

**The Ohio Constitution, and Its (Sometimes) Broader Rights**  
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by Andrea Whitaker, Esq.  
and Jacquenette S. Corgan, Esq.

## PRESENTER BIOGRAPHIES

**Andrea Whitaker** received her JD from Case Western Reserve Law School in 2001, magna cum laude. She began her practice in Cleveland with Goldstein and Associates, a union side labor law firm.

In 2005, she came to work in Akron with her father, Bill Whitaker. At that time, she also began working at Friedman and Gilbert in Cleveland, where she stayed until 2010.

Ms. Whitaker's practice is split between civil and criminal matters with an emphasis on litigation and appellate work. She has tried cases in both State and Federal Court addressing a variety of complex civil and criminal areas of the law. Ms. Whitaker has also briefed and argued many cases in various appellate courts and in the Ohio Supreme Court.

She is admitted to practice law in the State of Ohio, the Northern and Southern Districts of Ohio, the Sixth Circuit Court of Appeals and the Supreme Court of the United States.



**Jacquenette S. Corgan** is a solo practitioner who focuses on appellate advocacy, civil rights litigation (including First Amendment matters), and general civil litigation.

She has been licensed in Ohio since 2000. Corgan has also been admitted to practice before the U.S. District Courts for the Northern and Southern districts of Ohio, the U.S. Court of Appeals for the Sixth Circuit, and the Supreme Court of the United States. She is a member of the Akron Bar Association; the Summit County Association for Justice, where she is a member of the Board of Trustees and of the Amicus Committee; and the Scanlon-Bell Inn of Court.

The law is Mrs. Corgan's second career. For nearly 10 years, Corgan was a daily newspaper reporter and editor, serving as a staff writer for the *Buffalo News*, the *Medina County Gazette*, and the *Warren Tribune Chronicle* before becoming a masthead-level editor at the *New Philadelphia Times-Reporter*. She is married to fellow Akron attorney William H. Corgan III.

### **Trends: New Federalism**

“New Federalism” or “state constitutionalism” is a trend among state courts to rely on their state constitutions, rather than the federal Constitution, when examining individual rights and liberties. This is because state courts “are free to construe their state constitutions as providing different or even broader individual liberties than those provided under the federal Constitution.” *Arnold v. Cleveland*, 67 Ohio St.3d 35, 41-42, 616 N.E.2d 163 (1993).

So, in the *Arnold* case, the Ohio Supreme Court announced that “the Ohio Constitution is a document of independent force. In the areas of individual rights and liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall.” *Arnold*, 67 Ohio St.3d at 42.

Ohio’s adherence to New Federalism wavered after *Arnold*, but seems to have returned in force. For example, in 2016, the Court in *State v. Mole*, Slip Opinion 2016-Ohio-5124, renewed its commitment to examining Ohioans’ rights under the Ohio Constitution.

**Ohio Constitution Overview - Provisions of Interest to Criminal Law Practitioners**

Federal Constitution	Ohio Constitution	Coextensive, or not?	Case(s)
	Article I, Section 1	No federal equivalent; guarantees "the enjoyment of life and liberty [and] confers upon the individual the right to do whatever he or she wishes to do so long as there is no valid law proscribing such conduct and so long as the conduct does not infringe upon rights of others recognized by the common law. It is only where there is a law prohibiting express conduct that one may not so act. In all other cases, the person doing an act which unduly interferes with the enjoyment of life and liberty by others is responsible for damages and other sanctions for such act." <i>Preterm</i> .	<i>Preterm Cleveland v. Voinovich</i> , 89 Ohio App. 3d 684, 691, 627 N.E.2d 570 (10th Dist. 1993), citing <i>Palmer &amp; Crawford v. Tingle</i> , 55 Ohio St. 423, 441, 45 N.E. 313 (1896).
<b>1st Amendment - Religion - Establishment &amp; Free Exercise</b>	Article I, Section 7	Ohio grants broader rights of freedom of religious conscience to individuals	<i>Humphrey v. Lane</i> , 89 Ohio St.3d 62, 68, 728 N.E.2d 1039 (2000)
<b>1st Amendment - Speech &amp; Press</b>	Article I, Section 11	Generally coextensive - <u>but</u> Ohio grants greater protection to expressions of opinion	<i>Disciplinary Counsel v. Gardner</i> , 99 Ohio st.3d 416, 2003-Ohio-4048; <i>Eastwood Mall, Inc. v. Slanco</i> , 68 Ohio St.3d 224, 626 N.E.2d 59 (1994)
<b>1st Amendment - Assembly &amp; Petition</b>	Article I, Section 3	<b>No apparent precedents</b>	
<b>2nd Amendment - Individual right to possess firearms</b>	Article I, Section 4	<b>Pre-Heller:</b> Ohio granted affirmative <i>but limited</i> right to individuals to possess firearms	<i>Arnold v. Cleveland</i> , 67 Ohio St.3d 25, 616 N.E. 2d 163 (1993) - since right to possess firearm isn't absolute, Cleveland's "assault weapons" ban was Ok
<b>4th Amendment - Search</b>	Article I, Section 14	Coextensive in interpretation, <u>but</u> Ohio <u>extends</u> protection to misdemeanor cases	<i>State v. Brown</i> , 143 Ohio St.3d 444, 2015-Ohio-2438, 39 N.E.3d 496 (extra-jurisdiction traffic stops);

