ex rel. John Tague Post, American Legion v. Klinger, 114 Ohio St. 212, 151 N.E. 47 (1926) (county could appropriate for Memorial Day observance; was statutory authorization). See generally Annot., Use of Public Funds, *supra* note 50, at 1036–39, 1041–42. But see Love v. City of Raleigh, 116 N.C. 296, 21 S.E. 503 (1895) (no power to appropriate public money for celebrations in absence of express authorization). Cf. Marth v. City of Kingfisher, 22 Okl. 602, 98 P. 436 (1908) (no implied power found for Fourth of July celebration). As to Fourth of July celebrations, see generally Heintze, When in the Course of Human Events It Became Necessary to Celebrate July 4th, Phi Kappa Phi Forum, Summer, 2009, at 4, saying it is Americans' patriotic duty to celebrate July 4. See also Heintze, The Fourth of July Encyclopedia (McFarland & Co. 2007).

[54] Nohl v. Board of Education, 27 N.M. 232, 199 P. 373 (1921); State ex rel. Thompson v. City of Memphis, 147 Tenn. 658, 251 S.W. 46 (1923). See Bussie v. McKeithen, 259 So.2d 345 (La.App.1971), writ ref'd 261 La. 451, 259 So.2d 910 (insurance on state employees). Cf. Maryland Casualty Co. v. Wilson, 6 Ariz.App. 470, 433 P.2d 650 (1967) (state can provide insurance for its employees injured by uninsured motorist). See generally Annot., Right to Use Public Funds to Carry Insurance for Public Officers or Employees, 27 A.L.R. 1257 (1923).

[55] Struble v. Nelson, 217 Minn. 610, 15 N.W.2d 101 (1944); French v. Mayor of Millville, 66 N.J.L. 392, 49 A. 465 (1901), aff'd without opinion 67 N.J.L. 349, 51 A. 1109 (city can carry insurance on its building and can take out such insurance with a mutual company); State ex rel. King County v. Murrow, 199 Wash. 685, 93 P.2d 304 (1939). Cf. Clark School Township v. Home Insurance & Trust Co., 20 Ind.App. 543, 51 N.E. 107 (1898) (school trustees). See generally Libby v. City of Portland, 105 Me. 370, 74 A. 805 (1909) (city may own and manage farm but is liable for negligence in its operation). On problems faced by municipalities due to insurance companies' insertion (largely since the terrorist attacks of September 11, 2001) into their policies of exclusions of liability for terrorist acts, see Thomas, Insurance Implications of September 11 and Possible Responses, 34 Urban Law. 727 (2002).

activities that may lead to tort liability may be inferred the authority to take out liability insurance.[56]

§ 8.3 Interpreting Municipal Charters—Business Powers

Older authorities often took the view that even with specific authorization, a municipality should not engage in a business of a private nature,[57] or sell commodities that are commonly sold on the open market.[58] Today, however, such authorizations are usually held valid if the business can be justified as contributing to the public welfare and any profits are put to public purposes.[59]

Where it is necessary to *infer*, from some other power, the municipality's legal authority to engage in a business enterprise, a policy of strict construction has sometimes been encountered.[60] Thus, it has been held that the power to construct and maintain public streets does not give rise to authority to operate a stone quarry to furnish paving material for the streets,[61] and the power to maintain an exhibition hall does not confer

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[56] Travelers' Insurance Co. v. Wadsworth, 109 Ohio St. 440, 142 N.E. 900 (1924). See Annot., Power of Municipal Corporation to Take Out Liability Insurance, 33 A.L.R. 717 (1924). Cf. Sullivan v. Midlothian Park District, 51 Ill.2d 274, 281 N.E.2d 659 (1972) (liability insurance by local public entities authorized by statute); City of Spencer for Use of Spencer Municipal Utilities v. Hawkeye Security Insurance Co., 216 N.W.2d 406 (Iowa 1974); Medlar v. Aetna Insurance Co., 127 Vt. 337, 248 A.2d 740 (1968) (statute authorized but did not compel liability insurance on employees). The effect of a local government's taking out liability insurance, as well as the effect of legislative authorization of such insurance on municipal tort immunity, is discussed in connection with municipal liability in tort, *infra*.

[57] Union Ice & Coal Co. v. Town of Ruston, 135 La. 898, 66 So. 262 (1914); Opinion of Justices, 204 Mass. 607, 91 N.E. 405 (1910); Opinion of Justices (In re Municipal Fuel Plants), 182 Mass. 605, 66 N.E. 25 (1903); Opinion of Justices (In re House Bill No. 519), 155 Mass. 598, 30 N.E. 1142 (1892); Rippe v. Becker, 56 Minn. 100, 57 N.W. 331 (1894) (warehouse for storage of grain); Feldman & Co. v. City Council of Charleston, 23 S.C. 57 (1885). See Lowell v. City of Boston, 111 Mass. 454 (1873) (deficit might have to be made up by taxation; thus, a statute authorizing a city to go into private business could lead to taxation for nonpublic purposes); State ex rel. City of Toledo v. Lynch, 88 Ohio St. 71, 102 N.E. 670 (1913) (motion picture theatre), disapproved in part in Village of Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923).

[58] Laughlin v. City of Portland, 111 Me. 486, 90 A. 318 (1913); Baker v. City of Grand Rapids, 142 Mich. 687, 106 N.W. 208 (1906). See In re Opinion of Justices, 211 Mass. 624, 98 N.E. 611 (1912); Opinion of Justices (In re Municipal Fuel Plants), 182 Mass. 605, 66 N.E. 25 (1903).

[59] See Seattle Gas Co. v. Seattle, 291 U.S. 638, 54 S.Ct. 550, 78 L.Ed. 1037 (1934); Puget Sound Power & Light Co. v. Seattle, 291 U.S. 619, 54 S.Ct. 542, 78 L.Ed. 1025 (1934), rehearing denied 292 U.S. 603, 54 S.Ct. 712, 78 L.Ed. 1466; Huesing v. City of Rock Island, 128 Ill. 465, 21 N.E. 558 (1889) (public slaughterhouse); Standard Oil Co. v. Lincoln, 114 Neb. 243, 207 N.W. 172 (1926), aff'd 275 U.S. 504, 48 S.Ct. 155, 72 L.Ed. 395 (municipal charter authorized city to sell gas and oil at retail and wholesale); Moore v. City of Greensboro, 191 N.C. 592, 132 S.E. 565 (1926) (slaughterhouse). See State v. City of Tallahassee, 142 Fla. 476, 195 So. 402 (1940) (city may erect property for rental purposes where legislature has found a public purpose); Albritton v. City of Winona, 181 Miss. 75, 178 So. 799 (1938), appeal dism'd 303 U.S. 627, 58 S.Ct. 766, 82 L.Ed. 1088 (1938) (upholding statute authorizing city to own and operate manufacturing plants). Cf. Faulconer v. City of Danville, 313 Ky. 468, 232 S.W.2d 80 (1950) (city could issue bonds for construction of industrial building); Harrison v. Claybrook, 372 P.2d 602 (Okl.1962) (city could create municipal authority to obtain industrial development). On municipal power to enter into contracts, see generally the chapter on municipal contracts *infra*.

[60] See, indicating strict construction of grants that might be interpreted as allowing commercial activity by municipalities, MacRae v. Selectmen of Concord, 296 Mass. 394, 6 N.E.2d 366 (1937); Mauldin v. City Council of Greenville, 33 S.C. 1, 11 S.E. 434 (1890). Cf. Webb v. City of Demopolis, 95 Ala. 116, 13 So. 289 (1892) (city on navigable river cannot erect wharves and charge public for their use unless power is conferred by special legislative act); Taylor v. Dimmitt, 336 Mo. 330, 78 S.W.2d 841 (1934) (municipality had no power under state law to construct and maintain electric transmission line to serve consumers outside municipality).

[61] City of Radford v. Clark, 113 Va. 199, 73 S.E. 571 (1912); Donable's Administrator v. Town of Harrisonburg, 104 Va. 533, 52 S.E. 174 (1905). Cf. Attorney General v. Common Council of Detroit, 150 Mich. 310, 113 N.W. 1107 (1907) (no implied power to build municipal paving-brick plant for manufacture of brick to pave public streets). In Heckert Constr. Co. v. City of Fort Scott, 278 Kan. 223, 91 P.3d 1234 (2004), a state statute was applied that allowed a city or county governing body to sell paving materials to private entities if

power to operate a private garage business therein.[62] But, as is true generally, a trend toward greater liberality in finding implied powers can be seen in many cases. There are cases—contrary to those in note 61 *supra*—holding that the authority to operate a stone quarry *can* be found implied in the power to pave and maintain streets.[63] And it has been held that the power to operate a nursery and greenhouse may be inferred from the express power to provide and maintain parks.[64] Such city enterprises as the quarry and the nursery, of course, exist mainly to supply goods to the city government itself; but there has long been authority that any surplus or by-products may be sold on the open market for a profit, even without express authorization.[65] What of a business operation that *primarily* serves the public? The power of a municipality to operate a utility—such as gas, electric, or water company—often is expressly granted[66] and can even be found implied in the "general welfare" provision of the delegated police power.[67] The power of a municipality to engage in business outside the traditional utility fields presents somewhat more difficulty but is now usually upheld also, though often where some fairly specific authorization can be found.[68]

When municipal powers, especially to engage in commercial types of activity, are inferred, the inference is often drawn from the police power: the municipality's power, usually delegated by state statute and/or home-rule document, to act for the public safety, health, morals; *and* general welfare. While some courts hesitate to employ the general welfare clause, with its obviously very broad potential, to add significantly to

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such materials were not readily available from a nongovernmental entity. But asphalt was found to be readily available from nongovernmental sources.

[62] City of Cleveland v. Ruple, 130 Ohio St. 465, 200 N.E. 507 (1936). See People ex rel. Busching v. Ericsson, 263 Ill. 368, 105 N.E. 315 (1914).

[63] Schneider v. Menasha, 118 Wis. 298, 95 N.W. 94 (1903). Cf. Colwell v. Waterbury, 74 Conn. 568, 51 A. 530 (1902).

[64] People ex rel. Sweitzer v. City of Chicago, 363 Ill. 409, 2 N.E.2d 330 (1936).

[65] City of Tucson v. Sims, 39 Ariz. 168, 4 P.2d 673 (1931); Public Service Co. v. City of Loveland, 79 Colo. 216, 245 P. 493 (1926); Town of Hamden v. City of New Haven, 91 Conn. 589, 101 A. 11 (1917); Carroll v. City of Cedar Falls, 221 Iowa 277, 261 N.W. 652 (1935); Milligan v. Miles City, 51 Mont. 374, 153 P. 276 (1915); Light v. City of Danville, 168 Va. 181, 190 S.E. 276 (1937).

[66] See Travelers' Ins. Co. v. Village of Wadsworth, 109 Ohio St. 440, 142 N.E. 900 (1924); Lone Star Gas Co. v. City of Fort Worth, 128 Tex. 392, 98 S.W.2d 799 (Com. App.1936). Cf. Ruth v. Oklahoma City, 143 Okl. 62, 287 P. 406 (1930) (hospital); City National Bank v. Town of Kiowa, 104 Okl. 161, 230 P. 894 (1924) (municipality may itself engage in any business for which it could grant a franchise). On interpreting an express grant of power to operate a utility, see City of Tacoma v. Taxpayers of Tacoma, 108 Wash.2d 679, 743 P.2d 793 (1987) (city had implied power to pay for installation of energy conservation devices in residential and commercial structures; held not to be an unconstitutional gift of public funds).

