

Notes

The Indiana Home Rule Act: A Second Chance for Local Self-Government

I. INTRODUCTION

Although the General Assembly did not grant home rule,¹ a form of local self-government, to Indiana localities until the Powers of Cities Act in 1971;² Indiana advocates of home rule have long extolled its virtues:

Whatever the future may bring forth, the love of local self-government will remain. While the people retain their love of liberty, the balance between the state and municipalities, with the state as the sovereign, the municipality, not an antagonist, but a necessary agent, and a government in purely local matters, will be kept level and safe.³

In 1980, after nine years under the Powers of Cities Act, the Indiana General Assembly reevaluated its home rule policies and adopted the Home Rule Act.⁴ This recent reaffirmation of home rule makes appropriate an inquiry into how home rule has fared in the courts under the Powers of Cities Act and how the Home Rule Act is likely to change the courts' approach. This Note first establishes some criteria for successful home rule, emphasizing that whether the

¹Home rule has both a political and a legal meaning. Politically, home rule means "local autonomy, the freedom of a local unit of government to pursue self-determined goals without interferences by the legislature or other agencies of state government." Legally, home rule means "a grant of power to the electorate of a local governmental unit." The dual purpose of this term has led to some confusion concerning home rule's true meaning. Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 *Minn. L. Rev.* 643, 644-45 (1964). This Note will focus on home rule as a legal doctrine rather than a political doctrine.

²Powers of Cities Act, Pub. L. No. 250, 1971 Ind. Acts 955 (codified as amended at IND. CODE §§ 18-1-1.5-1 to -30 (1976)) (repealed 1980). Similar provisions appeared in other Indiana statutes which applied to county government, *see* Powers of Counties Act, Pub. L. No. 158, 1975 Ind. Acts 914 (repealed 1980), and to the governments of consolidated cities, *see* Act of Mar. 13, 1969, ch. 173, §§ 201-236, 1969 Ind. Acts 357, 360-67 (repealed 1980). These acts were replaced by the Home Rule Act. IND. CODE §§ 36-1-3-1 to -9 (1982). The Home Rule Act applies to "all units except townships." *Id.* § 36-1-2-23. *See id.* § 36-1-2-23 for the definition of units.

³Wolf, *Indiana Municipalities and the State Government*, 4 *IND. L.J.* 231, 247 (1929). *See generally* Ice, *Municipal Home Rule in Indiana*, 17 *IND. L.J.* 375 (1942).

⁴IND. CODE §§ 36-1-3-1 to -9 (1982).

state or locality should govern on a subject is a policy decision for the legislature rather than the courts. Next the Note briefly describes the form of the Indiana home rule statutes and the courts' application of them. The courts have either misapplied or failed to apply the predecessors of the Home Rule Act, especially the preemption provisions but also the private law and local affairs provisions. The flaws in the Powers of Cities Act and the courts' misapplication of the statute combined unfavorably to restrict local self-government. Finally, this Note will suggest that the Indiana courts should work within the spirit of the Home Rule Act in order to make home rule effective and local initiative possible.

II. THE BACKGROUND AND OBJECTIVES OF HOME RULE

The theory of home rule evolved as a remedy to problems created by adherence to the basic notion, followed in Indiana with a few noteworthy exceptions,⁵ that no inherent right to local self-government exists.⁶ Under this view, the state possesses all legislative power over localities, including "the power to create and the power to destroy; the power to define the form of municipal government and the powers and functions which may—or even must—be exercised [by localities]."⁷ Local governments possess no inherent powers but must depend totally upon state legislatures for every power they exercise.⁸

⁵Indiana briefly embraced the concept of an inherent right to local self-government in the late nineteenth century in *State ex rel. Jameson v. Denny*, 118 Ind. 382, 21 N.E. 252 (1888), and *State ex rel. Geake v. Fox*, 158 Ind. 126, 63 N.E. 19 (1902). These decisions addressed a General Assembly attempt to appoint the Board of Public Works and Board of Safety for certain Indiana cities and implied that state interference with a locality's choice of its own officials constituted overreaching. The court concluded in *Jameson*: "We do not think that the people have conferred upon the Legislature any such power. It is subversive of all local self-government, a right that the people did not surrender when they adopted the Constitution. They still retained . . . the right to select their own local officers . . ." 118 Ind. at 400, 21 N.E. at 258.