Federal Constitution	Ohio Constitution	Coextensive, or not?	Case(s)
4th Amendment - Seizure	Article I, Section 14	Coextensive in interpretation, <u>but, Ohio extends</u> protection to misdemeanor cases	<i>State v. Brown</i> , 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175 (no arrest permitted for minor misdemeanors)
5th Amendment/ 14th Amendment - Due Process	Article I, Section 10	Ohio grants greater protection	<i>State v. Bode</i> , 144 Ohio St.3d 155, 2015-Ohio-1519, 41 N.E.3d 1156 (can't use uncounseled juvenile disposition to enhance penalty for adult offense); <i>State v. Aalim</i> , Slip Opinion 2016-Ohio-8278
5th Amendment - Self-incrimination	Article I, Section 10	Ohio grants greater protection	<i>State v. Farris</i> , 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985 (evidence obtained as a result of belated Miranda warnings is suppressable)
5th Amendment - Grand jury	Article I, Section 10	<b>No apparent precedents</b>	
5th Amendment - Double Jeopardy	Article I, Section 10	Coextensive	<i>In re A.G.</i> , Slip Opinion 2016-Ohio-3306
6th Amendment - Counsel	Article I, Section 10	Coextensive in interpretation, but, Ohio extends protection to more situations or in different ways - such as in misdemeanors	<i>State v. Bode</i> , 144 Ohio St.3d 155, 2015-Ohio-1519, 41 N.E.3d 1156, (an accused has a right to counsel whenever an accused is facing the <i>possibility of confinement</i> )
6th Amendment - Presence at trial	Article I, Section 10	Coextensive	<i>State v. Williams</i> , 6 Ohio St.3d 281, 286, 452 N.E.2d 1323 (1983)

<b>Federal Constitution</b>	<b>Ohio Constitution</b>	<b>Coextensive, or not?</b>	<b>Case(s)</b>
<b>6th Amendment</b> - Fair Trial	Article I, Section 10	Coextensive in interpretation, but, Ohio extends protection to more situations or in different ways	<i>State v. Howard</i> , 42 Ohio St.3d 18, 22, 537 N.E.2d 188 (1989) - mandates a less coercive and more equally balanced jury charge than the federal version when the jury's potentially deadlocked.
<b>6th Amendment</b> - Speedy Trial	Article I, Section 10	Coextensive	<i>State v. O'Brien</i> , 34 Ohio St.3d 7 516 N.E.2d 218 (1987)
<b>6th Amendment</b> - Public trial	Article I, Section 11, and Article I, Section 16	Coextensive with First Amendment rights to access to courts	<i>State ex rel. Beacon Journal v. Bond</i> , 98 Ohio St.3d 146, 2002-Ohio-7117, 781 N.E.2d 180
<b>6th Amendment</b> - Confrontation clause	Article I, Section 10	Ohio grants greater protection	<i>State v. Storch</i> , 66 Ohio St.3d 280 (1993); <i>State v. Arnold</i> , 126 Ohio St. 3d 290, 2010-Ohio-2742, 933 N.E.2d 775
<b>8th Amendment</b> - Bail	Article I, Section 9	In Ohio, there's a <i>right</i> to a bond, except in capital cases	<i>Locke v. Jenkins</i> , 20 Ohio St.2d 45, 253 N.E. 2d 757 (1969)
<b>8th Amendment</b> - Cruel & Unusual Punishment	Article I, Section 9	Ohio's analysis is different!	<i>In re C.P.</i> , 131 Ohio St. 3d 513, 2012-Ohio-1446, 967 N.E.2d 729,
<b>14th Amendment</b> - Privacy (penumbra)	Article I, Section 1	Coextensive	<i>State v. Williams</i> , 88 Ohio St.3d 513, 525, 728 N.E.2d 342 (2000)
<b>14th Amendment</b> - Equal Protection	Article I, Section 2	Ohio grants greater protection	<i>State v. Mole</i> , Slip Opinion 2016-Ohio-5124

## Additional Concepts

### **Got the Power? Home Rule.**

When you're dealing with city ordinances, keep in mind that while Ohio gives municipalities and chartered counties (namely, Summit and Cuyahoga Counties) wide latitude to enact regulations that affect their own territories, that latitude is not infinite. Before you assume that an ordinance or regulation is valid, make sure it passes muster under Article XVIII, Section 3 — the Home Rule provision.