[67] Ellinwood v. City of Reedsburgh, 91 Wis. 131, 64 N.W. 885 (1895). Cf. City of Albuquerque v. New Mexico Pub. Serv. Comm'n, 115 N.M. 521, 854 P.2d 348 (1993) (municipal power to contract for utility rates on behalf of municipal inhabitants can be inferred from municipal powers to contract, to regulate use of streets, and to grant franchises to public utilities). But cf. Okeson v. City of Seattle, 159 Wash.2d 436, 150 P.3d 556 (2007) (municipal utility attempted to mitigate effects of its greenhouse gas emissions by paying public and private entities to reduce those entities' emissions; held that utility lacked power to use ratepayer money for these offset contracts since this program did not serve a proprietary utility purpose).

[68] See Jones v. City of Portland, 245 U.S. 217, 38 S.Ct. 112, 62 L.Ed. 252 (1917); Shaffer v. Allt, 25 Ariz.App. 565, 545 P.2d 76 (1976) (authority to purchase liquor license inferred from authority to operate places of recreation); Holton v. City of Camilla, 134 Ga. 560, 68 S.E. 472 (1910) (ice plant); Laughlin v. City of Portland, 111 Me. 486, 90 A. 318 (1914) (fuel yard). Cf. Interstate Power Co. v. City of Cushing, 12 F.Supp. 806 (W.D.Okl.1935), appeal dism'd 82 F.2d 1012; City of Blackwell v. Lee, 178 Okl. 338, 62 P.2d 1219 (1936) (municipality may operate airport and hangar where charter doesn't prohibit); Capen v. City of Portland, 112 Or. 14, 228 P. 105 (1924) (golf links held "public utility"). As to possible state or local power to print or coin money, see Allen, $=Euro=Bitcoin, 76 Md. L. Rev. 877 (2017). On municipal operation of businesses, see generally Chapter 16 *infra*.

powers that are expressly enumerated,[69] it has been noted that over the years, the "welfare grant" has often been liberally construed so as to give local governments considerable discretion in their exercises of the police power.[70] Many times, an implication can be found not only in the general welfare clause, but also in other portions of the police power. For instance, the fluoridation of the city's water supply has been upheld under the welfare *and* public-health headings,[71] while ordinances against violent or abusive language may be held valid under the welfare *and* public-morals headings.[72]

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[69] See City of Stuttgart v. Strait, 212 Ark. 126, 205 S.W.2d 35 (1947) (general welfare clause does not authorize establishing setback lines for property); Wood v. Peckham, 80 R.I. 479, 98 A.2d 669 (1953) (municipality not authorized by general welfare clause to regulate trailer parks).

[70] Adams v. City of New Kensington, 357 Pa. 557, 55 A.2d 392 (1947). See Ex parte Johnson, 77 Okl.Cr. 360, 141 P.2d 599 (1943); Etter, General Grants of Municipal Powers in Oregon, 26 Or.L.Rev. 141 (1947). Cf. Huff v. City of Des Moines, 244 Iowa 89, 56 N.W.2d 54 (1952) (city regulation of trailer parks authorized by general welfare clause). Legislative grants of the welfare power may be held to authorize city regulation of many businesses. See Summer v. Township of Teaneck, 53 N.J. 548, 251 A.2d 761 (1969), applying a New Jersey statute so as to uphold city regulation of real-estate brokers. Cf. Chicago Real Estate Board v. City of Chicago, 36 Ill.2d 530, 224 N.E.2d 793 (1967), upholding city licensing of real-estate brokers under a statute authorizing municipal "regulation" of such brokers. See generally Siegel, Chicago's Power to License and Regulate (1965). On the limitations that may be found inherent in legislative grants of general-welfare powers, see Wagner v. Mayor & Municipal Council of Newark, 24 N.J. 467, 132 A.2d 794 (1957) (grant relates only to matters of local concern, not those of statewide concern).

[71] Dowell v. City of Tulsa, 273 P.2d 859 (Okl.1954), cert. denied 348 U.S. 912, 75 S.Ct. 292, 99 L.Ed. 715. See Annot., Validity, Construction, and Effect of Statute, Ordinance, or Other Measure Involving Chemical Treatment of Public Water Supply, 43 A.L.R.2d 453 (1955). Cf. Wilson v. City of Council Bluffs, 253 Iowa 162, 110 N.W.2d 569 (1961). But cf. McGurren v. City of Fargo, 66 N.W.2d 207 (N.D.1954). See generally George, Municipal Power and Fluoridation, 1 Kan.L.Rev. 156 (1953); Note, Municipal Corporations—Constitutional Law—Validity of Fluoridation of Public Water Supply, 20 Brooklyn L.Rev. 298 (1954); Note, Municipal Corporations: Constitutional Law: Validity of Fluoridation of Public Water Supply, 8 Okl.L.Rev. 472 (1955). See also Antieau, The Power of Municipal Corporations to Protect Public Health and Safety, 1951 Wash.U.L.Q. 358. But the U.S. Supreme Court has never ruled on the constitutionality of fluoridating municipal water supplies, and some controversy continues over this question. See Note, Fluoridation of Public Water Systems: Valid Exercise of State Police Power or Constitutional Violation?, 14 Pace Envtl. L. Rev. 645 (1997). See generally Roosevelt, Not in My Water Supply, Time, Oct. 24, 2005, at 62 (despite evidence that fluoridation hardens teeth and prevents cavities, it still meets resistance). The federal government in 2011 lowered its recommended limit on the amount of fluoride in drinking water for the first time in 50 years, saying that spots on some children's teeth showed they were receiving too much of the mineral. Martin, Government Advises Less Fluoride in Water, Wall St. J., Jan. 8–9, 2011, at A3.

Another type of activity that might be justified under both the welfare and public-health headings of the police power is adjusting to the results of climate change. See Long, From Warranted to Valuable Belief: Local Government, Climate Change, and Giving Up the Pickup to Save Bangladesh, 49 Nat. Resources J. 743 (2009); Silveira da Rocka Sampaio, Regulation of Climate Change Risk at the Local Level—The Denver Experience: Greenprint or Greenwash?, 17 Mo. Envtl. L. & Pol'y Rev. 356 (2010). See also Section 18.4, note 106, *infra*.

Similarly, municipal preparation for possible disasters and emergencies, such as New Orleans experienced with Hurricane Katrina, may be justified as exercises of the public-health and welfare portions of the police power. See Symposium, Katrina's Wake: Emergency Preparedness With Response From the Bayou to the Beltway, 12 U. District of Columbia L. Rev. 3–133 (2009), particularly Morin, A Tale of Two Cities: Lessons Learned From New Orleans to the District of Columbia for the Protection of Vulnerable Populations From the Consequences of Disaster, *id.* at 45.

As to the possible justifications for local regulation of hydrofracking, see Note, Local Government Fracking Regulations: A Colorado Case Study, 33 Stan. Envtl. L. J. 61 (2014). As to zoning regulations related to fracking, see Section 18.4, note 106, paragraphs 4 & 5, *infra*.

[72] Oney v. Oklahoma City, 120 F.2d 861 (10th Cir. 1941).

An area in which municipal power is sometimes found implied—in the expressly provided general welfare power or other powers—is protection of human rights. See Note, Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative, 104 Colum. L. Rev. 768 (2004).

§ 8.4 Interpreting Municipal Charters—Tests That Have Been Developed

Jurisdictions vary in the liberality with which their courts are willing to infer municipal powers from general grants, and cases within any given jurisdiction are likely to show varying attitudes, also. For instance, the Utah court refused to infer, from the power to regulate streets and the parking of vehicles thereon for a fee, the power to establish a rule of evidence that the presence of a vehicle on a public street in violation of parking ordinances made a prima facie case that the person in whose name the vehicle was registered had committed or authorized the violation.[73] But at other times, that court has exhibited greater willingness to find implied powers—as where it inferred from general city powers the authority to prohibit drunken driving.[74]

A number of tests and rules have developed for possible use by the courts in determining whether or not to find a particular municipal power implied in home-rule documents or statutes. A rule that used to be encountered with great frequency, and to which at least lip service is still often paid, is the rule of strict construction: This declares that charters are special grants of power, and thus whatever power is not expressly given, or necessary to the fulfillment of express powers, must be deemed withheld.[75]

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[73] Nasfell v. Ogden City, 122 Utah 344, 249 P.2d 507 (1952), noted 3 Utah L.Rev. 382 (1953). Colorado also sometimes indicates an attitude of strict construction. See City of Sheridan v. City of Englewood, 199 Colo. 348, 609 P.2d 108 (1980) (statute authorizing tax on amusement or place of amusement did not authorize tax on persons gaining admission to public place or event; rule of strict construction stated).

[74] Salt Lake City v. Kusse, 97 Utah 113, 93 P.2d 671 (1938). See Triangle Oil, Inc. v. North Salt Lake Corp., 609 P.2d 1338 (Utah 1980) (under legislative grant of power to "regulate or prohibit" sale of beer, city could limit number of retail outlets). Cf. Utah Power & Light Co. v. Provo City, 94 Utah 203, 74 P.2d 1191 (1937), cert. denied 305 U.S. 628, 59 S.Ct. 92, 83 L.Ed. 402 (express authority to build power plant implies authority to issue revenue bonds to finance construction); Salt Lake City v. Bennion Gas & Oil Co., 80 Utah 530, 15 P.2d 648 (1932) (authority to pass inspection ordinances implies power to charge fee to pay for inspections). In one case in 1981, the Utah court repudiated Dillon's Rule to the extent it requires strict construction of local governmental powers. State v. Hutchinson, 624 P.2d 1116 (Utah 1981) (upholding ordinance requiring financial disclosure by candidates for public office; grant of general welfare power said to provide local governments with independent authority apart from specific grants). But cf. Redwood Gym v. Salt Lake County Commission, 624 P.2d 1138 (Utah 1981) (upholding county's "massage parlor" ordinance but saying local governments have no inherent police power but only such as is expressly or impliedly granted them or is essential to their fundamental objectives). Dillon's Rule was also applied (though not by name) in Provo City v. Ivie, 2004 Utah 30, 94 P.3d 206 (2004) (city not authorized to condemn property outside municipal borders for purposes of constructing a road and bike path).