The courts have never expressly overruled these opinions, and the Indiana Supreme Court cited them as late as 1960, when it was again faced with a state attempt to control the appointment of local officials. See *Datiman v. Gary Pub. Library*, 241 Ind. 83, 92, 170 N.E.2d 55, 60 (1960). After over 50 years of sidestepping the *Jameson* precedent, the court in *Datiman* still was cognizant that complete legislative abrogation of a municipality's appointment or election of its own officials would constitute overreaching. The court in *Datiman* did hold, however, that the General Assembly can prescribe the manner for selecting local officials. 241 Ind. at 92, 170 N.E.2d at 60.

⁶See generally Sandalow, *supra* note 1, at 646-48. For a discussion of the short lived idea of an inherent right of local self-government, see generally *id.* at 646 n.11. Sandalow reports that the few decisions which adopted the idea, first espoused in *Leroy v. Hurlbut*, 24 Mich. 44 (1871), were limited to the issue of whether municipalities have the right to elect their own officials.

⁷Sandalow, *supra* note 1, at 646 (footnotes omitted).

⁸*Id.*

The courts enforced this premise that no inherent right of self-government exists by employing Dillon's Rule,⁹ a rule which allowed municipalities only three types of powers:¹⁰ 1) powers expressly granted by the state legislature; 2) powers necessarily implied by express grants from the state legislature; and 3) powers "essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable."¹¹ In addition to employing Dillon's Rule as a rule of law, the Indiana courts also adopted a rule of construction that resolved any statutory ambiguities concerning the existence of a particular power against the municipality.¹²

Home rule advocates believe that effective local government depends upon the state legislature's grant of broad powers of self-government to localities.¹³ These advocates believe that those officials who are most directly responsible to local citizenry can best address local problems and improvements.¹⁴ Likewise, home rule advocates believe that the state legislature can address matters affecting more than one locality or requiring uniform statewide policy better than it can handle time consuming local issues in which the legislature could only prove meddlesome.¹⁵ Home rule advocates realize, however, that a complex society necessitates an interdependence among localities that demands many uniform statewide policies.¹⁶ They also recognize that the parochialism of small communities sometimes requires subjugation to a higher authority which will protect minority views.¹⁷ The challenge in successfully implementing home rule thus lies in finding a proper balance of state and local powers for effective government.

Under home rule, a locality ideally would possess the authority to evolve solutions to its individual problems and to experiment with new approaches to effective local government without first seeking authorization from the state legislature.¹⁸ Successful home rule depends

⁹J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911). For cases employing Dillon's Rule, see *Freigy v. Gargaro Co.*, 223 Ind. 342, 60 N.E.2d 288 (1945); *Central Union Tel. Co. v. Indianapolis Tel. Co.*, 189 Ind. 210, 126 N.E.268 (1920).

¹⁰*City of Crawfordsville v. Braden*, 130 Ind. 149, 152, 28 N.E. 849, 850 (1891).

¹¹*Id.* (quoting J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 89 (4th ed. 1890)).

¹²*City of Crawfordsville v. Braden*, 130 Ind. 149, 152-53, 28 N.E. 849, 850 (1891).

¹³See, e.g., Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 279 (1968).

¹⁴See, e.g., Sandalow, *supra* note 1, at 658, 709-10.

¹⁵See, e.g., Clark, *State Control of Local Government in Kansas: Special Legislation and Home Rule*, 20 U. KAN. L. REV. 631, 632 (1972); Sandalow, *supra* note 1, at 654-56; Vanlandingham, *supra* note 13, at 270.

¹⁶See, e.g., Vanlandingham, *supra* note 13, at 272.

¹⁷See, e.g., Sandalow, *supra* note 1, at 710-12.

¹⁸*City of South Bend v. Krovitch*, 149 Ind. App. 438, 273 N.E.2d 288 (1971),

ultimately upon the energy and competence of local officials.¹⁹ Nevertheless, to be successful home rule must meet three criteria which are within legislative and judicial control: 1) home rule powers should be protected from both legislative and judicial erosion;²⁰ 2) concurrent state and local legislation should be allowed whenever appropriate for effective government;²¹ and 3) the division of powers under home rule should change as societal needs change.²² A delicate interaction between the legislature and the judiciary is necessary to satisfy these criteria.