A local ordinance will be constitutional under Home Rule when it is an exercise of the city or county's police power, and does not conflict with a general state law. See *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, ¶ 17.

The analysis is in three parts:

1) Determine whether the ordinance is an exercise of the police power, rather than of local self-government. If the ordinance relates only to local self-government, then the analysis stops, and the ordinance will be constitutional; if, on the other hand, it pertains to "local police, sanitary and other similar regulations," then it's an exercise of the police power, and you proceed to the second part of the analysis. See *Mendenhall*, ¶18.

2) Determine whether the state law is a "general law." A general law is part of a statewide and comprehensive legislative enactment that applies to and operates in all parts of the state uniformly, and sets forth police, sanitary, or similar regulations, and regulates all Ohioans' conduct. See *Mendenhall*, ¶ 20. If the state law isn't a "general law," then the analysis stops, and the ordinance will be constitutional. See *id.*

3) Determine whether the ordinance conflicts with the state law. The general, overall rule is that an ordinance conflicts with a general state law when it presents a contrary directive; namely, when it “permits or licenses that which the statute forbids and prohibits, and vice versa.” See *Mendenhall*, ¶129.

Please note that if nobody challenged the ordinance’s constitutionality at the trial court, the issue may have been waived for appeal.

**Mind the Gap - Separation of Powers.**

Finally, be mindful of the Separation of Powers doctrine; it is *a state as well as a federal concern!*

For example, in *State v. Bodyke*, 126 Ohio St.3d 266, 2010 Ohio 2424, 933 N.E. 2d 755, the Ohio Supreme Court found that because the power to review and affirm, modify, or reverse other courts’ judgments is strictly limited to appellate courts, (see Section 3(B)(2), Article IV, Ohio Constitution), R.C. 2950.031 and 2950.032 were unconstitutional because they required the attorney general to reclassify sex offenders who had already been classified by court order under former law. See *Bodyke*, paragraphs one through three of the syllabus. The Court held that the statutes offended Article VI, Section 3 in two ways: they impermissibly required the executive branch to review past decisions of the judicial branch, and required final judgments to be reopened. See *Bodyke*, paragraphs two and three of the syllabus.



## **Making Your Case For Greater Protections**

How do you make a case that your client has broader rights under the Ohio Constitution than (s)he has under the U.S. Constitution?

The Ohio Supreme Court has held that where the two provisions are similar, and nobody presents a persuasive reason for interpreting them differently, it will likely determine that Ohio's protections are coextensive with the federal Constitution's. See, e.g., *State v. Robinette*, 80 Ohio St.3d 234, 238, 685 N.E.2d 762 (1997); *State v. Jones*, 9th Dist. Lorain No. 12CA010270, 2013-Ohio-2375, ¶13.

After *Arnold*, we're practically invited to ask the Supreme Court to interpret the Ohio Constitution. For example, in a case examining Occupy Cleveland's rights to free assembly, the Court did not examine those rights under the Ohio Constitution because nobody apparently asked it to do so. The situation resulted in the following admonition from Justice Pfeifer:

{¶ 26} After all these years, I remain confused when litigants assert a federal constitutional right in our state court system without also asserting similar rights under our state Constitution. As we stated in *Arnold v. Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993), paragraph one of the syllabus:

The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

We will never know whether the outcome of the case would have been different had McCardle asserted protection under Article I, Section 11 of the Ohio Constitution.

Cleveland v. McCardle, 139 Ohio St.3d 414, 2014-Ohio-2140, 12 N.E.3d 1169 (Pfeifer, J., dissenting).

So, compare the language in the two applicable provisions, and look particularly for *qualitative* differences in the language. See *Humphrey v. Lane*, 89 Ohio St.3d 62, 67, 728 N.E.2d 1039 (2000). Where the language is virtually identical, the Court – as in *Robinette* – is likely to find that the rights are coextensive.

Also look to see whether the Ohio Legislature has codified the Ohio Constitution’s protections by providing statutory rights that go beyond those of the U.S. Constitution. See *In re A.G.*, Slip Opinion 2016-Ohio-3306, ¶11 (“In *Ruff* we have recently stated, “The General Assembly in *codifying double-jeopardy protections* has expressed its intent as to when multiple punishments can be imposed.” Quoting *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, at ¶ 12; Court’s emphasis.)