[75] Hoskins v. City of Orlando, 51 F.2d 901 (5th Cir.1931); City of Flagstaff v. Associated Dairy Products Co., 75 Ariz. 254, 255 P.2d 191 (1953); City of Los Angeles v. Keck, 14 Cal.App.3d 920, 92 Cal.Rptr. 599 (Dist.Ct.1971); Martin v. Board of Public Instruction, 42 So.2d 712 (Fla.1949); City of Midway v. Midway Nursing & Convalescent Center, Inc., 230 Ga. 77, 195 S.E.2d 452 (1973); City of Chicago Heights v. Western Union Telegraph Co., 406 Ill. 428, 94 N.E.2d 306 (1950); Dolan v. Louisville Water Co., 295 Ky. 291, 174 S.W.2d 425 (1943); Philson v. City of Omaha, 167 Neb. 360, 93 N.W.2d 13 (1958); City of Clovis v. Crain, 68 N.M. 10, 357 P.2d 667 (1960); In re Smith, 146 N.Y. 68, 40 N.E. 497 (1895); Cain's Coffee Co. v. City of Muskogee, 171 Okl. 635, 44 P.2d 50 (1935); City of LaGrande v. Municipal Court; 120 Or. 109, 251 P. 308 (1926); Willman v. City of Corsicana, 213 S.W.2d 155 (Tex.Civ.App.1948), aff'd 147 Tex. 377, 216 S.W.2d 175. Cf. Harden v. Superior Court, 44 Cal.2d 630, 284 P.2d 9 (1955); Stine v. Kansas City, 458 S.W.2d 601 (Mo.App.1970); City of Richmond v. Confrere Club of Richmond, 239 Va. 77, 387 S.E.2d 471 (1990) (Virginia said to subscribe to Dillon's Rule of strict construction; statute expressly gave city council alone the authority to suspend bingo permits, and this power could thus not be delegated by the council). Strict construction of charter powers is sometimes said justified because charters are special grants under which any power not expressly given, or necessary to executing powers that are expressly given, must be deemed intentionally withheld. See State v. Smith, 67 Conn. 541, 35 A. 506 (1896); Bear v. City of Cedar Rapids, 147 Iowa 341, 126 N.W. 324 (1910); Brackman's Inc. v. City of Huntington, 126 W.Va. 21, 27 S.E.2d 71 (1943). Cf. Ex parte Higgs, 97 Okl.Cr. 338, 263 P.2d 752 (1953). See also Biggers v. City of Bainbridge Island, 169 P.3d 14, 162 Wash.2d 683 (2007) (where there is doubt as to the existence of the state's delegation of some of its power to a local government, the court will construe the question against the local government's having the claimed power; city's police power held

Under this rule of interpretation, it is often said that doubts or ambiguities in statutes or home-rule documents should be resolved against the existence of any municipal power.[76] Sometimes it has been said that municipal powers should not be extended by unauthorized or unduly liberal definitions of words.[77] But the trend seems away from strict construction. In some jurisdictions, this rule of strict interpretation has been clearly abrogated by constitutional or statutory provision,[78] and in a number of other states, the courts themselves have rejected the doctrine.[79] Certainly, it is now generally agreed—and often emphasized—that powers should not be so strictly construed as to defeat legislative intent[80] or to hinder reasonable exercise of the city's general powers.[81] Beyond that, some cases are now saying or indicating that where a power is fairly inferable, it should be inferred rather than rejected.[82]

Another common rule of construction distinguishes between municipal powers that are legislative or governmental in nature and those that are "proprietary" (*i.e.*, corporate or private or "businesslike") in nature. As this differentiation is generally applied, it results in governmental powers being strictly construed[83] while proprietary powers, once

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not to include authority to issue moratoria on shoreline development where the state constitution gave that power to the state).

[76] City of Ottawa v. Carey, 108 U.S. 110, 2 S.Ct. 361, 27 L.Ed. 669 (1883); Whitmore v. Brown, 207 Cal. 473, 279 P. 447 (1929); City of Miami v. Kayfetz, 158 Fla. 758, 30 So.2d 521 (1947); City of Chicago v. Barnett, 404 Ill. 136, 88 N.E.2d 477 (1949); In re Piers Old Nos. 8, 9, 10 & 11, 228 N.Y. 140, 126 N.E. 809 (1920); City of Purcell v. Wadlington, 43 Okl. 728, 144 P. 380 (1914) (denying city the power to employ attorney to appear before regulatory commission to resist telephone rate increase). See Oregon Short Line Railroad Co. v. Village of Chubbuck, 83 Idaho 62, 357 P.2d 1101 (1960); In re Valley Deposit & Trust Co., 311 Pa. 495, 167 A. 42 (1933); Wilson v. City of Seattle, 122 Wash.2d 814, 863 P.2d 1336 (1993) (if there is any doubt as to whether power is granted, the power must be denied).

[77] City of Jackson v. Freeman-Howie, Inc., 239 Miss. 84, 121 So.2d 120 (1960); City of Brookfield v. Kitchen, 163 Mo. 546, 63 S.W. 825 (1901); Dotson v. Town of Gilbert, 129 W.Va. 130, 39 S.E.2d 108 (1946). See City of Portland v. Portland Railway, Light & Power Co., 80 Or. 271, 156 P. 1058 (1916).

[78] An example of a statutory provision is Iowa Code Ann. § 362.8 (1999) (city code to be liberally construed to effectuate its purposes). Cf., interpreting the New Jersey constitution, Chrinko v. South Brunswick Township Planning Bd., 77 N.J.Super. 594, 187 A.2d 221 (1963); Greggio v. City of Orange, 69 N.J.Super. 453, 174 A.2d 390 (1961), aff'd 37 N.J. 462, 181 A.2d 751; Fred v. Mayor & Council of Old Tappan, 10 N.J. 515, 92 A.2d 473 (1952).

[79] See City of Grass Valley v. Walkinshaw, 34 Cal.2d 595, 212 P.2d 894 (1949); Tousley v. Leach, 180 Minn. 293, 230 N.W. 788 (1930); State v. Hutchinson, *supra* note 74. Cf. Northern Pacific Railway Co. v. Weinberg, 53 F.Supp. 133 (D.Minn.1943) (municipalities retained power to determine number and qualifications of persons who must serve on a locomotive at railroad crossings within corporate limits). On the question of whether it is the courts or the legislature that should change the law as to the use of Dillon's Rule, see Csoka, The Dream of Greater Municipal Autonomy: Should the Legislature or the Courts Modify Dillon's Rule, a Common Law Restraint on Municipal Power?, 29 N.C. Central L.J. 194 (2007).

[80] See Robia Holding Corp. v. Walker, 257 N.Y. 431, 178 N.E. 747 (1931); Seafeldt v. Port of Astoria, 141 Or. 418, 16 P.2d 943 (1932). Cf. Burns v. City of Watertown, 126 Misc. 140, 213 N.Y.S. 90 (1925).

[81] Reams v. McMinnville, 155 Tenn. 222, 291 S.W. 1067 (1927). See Fullerton v. City of Des Moines, 147 Iowa 254, 126 N.W. 159 (1910).

[82] Liberis v. Harper, 89 Fla. 477, 104 So. 853 (1925); State ex rel. Ellis v. Tampa Waterworks Co., 56 Fla. 858, 47 So. 358 (1908); Kirkwood Drug Co. v. City of Kirkwood, 387 S.W.2d 550 (Mo.1965). Cf. Kyle v. Malin, 8 Ind. 34 (1856) (municipal corporations are to be favored by the courts). Many cases, of course, state that a city charter must be given a sensible, reasonable construction. See Salinas v. Pacific Telephone & Telegraph Co., 72 Cal.App.2d 494, 164 P.2d 905 (Dist.Ct.1946); Cochrane v. Mayor of Frostburgh, 81 Md. 54, 31 A. 703 (1895); In re Village of Kenmore, 59 Misc. 388, 110 N.Y.S. 1008 (1908); West v. Lysle, 302 Pa. 147, 153 A. 131 (1931).

[83] Certain Lots v. Town of Monticello, 159 Fla. 134, 31 So.2d 905 (1947); Higgins v. City of Galesburg, 401 Ill. 87, 81 N.E.2d 520 (1948); Rose v. Port of Portland, 82 Or. 541, 162 P. 498 (1917). Cf. State ex rel. City of Memphis v. Hackman, 273 Mo. 670, 202 S.W. 7 (1918); Pressel v. Ferris, 148 Misc. 910, 266 N.Y.S. 517 (1933).

granted, are more leniently interpreted in favor of the municipal authority.[84] The theory is that when a city acts as a business, it should be readily assumed to have the powers that private businesses enjoy.[85] However, the distinction is sometimes rejected;[86] some cases have observed that business powers not *usual* to the operation of a government should not be easily assumed to exist;[87] and there are even cases applying the governmental-proprietary distinction in a manner opposite that of the majority view: It can be reasoned that proprietary powers of a municipality are exceptional, or at least outside the scope of the government's primary purpose, and therefore should be strictly construed, while governmental powers, connected with the locality's main reasons for existence, should be liberally construed.[88]

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[84] Indiana Service Corp. v. Town of Warren, 206 Ind. 384, 189 N.E. 523 (1934); City of Des Moines v. Horrabin, 204 Iowa 683, 215 N.W. 967 (1927); Dolan v. Louisville Water Co., 295 Ky. 291, 174 S.W.2d 425 (1943); State ex rel. White v. City of Cleveland, 125 Ohio St. 230, 181 N.E. 24 (1932). Cf. Mines v. Del Valle, 201 Cal. 273, 257 P. 530 (1927); City of Bowling Green v. Kirby, 220 Ky. 839, 295 S.W. 1004 (1927); Wilke v. City of Duluth, 172 Minn. 374, 215 N.W. 511 (1927); Butler v. Karb, 96 Ohio St. 472, 117 N.E. 953 (1917); Municipality of Metropolitan Seattle v. Division 587, Amalgamated Transit Union, 118 Wash.2d 639, 826 P.2d 167 (1992) (when municipality acts as a business, its powers are broadly construed; thus, power to enter into binding wage agreements with employees, including agreement to submit labor disputes to interest arbitration, was found). Washington State has been particularly inclined to apply the governmental-proprietary distinction. See Pacific Northwest Shooting Park Ass'n v. City of Sequim, 158 Wash.2d 342, 144 P.3d 276 (2006) (municipality acts in a proprietary capacity when it acts as proprietor of a business enterprise for private advantage of the municipality); Branson v. Port of Seattle, 152 Wash.2d 862, 101 P.3d 67 (2004) (acts of setting airport fees and entering into contracts are generally considered proprietary); Okeson v. City of Seattle, 150 Wash.2d 540, 78 P.3d 1279 (2003) (provision of streetlights through electric utility was a governmental function, even though operation of utility itself was proprietary). (After remand of the *Okeson* case *supra*, it was held that art projects funded with the electric utility's funds were properly limited to such projects that benefited the utility. Okeson v. City of Seattle, 130 Wash.App. 814, 125 P.3d 172 (2005).) In City of Tacoma v. City of Bonney Lake, 173 Wash.2d 584, 269 P.3d 1017 (2012), the court held that a city's decision to operate a utility is proprietary, including its right to contract for any lawful condition, while a city's decision to grant a franchise is governmental. Cf. Skagit County Public Hospital Dist. No. 304 v. Skagit County Public Hospital Dist. No. 1, 305 P.3d 1079 (Wash. 2013) (whether a municipal act is governmental or proprietary depends largely on whether the act is for the common good or for the specific benefit or profit of the corporate entity; rural public hospital district operates in a governmental capacity when providing health care).

[85] See Nelson-Johnston & Doudna v. Metropolitan Utilities District, 137 Neb. 871, 291 N.W. 558 (1940) (city operating municipal gas plant has implied power to sell gas appliances). Cf. Burns v. City of Seattle, 161 Wash.2d 129, 164 P.3d 475 (2007) (power to grant a franchise is a governmental power, but power of city to form an electric utility is a proprietary power, which the city may exercise very much in the same way as a private individual; city's municipal electric utility had power to enter agreement promising to pay other cities a percentage of revenues received from other cities' power customers in exchange for other cities' promise to forbear from establishing their own municipal electric utilities).