First, some mechanism should protect home rule powers from legislative and judicial erosion.²³ Unless a locality can be secure in the powers it possesses and will continue to possess under home rule, it is unlikely to exercise independently large scale initiatives but, rather, will continue to seek authorization from the state legislature for its programs.²⁴ A local government is more likely to try new solutions to its individual problems and to make improvements when assured that its expenditures of time and money do not rely on a power which the state legislature may withdraw easily or which state courts may decide was never a local power. Such a chilling effect on local initiative could result if the legislature reserves unfettered power to preempt local ordinances without any mechanism for making such preemption a conscious and difficult decision.²⁵ The chill more often results, however, when the courts approach independent local initiatives with distrust,²⁶ narrowly construing home rule grants and

demonstrates what home rule advocates would characterize as the deplorable fate of local initiative without home rule policies. A South Bend Board of Public Works and Safety ordinance provided for training certain firemen to perform special police functions, apparently to promote efficient use of city funds by extracting maximum service from city personnel. The Indiana Court of Appeals responded by narrowly construing a state statute to conclude that the legislature intended separate police and fire departments. *Id.* at 445-46, 273 N.E.2d at 292. Reciting the rule that doubtful claims of local power are resolved against the municipality, the court of appeals held, in essence, that cities were powerless to respond to their problems without explicit authorization from the General Assembly. *Id.* at 446, 273 N.E.2d at 293.

¹⁹See Vanlandingham, *supra* note 13, at 290.

²⁰See *infra* notes 23-32 and accompanying text.

²¹See *infra* notes 33-35 and accompanying text.

²²See *infra* notes 36-37 and accompanying text. The power to tax is sometimes considered a fourth requirement for successful home rule because few municipalities could finance their own activities without it. Vanlandingham, *supra* note 13, at 271.

²³See Sandalow, *supra* note 1, at 707; Vanlandingham, *supra* note 13, at 293; Winter, *Nebraska Home Rule: The Record and Some Recommendations*, 59 NEB. L. REV. 601, 625-26 (1980).

²⁴See Vanlandingham, *supra* note 13, at 293-96.

²⁵*Id.*

²⁶See Andersen, *Resolving State/Local Conflict—A Tale of Three Cities*, 18 URB. L. ANN. 129, 135-36 (1980); Vanlandingham, *supra* note 13, at 293.

using a doctrine of implied preemption to strike down local ordinances.²⁷ This judicial reluctance to cooperate with the state legislature's transfer of home rule powers to localities prevails in most state courts:²⁸ "[W]hen a state supreme court . . . rules against the state and in favor of a municipality, its decision is usually noteworthy."²⁹ Thus, without some external or internal controls, legislatures and courts can chip away at home rule powers with the result either that such powers no longer exist or that localities are afraid to use them.

Control over judicial erosion of home rule powers should begin with the home rule grant itself. The state legislature should provide the courts with guidance as to the powers localities may and may not exercise. Otherwise, the legislature essentially asks the courts to develop criteria for determining the spheres of local and state government, even though legislators would appear better suited to decide who shall govern the people on what subjects. Usually, a broad, vague grant of statutory authority forces the courts either to balance state and local policies to determine whose interest should predominate under the circumstances³⁰ or to devise tests capable of consistent application but removed from home rule policies.³¹ Because determining whether state or local interests predominate is basically a policy question, the courts are ill equipped to develop meaningful, consistent standards for separating the state and local spheres of government. Judicial erosion of home rule powers, therefore, is less likely to occur when the state legislature offers the courts guidance and when the courts accept that guidance.³²

Second, for successful home rule, the legislature and the courts

²⁷Clark, *supra* note 15, at 661-63. For a description of this process of judicial erosion in Nebraska, see Winter, *supra* note 23, at 614-26.

²⁸See, e.g., Sandalow, *supra* note 1, at 660-61, including cases cited therein; Vanlandingham, *supra* note 13, at 290-93, including cases cited therein; Winter, *supra* note 23, at 625-26, including cases cited therein.

²⁹Vanlandingham, *supra* note 13, at 293.

³⁰See *infra* notes 148-55 and accompanying text. Particularly difficult for the courts and detrimental for home rule is the precedential effect of decisions that resolve policy issues without legislative guidelines: "[E]very decision sustaining state legislation appears to be a limitation of municipal initiative, with the implication that even if the legislation were to be repealed, municipal regulation . . . would be impermissible." Sandalow, *supra* note 1, at 662.