There’s no apparent criteria for when a reason may be “persuasive” under *Robinette*. However, the Ninth District Court of Appeals last year determined that the following *weren’t* persuasive enough to extend Ohio Constitutional protections to prohibit dog sniffs in *State v. Duran*, 9th Dist. Lorain No. 15CA010820, 2016-Ohio-5459:

- ◆ The sniff wasn’t a *de minimus* invasion of his privacy;
- ◆ The trooper routinely had his dog sniff cars he stopped;
- ◆ The sniff didn’t further any governmental interest; and
- ◆ A dog sniff is the first step in an invasive search of the interior of a car.

See *Duran*, ¶ 12-15. (Note that the Court distinguished Duran's situation from that in *Rodriguez v. United States*, \_\_\_\_ U.S. \_\_\_\_, 135 S.Ct. 1609 (2015).)

### **Tips**

- ◆ Check the most recent cases concerning the Ohio Constitutional provisions that may be applicable to your client's case.
- ◆ In a void-for-vagueness argument, also analyze the law under *Preterm Cleveland v. Voinovich*, 89 Ohio App.3d 684, 691, 627 N.E.2d 570 (10th Dist. 1993).
- ◆ When your client's been prosecuted under a city or county ordinance, make sure the city or county had the power under the Home Rule provision to enact the ordinance in the first place. See *Mendenhall v. Akron*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255.
- ◆ Make sure the Legislature has delegated power to the proper branch of government under the Separation of Powers doctrine.
- ◆ Use the language from *Robinette* to argue for an expansion of your client's rights under the Ohio Constitution, where applicable.

## **Additional Resources**

Where to find the Ohio Constitution online: <https://www.legislature.ohio.gov/laws/ohio-constitution>

Where to find the proceedings and debates of Ohio's 1912 Constitutional Convention: <https://www.supremecourt.ohio.gov/LegalResources/LawLibrary/resources/1912Convention.asp>

The Ohio Public Defender's Office's online library: <http://opd.ohio.gov/The-Library/Welcome-To-The-Library>

## **Selected Provisions**

### **Article I - the Bill of Rights**

#### **§ 01 Inalienable Rights (1851)**

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

#### **§ 02 Right to alter, reform, or abolish government, and repeal special privileges (1851)**

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

#### **§ 03 Right to assemble (1851)**

The people have the right to assemble together, in a peaceable manner, to consult for their common good; to instruct their representatives; and to petition the general assembly for the redress of grievances.

#### **§ 04 Bearing arms; standing armies; military powers (1851)**

The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.

**§ 05 Trial by jury (1851, amended 1912)**

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

(As amended September 3, 1912.)

**§ 07 Rights of conscience; education; the necessity of religion and knowledge (1851)**

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

**§ 08 Writ of habeas corpus (1851)**

The privilege of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety require it.

**§ 09 Bail; cruel and unusual punishments**

All persons shall beailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

The General Assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community. Procedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(b) of the Constitution of the state of Ohio.

(As amended January 1, 1998.)

**§ 10 Trial for crimes; witness (1851; amended 1912)**

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on

presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

(As amended September 3, 1912.)

#### **§ 10a Rights of victims of crime**

Victims of criminal offenses shall be accorded fairness, dignity, and respect in the criminal justice process, and, as the general assembly shall define and provide by law, shall be accorded rights to reasonable and appropriate notice, information, access, and protection and to a meaningful role in the criminal justice process. This section does not confer upon any person a right to appeal or modify any decision in a criminal proceeding, does not abridge any other right guaranteed by the Constitution of the United States or this constitution, and does not create any cause of action for compensation or damages against the state, any political subdivision of the state, any officer, employee, or agent of the state or of any political subdivision, or any officer of the court.

(Adopted November 8, 1994)

#### **§ 11 Freedom of speech; of the press; of libels (1851)**

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

#### **§ 14 Search warrants and general warrants (1851)**

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.

**§ 16 Redress in courts (1851, amended 1912)**

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

(As amended September 3, 1912.)

**Article II, Section 28:**

**§ 28 Retroactive laws**

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

**Article III, Section 11:**

**§ 11 May grant reprieves, commutations and pardons**

The Governor shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as the Governor may think proper; subject, however, to such regulations, as to the manner of applying for commutations and pardons, as may be prescribed by law. Upon conviction for treason, the Governor may suspend the execution of the sentence, and report the case to the General Assembly, at its next meeting, when the General Assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. The Governor shall communicate to the general assembly, at every regular session, each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve, with the Governor's reasons therefor.

**Article IV, Section 5b:**

(B) The Supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the General Assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the General Assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

**Municipal “Home Rule” - Article XVIII, Section 3:**

**§ 03 Powers**

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

**Article X, Section 3** gives chartered counties (namely, Summit and Cuyahoga) the same home rule powers as municipalities.

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