[86] See MacRae v. Selectmen of Concord, 296 Mass. 394, 6 N.E.2d 366 (1937).

[87] Fort Scott v. W. G. Eads Brokerage Co., 117 F. 51 (8th Cir.1902), cert. denied 187 U.S. 647, 23 S.Ct. 846, 47 L.Ed. 348; Richards v. Wheeler, 10 Cal.App.2d 108, 51 P.2d 436 (Dist.Ct.1935); City of Rockford v. Hey, 366 Ill. 526, 9 N.E.2d 317 (1937). Cf. Williams v. Town of Dunnellon, 125 Fla. 114, 169 So. 631 (1936); City of Somerville v. Dickerman, 127 Mass. 272 (1879) (where city takes land for street, agreement to submit assessment of damages to arbitration is void).

[88] See Southern Utilities Co. v. City of Palatka, 86 Fla. 583, 99 So. 236 (1923), aff'd 268 U.S. 232, 45 S.Ct. 488, 69 L.Ed. 930. Cf. Arnold v. City of Chicago, 387 Ill. 532, 56 N.E.2d 795 (1944); Shreveport v. Southwestern Gas & Electric Co., 151 La. 864, 92 So. 365 (1922); Bull v. McQuie, 342 Mo. 851, 119 S.W.2d 204 (1938). In City of Grangeville v. Haskin, 116 Idaho 535, 777 P.2d 1208 (1989), the court noted that the general rule in Idaho is to construe proprietary powers of municipalities more strictly than governmental and thus held that a city had no implied power to impose a lien for overdue charges for city utility services. Cf. Chemical Bank v. Washington Pub. Power Supply Sys., 99 Wash.2d 772, 666 P.2d 329 (1983), appeal after remand 102 Wash.2d 874, 691 P.2d 524 (1984), cert. denied 471 U.S. 1065, 105 S.Ct. 2140, 85 L.Ed.2d 497 (1985) (implied power of municipality to pledge revenues to pay for electric generating facilities did not include implied power to agree, in exchange for a share of power generated by contemplated nuclear power plants, that municipalities would unconditionally guarantee payments on revenue bonds secured by pledge of utility revenues). See also Plummer v. City of Fruitland, 140 Idaho 1, 89 P.3d 841 (2003) (rule that if a power is in doubt, the doubt must

Where courts are making a strict construction of municipal powers, they also sometimes seize on the general principle that an express enumeration of powers is assumed exclusive, at least to the exclusion of powers not necessarily implied.[89] And sometimes, even if the state has not totally pre-empted the field or even if there is no substantial inconsistency with state law, courts may be less willing to infer powers in areas where the state itself has legislated.[90]

While many of these traditional rules help justify strict constructions against cities, the current trend is clearly toward more liberal interpretations, as municipalities feel called upon to perform an increasing array of activities.

Where express powers of a municipality are concerned, questions of interpretation, of course, can still arise. But usual rules of statutory construction are normally applied,[91] and the problems are less complex than those connected with implied powers. What, however, of that third and final part of Dillon's Rule, dealing with powers essential to the municipality's objects and purposes? This has not been of great use, but has occasionally been employed in recognizing municipal power to do something considered necessary to the effective operation of a government, such as removing an officer guilty of official misconduct,[92] or something necessary to the security of local residents, such as providing fire and police protection.[93] It has been said that while the first two parts of Dillon's Rule can be applied also in determining the powers of public *quasi*-corporations (such as counties, townships, etc.), the *third* part of Dillon's Rule does not apply to those entities, whose powers (since those governments are only arms of the state) are to be

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be resolved against the city is especially applicable to proprietary functions, such as garbage collection services).

[89] Canavan v. Messina, 31 Conn.Sup. 447, 334 A.2d 237 (1973); City of Pensacola v. Fillingim, 46 So.2d 876 (Fla.1950); Village of Lombard v. Illinois Bell Telephone Co., 405 Ill. 209, 90 N.E.2d 105 (1950); City of Humboldt v. Knight, 255 Iowa 22, 120 N.W.2d 457 (1963); George v. City of Raceland, 279 Ky. 316, 130 S.W.2d 825 (1939); Sebewaing Industries, Inc. v. Village of Sebewaing, 337 Mich. 530, 60 N.W.2d 444 (1953); Edwards v. Mayor & Council of Moonachie, 3 N.J. 17, 68 A.2d 744 (1949).

[90] See Allen v. City of Norfolk, 196 Va. 177, 83 S.E.2d 397 (1954), striking down a city anti-lottery ordinance. One provision of the ordinance *was* found inconsistent with state law, but the entire ordinance was initially held invalid. On rehearing, the portions of the ordinance not inconsistent with state law were upheld. See Note, Municipal Corporations—Section of City Ordinance Making Possession of Certain Indicia of a Lottery Prima Evidence of Guilt Held Invalid Because Inconsistent with State Statute, 40 Va.L.Rev. 966 (1954). Cf. Commonwealth v. Wolbarst, 319 Mass. 291, 65 N.E.2d 552 (1946) (state had pre-empted field of regulation of gambling). See also City of Seattle v. Hogan, 53 Wash.App. 387, 766 P.2d 1134 (1989) (city ordinance imposing greater penalty for misdemeanor of attempted vehicle prowling than was imposed under state law found to violate equal protection). As to state and municipal regulation of the largely *federal* field of immigration, see Comment, Emma Lazarus Weeps: State-Based Anti-Immigration Initiatives and the Federalism Challenge 80 U.M.K.C. L. Rev. 905 (2012). See generally Marzen, Hispanics in the Heartland: The Fremont, Nebraska, Immigration Ordinance and the Future of Latino Civil Rights, 29 Harv. J. Racial & Ethnic Just. 69 (2013); Varley & Snow, Don't You Dare Live Here: The Constitutionality of the Anti-Immigrant Employment and Housing Ordinances at Issue in *Keller v. City of Fremont*, 45 Creighton L. Rev. 503 (2012). See also Section 7.4, note 52, *supra*. On discrimination against immigrant home-buyers, see Section 20.8, note 93.

[91] See 2A McQuillin, Municipal Corporations §§ 10.10, 10.18–.26 (3d rev. ed. 1996).

[92] Hawkins v. Common Council of Grand Rapids, 192 Mich. 276, 158 N.W. 953 (1916).

[93] Ellinwood v. City of Reedsburgh, 91 Wis. 131, 64 N.W. 885 (1895). Cf. Denver & Salt Lake Railway Co. v. Moffat Tunnel Improvement District, 35 F.2d 365 (D.Colo. 1929); Morley Bros. v. Carrollton Township, 305 Mich. 285, 9 N.W.2d 543 (1943); Palisades Properties, Inc. v. Brunetti, 44 N.J. 117, 207 A.2d 522 (1965); Y & Y Cab Service v. Oklahoma City, 167 Okl. 134, 28 P.2d 551 (1933); Huff v. City of Wichita Falls, 121 Tex. 281, 48 S.W.2d 580 (1932); State ex rel. Hunter v. Superior Court, 34 Wn.2d 214, 208 P.2d 866 (1949). Cf. Nance v. Mayflower Tavern, Inc., 106 Utah 517, 150 P.2d 773 (1944). But cf. Public Serv. Co. v. Town of West Newbury, 835 F.2d 380 (1st Cir.1987) (issuance of permits allowing nuclear power plant to erect emergency warning sirens on utility poles held not within town's inherent authority).

more strictly limited.[94] But some cases have applied the third part of Dillon's Rule even to such quasi-corporate entities as school districts and counties.[95]

§ 8.5 Exercise of Municipal Powers—"Reasonableness" Limitation

Assuming that a municipality has a particular power, how is it to be exercised? It is usually said that unless the power's exercise is clearly limited by some law, the method of exercise is left to the reasonable discretion of local officials.[96] Any "appropriate" mode of execution may be employed,[97] and there is a presumption of the correctness and validity of actions taken by municipal authorities under any grant of power.[98] There is a vague, general standard of reasonableness that the actions of local governments must meet; but seldom is it applied so as to strike down any actions. Thus, where such a government acts in a legislative capacity, as by passing an ordinance, the action will not be found "ultra vires" (*i.e.*, outside the scope of the government's authority) so long as it is "fairly debatable" whether or not the government is acting properly.[99] It has been said

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[94] Wilson v. School District, 328 Pa. 225, 195 A. 90 (1937). See SDI, Inc. v. Pivotal Parker Commercial, LLC, 339 P.3d 672 (Colo. 2014) (as creatures of statute, special districts possess only those powers expressly conferred on them by constitution or statute, as well as the incidental implied powers reasonably necessary to perform the express powers).

[95] See Seattle High School Chapter No. 200 v. Sharples, 159 Wash. 424, 293 P. 994 (1930). Cf. Goodman v. School District No. 1, 32 F.2d 586 (10th Cir. 1929) (school district could operate restaurant); Commonwealth v. Fayette County, 239 Ky. 485, 39 S.W.2d 962 (1931) (county could purchase fire truck). The "essential powers" portion of Dillon's Rule was held applicable to a public utility district, which was treated as a form of municipal corporation, in Hite v. Public Util. Dist. No. 2, 112 Wash.2d 456, 772 P.2d 481 (1989) (lien to secure payment of electricity charges was within district's power; proprietary nature of activity stressed by court, which followed majority view that proprietary powers are to be construed more liberally than governmental).

[96] Walker v. Jameson, 140 Ind. 591, 37 N.E. 402 (1894); Webb v. City of Meridian, 195 So.2d 832 (Miss.1967); City of Flordell Hills v. Hardekopf, 271 S.W.2d 256 (Mo.App.1954); Page v. Town of Gallup, 26 N.M. 239, 191 P. 460 (1920); Matter of Assessment of Improvement of Lateral Sewer, 24 Misc.2d 618, 194 N.Y.S.2d 279 (1959); Lakota Oil & Gas Co. v. City of Casper, 57 Wyo. 329, 116 P.2d 861 (1941). See Red River Construction Co. v. City of Norman, 624 P.2d 1064 (Okl.1981) (if reasonableness is fairly debatable, action comes within ambit of legislative discretion even if compliance with edict is burdensome—but ordinance restricting weight of sand trucks here found unreasonable).

[97] Kindricks v. Machin, 135 Ark. 459, 205 S.W. 815 (1918); Heman v. Schulte, 166 Mo. 409, 66 S.W. 163 (1901), aff'd 189 U.S. 507, 23 S.Ct. 852, 47 L.Ed. 922; Lower Colorado River Authority v. Chemical Bank & Trust Co., 185 S.W.2d 461 (Tex.Civ.App.1945), aff'd 144 Tex. 326, 190 S.W.2d 48. Cf. Meyers v. New York State Division of Housing & Community Renewal, 36 A.D.2d 166, 319 N.Y.S.2d 522 (1971).

[98] Austin Western Road Machinery Co. v. City of New Madrid, 185 S.W.2d 850 (Mo.App.1945); Philippi v. Tygarts Valley Water Co., 99 W.Va. 473, 129 S.E. 465 (1925).