³¹One such test, not justified by home rule principles, was Oregon's allocation of procedure to the cities and substance to the state. Andersen, *supra* note 26, at 140-42 (discussing *City of La Grande v. Public Employees Retirement Bd.*, 281 Or. 137, 576 P.2d 1204, *aff'd on rehearing*, 284 Or. 173, 586 P.2d 765 (1978)).

³²Baum, *A Tentative Survey of Illinois Home Rule (Part II): Legislative Control, Transition Problems, and Intergovernmental Conflict*, 1972 U. ILL. L.F. 559, 571-72; see Winter, *supra* note 23, at 628.

should allow and protect concurrent state and local legislation.³³ Although statewide conditions may necessitate state action on a subject, that action might not adequately address the needs of a particular locality.³⁴ Therefore, both state and local legislation may be appropriate. When a local ordinance does not directly conflict but can harmoniously coexist with a state statute, the courts should not invalidate the ordinance by implied preemption but, rather, should seek to have the legislature define the intended scope of the statute that impinges on home rule powers.³⁵

Third, the division of powers under home rule should change as societal needs change.³⁶ As society increases in complexity and as geographic areas become more interdependent, matters originally appropriate for local regulation eventually demand a uniform state policy which supersedes local interests.³⁷ For this reason, the legislature must retain the ability to recover, albeit not too rashly, powers initially delegated to localities to prevent home rule from becoming an obstacle to progress in a changing society.

In summary, to evaluate a state's home rule experience, one must examine the interaction between the home rule grant and the court's approach to concurrent state and local legislation according to three criteria: the degree of legislative and judicial erosion of home rule powers, the degree of allowable concurrent state and local legislation, and the capability for reallocation of state and local powers.

III. THE FORM OF THE INDIANA HOME RULE ACT

Two basic types of home rule authority exist, constitutional and statutory.³⁸ Both types can be either self-executing, becoming effective without further action, or charter enabling, allowing cities to draft their own plans for self-government subject to various adoption procedures.³⁹

³³Baum, *A Tentative Survey of Illinois Home Rule (Part I): Power and Limitations*, 1972 U. ILL. L.F. 137, 154-55; Baum, *supra* note 32, at 571-72; Vandlandingham, *supra* note 13, at 305.

³⁴*See, e.g.*, *City of Indianapolis v. Wright*, 267 Ind. 471, 371 N.E.2d 1298 (1978); *Medias v. City of Indianapolis*, 216 Ind. 155, 23 N.E.2d 590 (1939); *Board of Pub. Safety v. State ex rel. Benkovich*, 388 N.E.2d 582 (Ind. Ct. App. 1979); *Meinschein v. J.R. Short Milling Co.*, 157 Ind. App. 53, 298 N.E.2d 495 (1973).

³⁵*See infra* text accompanying notes 54-123.

³⁶*See Andersen, supra* note 26, at 149 (discussing *City of Thornton v. Farmers Reservoir & Irrigation Co.*, 194 Colo. 526, 575 P.2d 382 (1978)); Vandlandingham, *supra* note 13, at 272.

³⁷*Weekes v. City of Oakland*, 21 Cal. 3d 386, 405, 579 P.2d 449, 460, 146 Cal. Rptr. 558, 569 (1978) (Richardson, J., concurring).

³⁸Note, *Defining "Municipal or Internal Affairs": The Limits of Power for Indiana Cities*, 49 IND. L.J. 482, 484-85 n.16 (1974).

³⁹*Id.*

Indiana chose a statutory grant of home rule powers⁴⁰ when it drafted the Powers of Cities Act and the subsequent Home Rule Act. The statutory grant, by definition, lacks the ability of the constitutional grant to place home rule powers virtually beyond legislative erosion and subjects the powers to possible retraction at each legislative whim.⁴¹ On the other hand, Indiana's statutory grant allows greater responsiveness to change than does a constitutional grant, which must be amended before powers can be reallocated.⁴² Because it is self-executing, the Indiana statutory grant also avoids any adoption procedure that may discourage cities from accepting home rule under a charter enabling grant.⁴³