[99] See City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 486, 3 So.2d 364, 366 (1941); King v. City of Tulsa, 415 P.2d 606 (Okl.Cr.1966).

It has been held that where a municipal ordinance is expressly authorized by statute or by city charter provision, there can be no attack on its reasonableness, apart from constitutional arguments (such as the due process requirement that penal ordinances be reasonably definite and certain, and the equal protection argument that classification be based on reasonable differences). See Standard Oil Co. v. City of Charlottesville, 42 F.2d 88 (4th Cir.1930); Hagerty v. City of Chicago, 360 Ill. 97, 195 N.E. 652 (1935); People ex rel. Doyle v. Atwell, 232 N.Y. 96, 133 N.E. 364 (1921), error dism'd 261 U.S. 590, 43 S.Ct. 410, 67 L.Ed. 814; Bungalow Amusement Co. v. City of Seattle, 148 Wash. 485, 269 P. 1043 (1928). Cf. State v. Rice, 158 N.C. 635, 74 S.E. 582 (1912). But municipal legislation enacted under general or implied grants of power is often said to be subject to a test of reasonableness in addition to the test of constitutionality. The test of reasonableness, however, usually amounts only to a requirement that the ordinance appear fair, general, and not unduly oppressive. See Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); Klever Shampay Karpet Kleaners, Inc. v. City of Chicago, 323 Ill. 368, 154 N.E. 131 (1926); Commonwealth v. Kimball, 299 Mass. 353, 13 N.E.2d 18 (1938); People v. Kuc, 272 N.Y. 72, 4 N.E.2d 939 (1936); State ex rel. Carter v. Harper, 182 Wis. 148, 196 N.W. 451 (1923). Even where an ordinance *is* expressly authorized by statute or

that municipal *legislation* will be invalidated as unreasonable only if it is found an arbitrary fiat or whimsical in nature.[100] Where *non*-legislative actions of the locality are concerned, as with the internal administration of a city's government, much is also left to the discretion of officials, and conduct will be declared invalid only if malicious, capricious, or corrupt.[101] Of course, even if action is found reasonable so as not to be ultra vires, it still may be challenged on constitutional grounds of due process and equal protection, under which standards of reasonableness are also often employed; thus, the "reasonableness" test used in the "ultra vires" sense of determining whether the exercise of a power is within the scope of local authority blends sometimes with "reasonableness" as applied under constitutional requirements.[102]

One area in which the "reasonableness" (in the "ultra vires" sense) of city action is often called into question is the city's entering into contracts the performance of which extends into the future. The city, it has been said, cannot bind itself perpetually or for an unreasonable length of time.[103] But members of a city council, or other governing board, must often act so as to secure leases, utility service, etc. for a municipality well into the future; so what is the test of such members' power to bind their successors? A distinction is drawn between the governmental and the proprietary activities of the locality. Where the local unit acts in a governmental or legislative capacity, or a matter of policy-making "discretion" is involved, the rule of thumb is that the council cannot, in the absence of some express grant of power, bind the city beyond the present council's own term.[104] But where the council acts in a business-type or proprietary area of activity,

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charter, the *details* of the ordinance, if not themselves specifically authorized, may be challenged as an unreasonable exercise of power. People ex rel. Busching v. Ericsson, 263 Ill. 368, 105 N.E. 315 (1914).

[100] Brae Burn, Inc. v. City of Bloomfield Hills, 350 Mich. 425, 432, 86 N.W.2d 166, 170 (1957). See McConnell v. Town Clerk of Tipton, 704 P.2d 479 (Okl.1985) (only legitimate basis for judicial interference with the legislative functions of a municipality occurs when the municipality has acted unreasonably, arbitrarily, or in such a way as to violate Equal Protection or Due Process); City of Healdton v. Beall, 341 P.2d 583 (Okl.1959). Cf. Homes Unlimited, Inc. v. City of Seattle, 90 Wn.2d 154, 579 P.2d 1331 (1978).

[101] Wolgamood v. Village of Constantine, 302 Mich. 384, 4 N.W.2d 697 (1942). Cf. Atlas Life Insurance Co. v. Board of Education, 83 Okl. 12, 200 P. 171 (1921). See also Johnson v. Central Valley School Dist. No. 356, 97 Wash.2d 419, 645 P.2d 1088 (1982), cert. denied 459 U.S. 1107, 103 S.Ct. 732, 74 L.Ed.2d 955 (1983), distinguishing the ultra vires acts of a municipality that are done wholly without legal authorization or in direct violation of statute from those acts which are merely performed in an irregular manner or through unauthorized procedures. An example of municipal action that was held arbitrary and unreasonable is found in Lane Ranch Partnership v. City of Sun Valley, 145 Idaho 87, 175 P.3d 776 (2007), where a city had misinterpreted its ordinances by unnecessarily requiring design review or subdivision approval in order for a landowner to construct a private road. The city's actions were found to be an abuse of discretion because the city had acted without a reasonable basis in fact or law, entitling the landowner to attorney's fees.

[102] See Petstel, Inc. v. County of King, 77 Wn.2d 144, 459 P.2d 937 (1969), stating various "ultra vires" and constitutional criteria of "reasonableness" by which legislation should be judged. Cf. Montgomery v. Oklahoma City, 195 Okl. 312, 157 P.2d 454 (1945) (ordinance regulating a business will be declared invalid only if passes beyond limits of police power and infringes on basic rights). See generally Stason & Kauper, Municipal Corporations 123–24 n. 4 (1959).

[103] See Flynn v. Little Falls Electric & Water Co., 74 Minn. 180, 77 N.W. 38 (1898), aff'd 74 Minn. 180, 78 N.W. 106 (city could not enter into 30-year contract with company that was to furnish and maintain fire hydrants). See also Section 25.3 and cases cited therein.

[104] See Omaha Water Co. v. City of Omaha, 147 F. 1 (8th Cir.1906), appeal dism'd 207 U.S. 584, 28 S.Ct. 262, 52 L.Ed. 351; Illinois Trust & Savings Bank v. Arkansas City, 76 F. 271 (8th Cir. 1896); City of Riviera Beach v. Witt, 286 So.2d 574 (Fla. App.1973) (employment of city prosecutor); Westminster Water Co. v. Mayor of Westminster, 98 Md. 551, 56 A. 990 (1904); Columbus Gaslight & Coke Co. v. City of Columbus, 50 Ohio St. 65, 33 N.E. 292 (1893). See Edsall v. Wheler, 29 A.D.2d 622, 285 N.Y.S.2d 306 (1967) (retention of engineers; contract void). Cf. Town of Tempe v. Corbell, 17 Ariz. 1, 147 P. 745 (1915); East St. Louis & Interurban Water Co. v. City of Belleville, 360 Ill. 490, 196 N.E. 442 (1935) (annual rental for fire hydrants); Hansen v. City of Havre, 112 Mont. 207, 114 P.2d 1053 (1941) (no discretion left council to make up deficiency; so contract binding successors is valid); Sherman v. City of Picher, 201 Okl. 229, 204 P.2d 535 (1949). But see

it is governed by basically the same rules that would control those operating a private business,[105] and a valid and binding contract may be made for any reasonable period of time.[106] Thus, a local governing body has been allowed to enter into leases of property extending beyond the term of any present member of the council.[107] The appointment and removal of officers is generally held a governmental function as to which contractual commitments may not be made beyond the term of those presently on the council.[108] But where the hiring of mere "employees" such as schoolteachers is concerned (that is, the hiring of persons not vested with any of the governing authority), it is usually held that

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Bowley v. City of Omaha, 181 Neb. 515, 149 N.W.2d 417 (1967) (contract granting use of park to city valid though related to governmental function and extended beyond term of city officials). See generally Griffith, Local Government Contracts: Escaping from the Governmental/Proprietary Maze, 75 Iowa L. Rev. 277 (1990).

Where members of the municipal legislative body are serving *staggered* terms, it is possible to uphold a governmental contract extending beyond the term of some or all of the members by applying the theory that the legislative body is a continuing one. See Daly v. Stokell, 63 So.2d 644 (Fla.1953). But where the existing *majority* may be ousted in an upcoming election, *most* cases invalidate a governmental contract extending beyond the current terms of the majority. See Board of Education v. Gulick, 398 S.W.2d 483 (Ky.1966); Duggan v. City of Taunton, 360 Mass. 644, 277 N.E.2d 268 (Mass. 1971); Thomas v. Board of Education, 89 N.J.Super. 327, 215 A.2d 35 (1965), aff'd 46 N.J. 581, 218 A.2d 630. Cf. Independent School District v. Pennington, 181 Iowa 933, 165 N.W. 209 (1917) (contract invalid where it was totally within term of succeeding board). But see King City Union High School District v. Waibel, 2 Cal.App.2d 65, 37 P.2d 861 (Dist.Ct.1934). Cf. Board of Education v. Finne, Lyman & Finne, 88 N.J.Super. 91, 210 A.2d 794 (1965) (rejecting idea that school board with staggered terms is continuous body but applying rule of reasonableness to uphold an architect's contract).

In Brunick v. Clatsop County, 204 Or.App. 326, 129 P.3d 738 (2006), it was held that an elected governing body of finite tenure which enters into a contract involving a governmental function cannot bind a subsequently elected body; and thus, where an elected body or officer makes "just cause" the termination standard for an employee who performs governmental functions, the "just cause" standard does not bind a subsequently elected body or officer because, even if that standard becomes part of the employment contract, the subsequently elected body or officer is not bound by the contract.

[105] See City of Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 19 S.Ct. 77, 43 L.Ed. 341 (1898); McBean v. City of Fresno, 112 Cal. 159, 44 P. 358 (1896); City of Vincennes v. Citizens' Gaslight Co., 132 Ind. 114, 31 N.E. 573 (1892); Boerth v. Detroit City Gas Co., 152 Mich. 654, 116 N.W. 628 (1908); Picket Publishing Co. v. Board of Commissioners, 36 Mont. 188, 92 P. 524 (1907) (public printing). But cf. Shelden v. Butler County, 48 Kan. 356, 29 P. 759 (1892) (public printing; contract could not extend beyond term of present council).

[106] City of Detroit v. Detroit Citizens' Street Railway Co., 184 U.S. 368, 22 S.Ct. 410, 46 L.Ed. 592 (1902); City of Valparaiso v. Gardner, 97 Ind. 1 (1884). Occasionally, this rule of reasonableness is applied even to contracts that may be of a *governmental* nature. See Board of Education v. Finne, Lyman & Finne, *supra* note 104 (rejecting governmental-proprietary distinction and upholding contract for planning and constructing a new school). But see Uintah Basin Med. Center v. Hardy, 2002 Utah 92, 54 P.3d 1165 (2002) (court declined to repudiate governmental/proprietary test and held that contract for pathology services between doctor and county hospital involved a proprietary function and therefore was enforceable against successor boards of trustees if it was of a reasonable duration).