Home rule grants are further classified into those that employ broad, general language and those that enumerate specific powers.⁴⁴ Usually, a broad grant simply confers legislative powers over a city's "municipal affairs."⁴⁵ Enumerations may specify all or some powers granted the locality, all or some powers denied the locality, all or some powers reserved by the state, or all or some powers denied the state.⁴⁶ Indiana's statute enumerates powers specifically withheld from localities⁴⁷ as well

⁴⁰*Dortch v. Lugar*, 255 Ind. 545, 266 N.E.2d 25 (1971), tested the constitutional validity of the Indiana variety of home rule legislation. The court in *Dortch* held that a state law that permitted consolidation of city and county governmental functions in large metropolitan communities was a valid delegation of authority under article IV, section 1 of the Indiana Constitution: "*Such legislation is not regarded as a transfer of general legislative power, but rather as a grant of the authority to prescribe local regulation . . .*" 255 Ind. at 586, 266 N.E.2d at 50 (quoting 2 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 4.09 (3d ed. 1968) (emphasis as supplied by court)).

⁴¹See Vanlandingham, *supra* note 13, at 277.

⁴²See Andersen, *supra* note 26, at 149. A requirement that legislation allowing preemption uniformly apply to a large number of cities and a strong municipal lobby can enhance the success of statutory home rule. Vanlandingham, *supra* note 13, at 296.

⁴³See Vanlandingham, *supra* note 13, at 281.

⁴⁴Sandalow, *supra* note 1, at 669. Sandalow contended that the distinction between the broad and the specific grant is more significant than the distinction between the constitutional and the statutory grant because the language of the grant, rather than its source, has more impact upon the courts. *Id.* at 669-70.

⁴⁵See generally discussion and cases cited in Sandalow, *supra* note 1, at 652-58; Vanlandingham, *supra* note 13, at 291-93.

⁴⁶See Andersen, *supra* note 26, at 150; Sandalow, *supra* note 1, at 652; Vanlandingham, *supra* note 13, at 303-08.

⁴⁷IND. CODE § 36-1-3-8 (1982) provides:

A unit does not have the following:

- (1) The power to condition or limit its civil liability, except as expressly granted by statute.
- (2) The power to prescribe the law governing civil actions between private persons.
- (3) The power to impose duties on another political subdivision, except as expressly granted by statute.
- (4) The power to impose a tax, except as expressly granted by statute.

as powers exclusively granted to them.⁴⁸ The enumeration of those powers denied to localities protects the state's interest in a uniform policy upon subjects such as taxation.⁴⁹ The enumeration of exclusive powers granted the locality protects its initiative in areas such as use of public lands and minimizes its fear of implied preemption by the courts.⁵⁰ An enumeration of specific powers granted the locality also reminds the legislature of its commitment to home rule, making legislative erosion less covert.⁵¹

Indiana, therefore, possesses a well-conceived home rule grant. The enumeration of powers in the Indiana statute is preferable to a broad grant of power, which amounts to a mere policy statement without protection from either judicial or legislative erosion. Also, as a self-executing statutory grant, it needs no adoption procedure by the municipalities and affords adaptability to change.⁵²

IV. PROBLEMATIC ASPECTS OF THE INDIANA HOME RULE EXPERIENCE

Although it is a generally well-drafted statute, experience under the Powers of Cities Act indicates that at least three doubtful areas

(5) The power to impose a license or other fee greater than that reasonably related to the administrative cost of exercising a regulatory power.

(6) The power to impose a service charge greater than that reasonably related to the cost of the service provided.

(7) The power to regulate conduct that is regulated by a state agency, except as expressly granted by statute.

(8) The power to prescribe a penalty for conduct constituting a crime or infraction under statute.

(9) The power to prescribe a penalty of imprisonment for an ordinance violation.

(10) The power to prescribe a penalty of a fine of more than two thousand five hundred dollars (\$2,500) for an ordinance violation.

(11) The power to invest money, except as expressly granted by statute.

⁴⁸*Id.* § 36-1-3-9(a) provides that "a municipality has exclusive jurisdiction over bridges . . . , streets, alleys, sidewalks, watercourses, sewers, drains, and public grounds inside its corporate boundaries, unless a statute provides otherwise."

⁴⁹*See* Vanlandingham, *supra* note 13, at 310-11.

⁵⁰*Id.* at 296 n.139.