[107] Lease of city property to others: City of Biddeford v. Yates, 104 Me. 506, 72 A. 335 (1908); Baily v. City of Philadelphia, 184 Pa. 594, 39 A. 494 (1898). Cf. Macon Ambulance Service, Inc. v. Snow Properties, Inc., 218 Ga. 262, 127 S.E.2d 598 (1962) (five-year exclusive franchise to operate ambulance service found unreasonably long). (Franchise contracts—especially those granting exclusive rights—may be subject to especially strict scrutiny, and are often subject to statutory or constitutional length limitations. See generally Section 5.2 *supra*.) Lease of property from others by city: Gale v. Village of Kalamazoo, 23 Mich. 344 (1871); Ambrozich v. City of Eveleth, 200 Minn. 473, 274 N.W. 635 (1937).

[108] Millikin v. Edgar County, 142 Ill. 528, 32 N.E. 493 (1892); Board of Commissioners v. Taylor, 123 Ind. 148, 23 N.E. 752 (1890); Water Commissioners v. Cramer, 61 N.J.L. 270, 39 A. 671 (1898); Bergeron v. Jackson, 94 Vt. 91, 108 A. 912 (1920). Cf. Serna v. Pima County, 185 Ariz. 380, 916 P.2d 1096 (Ariz.App.1995) (county could not enter into contract with county manager extending beyond political life of county's governing board where contract was for personal or professional services for board itself). But if a contract is not for services to be rendered during a particular period but for the performance of a specific task, the contract may be valid though the performance is likely to extend, and does extend, beyond the term of the council members who make the contract. See Denio v. City of Huntington Beach, 22 Cal.2d 580, 140 P.2d 392 (1943).

no governmental power is being exercised in such appointment, and a contract may be made for any reasonable period.[109]

Since contracts involving utility service are of a proprietary nature and must only meet the "reasonableness" test as to length of time, contracts for water or sewer service have been upheld though the city had committed itself for 30 years[110] or some other substantial period,[111] or even indefinitely.[112] Such contracts are especially likely to be upheld if the city has received, in return for the service it provides, some substantial and equally long-lasting benefit.[113]

§ 8.6 Exercise of Municipal Powers—Territorial Limitation

Assuming that a municipality possesses a specific power and exercises it reasonably, within what territory does the municipality have authority to act? We start with the general rule that a local government has no extraterritorial powers and cannot, without express authorization from the state, extend its regulations or the force of its laws outside its own boundaries.[114] But it must be noted that (1) statutes often do

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[109] Gates v. School-District, 53 Ark. 468, 14 S.W. 656 (1890); Manley v. Scott, 108 Minn. 142, 121 N.W. 628 (1909). See Annot., Power of Board to Appoint Officer or Make Contract Extending Beyond Its Own Term, 70 A.L.R. 794, 802 (1931).

[110] Little Falls Electric & Water Co. v. City of Little Falls, 102 F. 663 (C.C. Minn. 1900), upholding as reasonable the same contract that, on demurrer, was declared unreasonably long in the *Flynn* case decided by the Minnesota Supreme Court, *supra* note 103. Cf. Gillam v. City of Fort Worth, 287 S.W.2d 494 (Tex.Civ.App.1956), ref'd n. r. e. (ten-year contract to supply water to another city).

[111] Creston Waterworks Co. v. City of Creston, 101 Iowa 687, 70 N.W. 739 (1897); Oconto City Water-Supply Co. v. City of Oconto, 105 Wis. 76, 80 N.W. 1113 (1899). See City of Phoenix v. Long, 158 Ariz. 59, 761 P.2d 133 (App. 1988) (agreement between six cities and two public utilities granting the utilities options, good for 67 years, to purchase sewage effluent upheld). See generally Annot., Power of Board to Make Appointment to Office or Contract Extending Beyond Its Own Term, 149 A.L.R. 336 (1944); Annot., Power of Board to Appoint Officer or Make Contract Extending Beyond Its Own Term, 70 A.L.R. 794 (1931).

[112] City of Des Moines v. City of West Des Moines, 239 Iowa 1, 30 N.W.2d 500 (1948), noted 34 Iowa L.Rev. 121 (1948) (contract of indefinite duration to supply water to another city at a set price).

[113] See City of Gainesville v. Board of Control, 81 So.2d 514 (Fla.1955), noted 35 Neb.L.Rev. 140 (1956), upholding a contract under which the city agreed to furnish water free to the University of Florida; the court interpreted this to mean the free service would last so long as the University remained in Gainesville.

[114] City of Sedalia ex rel. Ferguson v. Shell Petroleum Corp., 81 F.2d 193 (8th Cir.1936); Jones v. Hines, 157 Ala. 624, 47 So. 739 (1908); City of Wichita v. Clapp, 125 Kan. 100, 263 P. 12 (1928); Summit Township v. City of Jackson, 154 Mich. 37, 117 N.W. 545 (1908); Taylor v. Dimmitt, 336 Mo. 330, 78 S.W.2d 841 (1934); Light v. City of Danville, 168 Va. 181, 190 S.E. 276 (1937). See City of Pueblo v. Flanders, 122 Colo. 571, 225 P.2d 832 (1950); Capital Elec. Line Builders, Inc. v. Lennen, 232 Kan. 379, 654 P.2d 464 (1982), modified 232 Kan. 652, 658 P.2d 365 (1983) (statute governing local retailers' sales tax construed as referring to place where services were actually performed, thus avoiding an interpretation that would have unconstitutionally granted local units power to collect the tax on services outside their jurisdiction); Hauser Lake Rod & Gun Club v. City of Hauser, 396 P.3d 689 (Idaho 2017) (city acted without reasonable basis in fact or law by attempting to enforce its code provision outside city limits on non-resident). Cf. McClain v. City of South Pasadena, 155 Cal.App.2d 423, 318 P.2d 199 (Dist.Ct.1957). But cf. Butler v. City of Little Rock, 231 Ark. 834, 332 S.W.2d 812 (1960) (city planning commissions given jurisdiction over land within 5 miles of municipal limits; act upheld); City of Union Gap v. Printing Press Properties L.L.C., 409 P. 3d 239 (Wash. App. 2018) (city, which designed, constructed, and maintained boulevard, had authority to enter into development agreement with owner of commercial property abutting the boulevard that covered owner's entire tract of land, even though portion of owner's land was located outside city limits when agreement was executed).

Generally, a police officer's authority (to make arrests, searches, etc.) does not extend beyond the boundaries of the officer's jurisdiction, with three often-recognized exceptions: (1) when the officer is in hot pursuit of a suspect or escapee, (2) when one municipality or other governmental unit has asked for assistance from another, pursuant to a statute, and (3) when an officer is serving an arrest warrant. See State of Oklahoma v. Keffe, 394 P.3d 1272 (Okla. Crim. App. 2017); United States of America v. Sawyer, 92 P.3d 707 (Okla. Crim. App. 2004) (police officers acting outside their jurisdiction under color of law cannot legally obtain consent to search). Cf. Shaw v. Oklahoma City, 380 P. 3d 894 (Okla.Civ. App. 2016) (police officers had probable cause to arrest or seize off-duty officer from another city). Compare State of Kansas v. Vrabel, 347 P. 3d 201

expressly authorize municipalities to exercise specified police powers, and the power of eminent domain for certain purposes, outside city limits, at least within a certain radius of the city,[115] and (2) it has been held that if a power expressly granted a municipality *cannot* be exercised without its going outside its corporate boundaries, the authority to act extraterritorially may even be implied.[116] Thus, where a city has express power to provide sewers and drains and it is essential to the well-being of city inhabitants that drainage be removed from city limits, an implied power can be found in the city government to contract for the construction of the necessary plants outside the municipal borders.[117]

A municipality's laws ordinarily extend only to its own boundaries. Thus, a city cannot impose against a non-resident its charter's requirement that a certain amount of notice be given before suit is filed against the city;[118] nor does a city, without express

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(Kan. 2015) (Kansas law recognizes county-bordering-municipalities exception, allowing law enforcement officers from any jurisdiction in county to exercise their police powers in any adjoining city within county but only when a crime has been or is being committed in view of the intruding officer). As to *state* jurisdiction, see Florey, State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation, 84 Notre Dame L. Rev. 1057 (2009).

[115] See White v. City of Decatur, 225 Ala. 646, 144 So. 873 (1932); Smeltzer v. Messer, 311 Ky. 692, 225 S.W.2d 96 (1949); State v. Rice, 158 N.C. 635, 74 S.E. 582 (1912); Salt Lake City v. Young, 45 Utah 349, 145 P. 1047 (1915); Kelley v. County of Brunswick, 200 Va. 45, 104 S.E.2d 7 (1958); Haddenham v. City of Laramie, 648 P.2d 551 (Wyo. 1982) (city found to have statutory authorization to restrict sale, offer for sale, or use, of fireworks within two miles of city limits). Cf. City of Naperville v. Wehrle, 340 Ill. 579, 173 N.E. 165 (1930). See generally Maddox, Extraterritorial Powers of Municipalities in the United States (1955); Anderson, The Extraterritorial Power of Cities, 10 Minn.L.Rev. 475, 564 (1926); Hemingway, The Extraterritorial Powers of a Municipality, 24 Ky.L.J. 107 (1936); Note, Extraterritorial Powers of Municipalities, 41 Harv.L.Rev. 894 (1928). See also Twin Falls County v. Hettinga, 151 Idaho 209, 254 P.3d 510 (App. 2011) (county code designated area bordering city as city impact area and stated that area of impact was to be governed by city's zoning ordinances). But cf. Hatman v. City of Mission, 43 Kan. App.2d 867, 233 P.3d 755 (2010) (under state law, only residents of city may sign a petition seeking a referendum election in the city or vote in any such election; mere property owners or business owners have no such rights).

In Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 99 S.Ct. 383, 58 L.Ed.2d 292 (1978), the Court upheld statutes which subjected areas near, but outside, city limits to city police, sanitary, and licensing laws, even though residents of the areas could not vote in city elections. Cf. May v. Town of Mountain Village, 969 P.2d 790 (Colo. App.1998) (extension of voting franchise to nonresident property owners did not violate state constitution or home-rule statute).

[116] Austin v. Shaw, 235 N.C. 722, 71 S.E.2d 25 (1952) (power implied to spend money on overpasses and underpasses outside city limits); Schneider v. Menasha, 118 Wis. 298, 95 N.W. 94 (1903) (power implied to acquire land outside city for manufacturing crushed rock to use on city streets). See Howard v. City of Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940). On the problem of whether or not a city, expressly authorized to operate an airport outside city limits, may zone the surrounding extraterritorial property, see Yara Engineering Corp. v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (1945) (no such power). See generally Note, Municipal Power Arising from the Ownership of Extraterritorial Property, 1957 U.Ill.L. Forum 99.

[117] Langley v. City Council of Augusta, 118 Ga. 590, 45 S.E. 486 (1903); City of Evansville v. Decker, 84 Ind. 325 (1882); City of Coldwater v. Tucker, 36 Mich. 474 (1877). See McBean v. City of Fresno, 112 Cal. 159, 44 P. 358 (1896). Cf. Cales v. State, 648 P.2d 838 (Okl. Crim. App. 1982) (firemen acting outside city limits while engaged in official firefighting duties were within protection of state statute prohibiting interference with firefighters). A municipal police officer is generally held to have power to act extraterritorially only if in hot pursuit of a person reasonably suspected of having committed an unlawful act within the officer's jurisdiction, or if in response to another municipality's request for assistance, or where—if authorized by statute—serving an arrest warrant. See Staller v. State, 932 P.2d 1136 (Okl. Crim. App. 1996) (peace officer outside his jurisdiction acts as private citizen, but evidence seized by such officer can be used in establishing probable cause for arrest warrant); Graham v. State, 560 P.2d 200 (Okl. Crim. App. 1977). But cf. Molan v. State, 614 P.2d 79 (Okl. Crim. App. 1980) (no power to make extraterritorial arrest where crime had occurred outside officer's jurisdiction, making "hot pursuit" rule inapplicable). See generally State v. Ross, 247 Kan. 191, 795 P.2d 937 (1990) (city police officer may exercise powers outside city limits when in fresh pursuit of suspect or where request for assistance made by officers of neighboring jurisdiction).

[118] City of Collinsville v. Brickey, 115 Okl. 264, 242 P. 249 (1925). Cf. City of Rockford v. Hey, 366 Ill. 526, 9 N.E.2d 317 (1937); Sproles v. City of Tulsa, 730 P.2d 9 (Okl. Crim. App. 1986) (to prevent reversal of

state authorization, have power to license and regulate businesses carried on outside the city.[119] But extraterritorial businesses often affect city residents, as where a dairy operated outside city limits sells its milk products within the city. The city may then have an obvious interest in protecting its residents against unwholesome products sold by such a concern. Three main generalizations may be made.

(1) A city may, despite the indirect effect of regulating extraterritorial operations, impose reasonable conditions and limitations on the sale of goods and offering of services within its own limits. Thus, in reasonably exercising its police power for protection of public health, safety, and welfare, it may require that milk sold in the city, whatever the milk's place of production, be pasteurized, that the seller be licensed, and that the pasteurization plant and/or sources of supply be inspected and approved by the city's own officials.[120] Where any substantial amount of extraterritorial regulation, or complex licensing procedure, is involved, express authorization—or at least authorization that can be clearly implied—may be required by some courts; but state authorization, by statute or through home-rule document, will, where clearly granted, be universally upheld against constitutional attack.[121]

(2) The extraterritorial effects of the city's laws must be for purposes of regulation, not revenue. Even with state authorization, a city cannot impose a tax on trades or occupations carried on outside city limits,[122] as this would amount to taxation without representation and to a taking of private property without due process of law.[123] Of course, once a business is carried on inside city limits, its sales and activities can be taxed even if the business's "home base" is elsewhere. And a license fee or tax may be imposed on such an "extraterritorial" business if this charge is not for revenue but to

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municipal court conviction, city must establish that violation of city ordinance occurred within municipal limits; insufficient that witnesses merely provided street names and name of a building).

[119] See State v. Nelson, 66 Minn. 166, 68 N.W. 1066 (1896); City of Norfolk v. Flynn, 101 Va. 473, 44 S.E. 717 (1903).

[120] State v. Nelson, *supra* note 119; Korth v. City of Portland, 123 Or. 180, 261 P. 895 (1927); Hill v. Fetherolf, 236 Pa. 70, 84 A. 677 (1912). See Otto Milk Co. v. Rose, 375 Pa. 18, 99 A.2d 467 (1953), noted 27 Temp. L.Q. 361 (1954). Cf. Wright v. Richmond County Department of Health, 182 Ga. 651, 186 S.E. 815 (1936) (upholding county regulation forbidding shipment of ice cream into a city within the county from points outside the inspection area of board of health, which covered area within radius of 60 miles from the city).

[121] See Jourdan v. City of Evansville, 163 Ind. 512, 72 N.E. 544 (1904). Cf. Standard Chemical & Oil Co. v. City of Troy, 201 Ala. 89, 77 So. 383 (1917); Chicago Packing & Provision Co. v. City of Chicago, 88 Ill. 221 (1878) (upholding statute allowing city to regulate packing houses within one mile of its borders—even if packing house was within another municipality). But there are limits to the amount of extraterritorial power that may be constitutionally conferred on a city. Thus, a city cannot be authorized to exercise all governmental control over outlying areas. See Malone v. Williams, 118 Tenn. 390, 103 S.W. 798 (1907). Cf. Brown v. City of Cle Elum, 145 Wash. 588, 261 P. 112 (1927) (city cannot be authorized to pass penal ordinance regarding lake outside city limits). See generally Annot., Extension of Police Power of Municipal Corporation Beyond Territorial Limits, 55 A.L.R. 1182 (1928).

[122] St. Charles v. Nolle, 51 Mo. 122 (1872) (charter only authorized licensing and taxing of wagons used within city; ordinance applied to wagons carrying goods from points in city to points outside, and vice versa); Western Union Telegraph Co. v. Fremont, 39 Neb. 692, 58 N.W. 415 (1894), reh. denied 43 Neb. 499, 61 N.W. 724. See generally Vigdor, Other People's Taxes: Nonresident Voters and Statewide Limitation of Local Government, 47 J.L. & Econ. 453 (2004).

[123] Robinson v. City of Norfolk, 108 Va. 14, 60 S.E. 762 (1908). See City of Argenta v. Keath, 130 Ark. 334, 197 S.W. 686 (1917). Cf. City of Sedalia ex rel. Ferguson v. Shell Petroleum Corp., 81 F.2d 193 (8th Cir.1936); Madden v. Governing Body of City of Lenexa, 239 Kan. 397, 721 P.2d 261 (1986) (without statutory authorization, municipality cannot assess land outside its boundaries for a local improvement). See also MeadWestvaco Corp. v. Illinois Dept. of Revenue, 553 U.S. 16, 128 S.Ct. 1498, 170 L.Ed.2d 404 (2008) (Due Process and Commerce Clauses bar states from taxing extraterritorial values, but state may tax an apportioned share of value generated by intrastate and extrastate activities of multistate enterprise, if those activities form part of a unitary business).

cover the cost of permissible regulation.[124] Thus, this limitation often means little more than that a city must have some territorial connection with a business in order to tax it, such as income earned or sales made within the city.

(3) Any distinctions drawn by the city between extraterritorial businesses and those conducted entirely within the city must be reasonable; there usually can be no flat prohibition of goods or services coming into the city from outside; and there can be no undue burden on interstate commerce. Thus, requirements that only milk pasteurized *within* the city be sold therein may be found unnecessarily and unreasonably strict,[125] as may a policy of inspecting only milk produced within or near the city and labeling all other milk "uninspected."[126] Where unbridled discretion is given some officer to decide what products are allowed to be sold in the city and what are not, a municipal ordinance will also be invalidated as unreasonable.[127]

With a 1951 decision of the U.S. Supreme Court,[128] much of the law as to extraterritorial effect of municipal regulation came to depend on interpretation of the Commerce Clause of the federal Constitution. It was there held that a city ordinance limiting inspection of pasteurization plants to those within 5 miles of the city square, and generally prohibiting the sale of milk from uninspected facilities, was invalid as a discriminatory burden on interstate commerce. But a municipal ordinance is not invalid merely because it has some incidental effect on an interstate business so long as no unreasonable burden is imposed,[129] and so long as there is no discrimination against interstate commerce.[130] For example, Michigan statutes prohibiting out-of-state

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[124] White v. City of Decatur, 225 Ala. 646, 144 So. 873 (1932); Standard Chemical & Oil Co. v. City of Troy, *supra* note 121.

[125] State ex rel. Larson v. City of Minneapolis, 190 Minn. 138, 251 N.W. 121 (1933). Cf. Buckler v. City of Geary, 174 Okl. 533, 51 P.2d 271 (1935) (ordinance prohibiting baker outside city from delivering products at wholesale to retail merchants of city is not within city's power); Prescott v. City of Borger, 158 S.W.2d 578 (Tex.Civ.App.1942), error ref'd (striking down ordinance prohibiting sale within city of milk pasteurized outside county in which city located). But see Lang's Creamery, Inc. v. City of Niagara Falls, 224 App.Div. 483, 231 N.Y.S. 368 (1928), aff'd 251 N.Y. 343, 167 N.E. 464, upholding a requirement that only milk pasteurized in the city be sold therein.

[126] Dean Milk Co. v. City of Aurora, 404 Ill. 331, 88 N.E.2d 827 (1949). Cf. Higgins v. City of Galesburg, 401 Ill. 87, 81 N.E.2d 520 (1948), noted 44 Ill.L.Rev. 241 (1949).

[127] City of Wewoka v. Rose Lawn Dairy, 202 Okl. 286, 212 P.2d 1056 (1949).

[128] Dean Milk Co. v. City of Madison, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951). Cf. Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 96 S.Ct. 923, 47 L.Ed.2d 55 (1976), striking down a Mississippi regulation that milk from another state could be sold in Mississippi only if the other state accepted milk produced and processed in Mississippi on a reciprocal basis. For earlier cases raising the interstate commerce implications of restrictive milk laws, see Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1935); Miller v. Williams, 12 F.Supp. 236 (D.Md. 1935).

[129] See City of Chicago v. Willett Co., 344 U.S. 574, 73 S.Ct. 460, 97 L.Ed. 559 (1953); Richard v. City of Mobile, 208 U.S. 480, 28 S.Ct. 372, 52 L.Ed. 581 (1908); Phillips v. City of Mobile, 208 U.S. 472, 28 S.Ct. 370, 52 L.Ed. 578 (1908); Atlantic & Pacific Telegraph Co. v. City of Philadelphia, 190 U.S. 160, 23 S.Ct. 817, 47 L.Ed. 995 (1903); Wiggins Ferry Co. v. East St. Louis, 107 U.S. 365, 2 S.Ct. 257, 27 L.Ed. 419 (1883). But cf. Harmon v. City of Chicago, 147 U.S. 396, 13 S.Ct. 306, 37 L.Ed. 216 (1893) (ordinance requiring license fee of tugboats involved in interstate and foreign commerce invalid).

[130] Under the Commerce Clause of the U.S. Constitution, a state may not discriminate between transactions on the basis of an interstate element, as by taxing a transaction or incident more heavily because it has crossed state lines. See Armco Inc. v. Hardesty, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984), reh. denied 469 U.S. 912, 105 S.Ct. 285, 83 L.Ed.2d 222 (1984) (West Virginia's wholesale gross receipts tax unconstitutionally discriminated against interstate commerce by exempting local manufacturers from tax). (The *Armco* decision *supra* was applied retroactively in National Mines Corp. v. Caryl, 497 U.S. 922, 110 S.Ct. 3205, 111 L.Ed.2d 740 (1990)). Cf. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994), on remand 208 A.D.2d 612, 617 N.Y.S.2d 482 (1994) (town ordinance requiring that all solid waste processed or handled within town be processed or handled at town's transfer station

discriminated against interstate commerce and was thus invalid); Oregon Waste Systems, Inc. v. Department of Environmental Quality, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994), on remand 319 Or. 251, 876 P.2d 749 (1994) (Oregon placed higher surcharge on disposal of out-of-state waste than imposed on in-state waste; held discriminatory on its face and thus violative of Commerce Clause). See generally Turner, The Flow Control of Solid Waste and the Commerce Clause: *Carbone* and Its Progeny, 7 Villanova Envtl. L.J. 203 (1996); Note, Solid Waste Flow Control and the Commerce Clause: Circumventing *Carbone*, 7 Albany L.J. Sci. & Tech. 185 (1996); Note, Environmental Law—Solid Waste Disposal: The Dormant Commerce Clause and Traditional Governmental Functions, 14 Temple Envtl. L. & Tech. J. 77 (1995); Note, The Need for a Rational State and Local Response to *Carbone*: Alternate Means to Responsible, Affordable Municipal Solid Waste Management, 18 Va. Envtl. L.J. 129 (1999). See also McCray, Commerce Clause Sanctions Against Taxation on Mail Order Sales: A Re-Evaluation, 17 Urban Law. 529 (1985), noting that most seller's and buyer's states do not impose a sales tax on interstate sales due to the Commerce Clause prohibitions laid down by the U.S. Supreme Court. For discussion of cases concerning imposition of state sales tax on mail order sales, see Politi and Karl, Recent Developments in State and Local Taxation, 19 Urban Law. 1067, 1067–81 (1987), which favors the overruling of National Bellas Hess, Inc. v. Department of Rev., 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967), the leading case holding that a state may not require collection of taxes on mail order sales made by an out-of-state company to residents of that state. See generally McCray, Overturning *Bellas Hess*: Due Process Considerations, 1985 B.Y.U.L. Rev. 265 (1985); Comment, The Imposition of Use Tax Collection Liability on Mail-Order Retailers: What Happens When the *Bellas Hess* Barrier Is Removed?, 23 Conn. L. Rev. 1087 (1991). In Quill Corp. v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), the Court further defined the nexus required between a mail order retailer and a state in order for the state to assert use tax jurisdiction and held that due process does not bar enforcement of state use tax collection statutes against mail order sellers merely because the seller lacks a physical presence in the state. But *Bellas Hess* was not overruled, and the physical presence requirement was retained for Commerce Clause purposes. See Note, *National Bellas Hess*, Inc.: Obsolescent Precedent or Good Law After *Quill Corp. v. North Dakota?*, 49 Wash. & Lee L. Rev. 1183 (1992). Finally, in South Dakota v. Wayfair, Inc., 138 S.Ct. 2080 (2018), the Court overruled *Bellas Hess* and *Quill* and held that an out-of-state seller's physical presence in the taxing state is not necessary for the state to collect and remit its sales tax.

Even when Congress has been silent on a matter, the Supreme Court has sometimes interpreted the Commerce Clause as forbidding state taxation of interstate commerce; this involves application of the so-called "dormant" Commerce Clause. Compare Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997) (property tax exemption statute that favored institutions that served mostly state residents held invalid under dormant Commerce Clause; discrimination against interstate commerce found), with Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995), noted 34 Duquesne L. Rev. 139 (1995) (sales tax on interstate bus tickets not prohibited). Cf. Comptroller of Treasury of Maryland v. Wynne, ___ U.S. ___, 135 S.Ct. 1787 (2015) (Maryland's income tax scheme violated dormant Commerce Clause by imposing double taxation on income earned by Maryland residents out of state, thus favoring intrastate commerce); American Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n, 545 U.S. 429, 125 S.Ct. 2419, 162 L.Ed.2d 407 (2005) (dormant Commerce Clause prevents state from jeopardizing welfare of nation as a whole by placing burdens on flow of commerce across its borders that commerce wholly within those borders would not bear; but Michigan imposition of flat annual fee on trucks engaging in intrastate commercial hauling did not violate dormant Commerce Clause where fee was imposed only on intrastate transactions and did not reflect effort to tax activity taking place outside of state). See generally Lirette & Viard, Putting Commerce Back in the Dormant Commerce Clause: State Taxes, State Subsidies and Commerce Neutrality, 24 J. L. & Pol'y 467 (2016); Zelinsky, Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition of Discriminatory Taxation, 29 Ohio N.U. L. Rev. 29 (2002); Note, State Taxation on Interstate Transactions and How to Comply with the Dormant Commerce Clause, 49 S.D. L. Rev. 341 (2004). See also Firestone, Does a Commuter's Choice of Where to Reside Implicate the Dormant Commerce Clause?, 49 N.Y.U. Sch. L. Rev. 943 (2004–05); Comment, Interstate Commerce and the Future of State Sales and Use Taxes, 54 Ala. L. Rev. 1393 (2003). It has been suggested that the dormant Commerce Clause may also come into play when local governments attempt to limit the size of retail stores, since the desire to protect local enterprises from competition is often one reason for the legislation. See Denning & Lary, Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine, 37 Urban Law. 907 (2005). See also Monk, Are Public Facilities Different from Private Ones?: Adopting a New Standard of Review of the Dormant Commerce Clause, 60 SMU L. Rev. 157 (2007), arguing that a law that does not discriminate between local and foreign private firms is presumptively non-discriminatory, and that if a substantial majority of the law's burdens fall on local residents, there should be a presumption of non-discrimination. Compare Day, The Expanded Concept of Facial Discrimination in the Dormant Commerce Clause Doctrine, 40 Creighton L. Rev. 497 (2007). As to the purpose of the dormant Commerce Clause, see Douglas Disposal, Inc. v. Wee Haul, LLC, 170 P.3d 508 (Nev.2007) (Clause does not protect any particular interstate business interest; it protects the flow of commerce between the states so that no single business interest, intrastate or interstate, unduly burdens that flow; county's exclusive franchise agreement upheld).

wineries from shipping wine directly to in-state consumers, but permitting in-state wineries to do so if licensed, was held to discriminate impermissibly against interstate commerce.[131]

While state or local laws that discriminate against interstate commerce are subject to strict judicial scrutiny and are generally invalid, a law that merely burdens interstate commerce will normally be upheld if it burdens local and interstate commerce equally and if the local benefits outweigh the burden on commerce. See Farber, State Regulation and the Dormant Commerce Clause, 18 Urban Law. 567 (1986). Cf. Department of Revenue of Kentucky v. Davis, 553 U.S. 328, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008) (state's exempting interest on bonds issued by state or its subdivisions from state income tax, while taxing interest on bonds from other states and their subdivisions, did not run afoul of dormant Commerce Clause; the exemption favored traditional government function without any differential treatment favoring local entities over substantially similar out-of-state interests); Goldberg v. Sweet, 488 U.S. 252, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989) (Illinois tax on interstate telecommunications which taxed only those calls originated or terminated in Illinois and charged to Illinois service address did not violate Commerce Clause since tax was fairly apportioned, didn't discriminate against interstate commerce, and was fairly related to services which state provided taxpayer); National Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124 (7th Cir.1995), cert. denied 515 U.S. 1143, 115 S.Ct. 2579, 132 L.Ed.2d 829 (1995) (no undue burdening of interstate commerce found in anti-graffiti ordinance that forbade sale or possession of spray paint or indelible jumbo magic markers); Shell Oil Co. v. City of Santa Monica, 830 F.2d 1052 (9th Cir.1987), cert. denied 487 U.S. 1235, 108 S.Ct. 2901, 101 L.Ed.2d 934 (1988) (no discrimination against interstate commerce, or subjection of such commerce to inconsistent regulation, found in city's oil pipeline franchise fee). Compare American Trucking Ass'n v. Scheiner, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987), on remand 528 Pa. 212, 596 A.2d 784 (1991) (Pennsylvania statutes imposing lump-sum annual taxes on out-of-state trucks held to discriminate against interstate commerce and thus contradict purpose of Commerce Clause). It has been held that Congress may authorize state regulations that burden or discriminate against interstate commerce, but any such authorizations must be clearly expressed. Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 123 S.Ct. 2142, 156 L.Ed.2d 54 (2003). As to the effect that *Department of Revenue of Kentucky v. Davis, supra,* has had, see Recent Development Note, To Form a More Perfect Union: Taxation, Economic Efficiency, and the Dormant Commerce Clause, 88 N.C.L. Rev. 311 (2009); Note, The Dormant Commerce Clause: Adopting a New Standard and a Return to Principle, 17 Wm. & Mary Bill Rights J. 1243 (2009). See generally Mank, The Supreme Court's New Public-Private Distinction Under the Dormant Commerce Clause: Avoiding the Traditional Versus Nontraditional Classification Trap, 37 Hastings Const. L.Q. 1 (2009). A good summary of Dormant Commerce Clause litigation is found in Zimmerman v. Hudson, 293 Kan. 332, 264 P.3d 989 (2011) (zoning amendment that prohibited development of commercial wind farms held not facially violative of that Clause; case was remanded to determine outcome of balancing of the burden and benefits).

For criticism of the *Department of Revenue of Kentucky* case, *supra,* see Zelinsky, The False Modesty of *Department of Revenue of Kentucky v. Davis*: Disrupting the Dormant Commerce Clause Through the Traditional Public Function Doctrine, 29 Va. Tax Rev. 407 (2010). See generally Comment, Rethinking the Dormant Commerce Clause: The Supreme Court as Catalyst for Spurring Legislative Gridlock in State Income Tax Reform, 2013 B.Y.U. L. Rev. 1021. In Rousso v. State, 239 P.3d 1084 (Wash. 2010), it was held that a statute that in effect banned Internet gambling does not violate the Dormant Commerce Clause because it does not discriminate against out-of-state versus in-state economic interests, serves a legitimate state purpose, and does not impose a clearly excessive burden on interstate commerce.

It has been held that one state's laws may not be applied to commerce that takes place wholly outside that state's borders even if the commerce has effects within that state. Healy v. Beer Institute, Inc., 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989) (Connecticut beer-price affirmation statute held violative of Commerce Clause).

The federal government's powers under the Commerce Clause have traditionally been construed as quite broad, but the majority opinion of the U.S. Supreme Court on the federal health-care laws indicated a more restrictive reading of that Clause in National Federation of Independent Business v. Sebelius, 567 U.S. 519, 132 S.Ct. 2566, 2587–91, 183 L.Ed.2d 450 (2012) (Affordable Health Care Act not sustainable under Commerce Clause, though upheld under Taxing Clause).

[131] Granholm v. Heald, 544 U.S. 460, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005), noted 75 Miss. L.J. 619 (2006). See Note, Constitutional Mixologists: Muddling the Analysis of Protectionist Alcoholic Beverage Laws After *Granholm v. Heald,* 93 Wash. U.L. Rev.1071 (2016). But see United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Management Auth., 550 U.S. 330, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007) (county flow control ordinances that favored state-created public benefit corporation but that treated every private business, whether in-state or out-of-state, in exactly the same way, did not discriminate against interstate commerce in violation of dormant aspect of Commerce Clause). Cf. Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28 (1st Cir. 2007) (Maine statute permitting farm wineries to sell directly to consumers only when they conduct the transaction face-to-face does not violate the dormant Commerce Clause). For a summary of U.S.

Supreme Court treatment of the dormant Commerce Clause, including the *Carbone* case, *supra* note 130, and the *United Haulers* case, *supra*, see Shanske, The Supreme Court and the New Old Public Finance: A New Old Defense of the Court's Recent Dormant Commerce Clause Jurisprudence, 43 Urban Law. 659 (2011) (praising the "sensible and administrable analysis that *United Haulers* indicates should be applied in the majority of cases likely to arise"; *id.* at 721). See also Bobrowski, The Regulation of Formula Businesses and the Dormant Commerce Clause Doctrine, 44 Urban Law. 227 (2012) ("formula businesses" being those, generally including franchise outlets, that sell standardized merchandise from standardized stores, restaurants, etc.; see *id.*, at 233–37).