⁵¹*See* Andersen, *supra* note 26, at 148-49 (discussing *City of Thornton v. Farmers Reservoir & Irrigation Co.*, 194 Colo. 526, 575 P.2d 382 (1978)); Vanlandingham, *supra* note 13, at 296 n.142.

⁵²The Indiana home rule statute is preferable to the Missouri *imperio in imperium* model, which constitutionally allowed municipal charter provisions to prevail over state law in purely local concerns, thus creating a "sovereignty within a sovereignty." MO. CONST. of 1875, art. IX, §§ 16, 23. *See* Vanlandingham, *supra* note 13, at 284. Indiana's statute is also preferable to the Colorado model, which also constitutionally denies certain powers to the state but does so by enumerating which powers are local. COLO. CONST. art. XX, § 6. *See* Andersen, *supra* note 26, at 148-49. Because they are constitutional grants, both the Missouri and the Colorado models hamper adaptability to increasing needs for state uniformity.

remain under the Home Rule Act: state preemption, local power to affect private relationships, and the local affairs limitation.⁵³

A. State Preemption

Home rule cannot flourish as long as ordinances governing local concerns are subject to preemption by state legislatures.⁵⁴ The real threat to home rule powers, however, derives not from preemption per se, but from implied preemption by the courts.⁵⁵ The same power that allows a legislature expressly to invalidate a local ordinance also allows it to effect state policy. Judicially implied preemption has no such redeeming feature and may even defeat the state policy favoring home rule. To prevent legislative and judicial erosion of home rule powers, the home rule grant should address preemption by providing a mechanism which not only would prevent the state legislature from rashly denying a home rule power but also would prevent the courts from making independent determinations that a state statute precludes the operation of a local ordinance. Furthermore, the home rule statute and the courts should recognize that a local ordinance that addresses local needs can coexist with a state statute on the same subject so long as the ordinance does not directly conflict with the statute. This is especially important in a state like Indiana, where the constitution prohibits the state from enacting special legislation for individual localities.⁵⁶

1. *The Powers of Cities Act.*—The fact that the Indiana General Assembly has twice changed its original preemption language suggests a continuing desire to elicit more acceptable responses from the courts. The original 1971 Powers of Cities Act allowed localities to exercise power “only if and to the extent that such power is not denied or preempted by any other law or is not vested by any other law in a county or state agency, special purpose district, or separate municipality or school corporation,”⁵⁷ unless “prohibited by the Constitution of this state or the Constitution of the United States.”⁵⁸ It further provided that no state statute approved either before or after the Powers of Cities Act

shall be construed . . . to preempt . . . or to occupy the field . . . so as to deny or supersede the power of any city to enact

⁵³IND. CODE § 36-1-3-4(b)(2) (1982) limits local authority to “powers necessary or desirable in the conduct of its affairs.”

⁵⁴Winter, *supra* note 23, at 625-26.

⁵⁵*Id.*

⁵⁶IND. CONST. art. IV, § 23.

⁵⁷Powers of Cities Act, Pub. L. No. 250, sec. 1, § 1, 1971 Ind. Acts 955 (amended 1973) (repealed 1980).

⁵⁸*Id.* at 965.

an ordinance or exercise a power dealing with the same subject matter, *unless* such law contains an *express* provision indicating such intention Any state law whose provisions are *mandatory* and obligatory upon a city . . . shall . . . preempt . . . and . . . occupy the field in which such law operates.⁵⁹

If a state statute were approved after the Powers of Cities Act, it could preempt a local ordinance if there was "a direct and positive conflict . . . that . . . cannot be reconciled."⁶⁰ If a state statute had been approved before the Powers of Cities Act, it also could preempt a local ordinance if the statute were "so *comprehensive* as to completely occupy the field of such subject matter, and clearly indicate the intention of the General Assembly to preclude any action by a city relating to the same subject matter."⁶¹ Thus, the exceptions allowing mandatory and pre-existing comprehensive statutes to occupy the field considerably weakened a strong statement that the General Assembly could preclude home rule powers only by express provision.

The only case decided under these original preemption provisions in the Powers of Cities Act, *Meinschein v. J.R. Short Milling Co.*,⁶² illustrates how the courts can erode home rule powers by implied preemption. The issue in *Meinschein* was whether the city of Mt. Vernon could pass an ordinance that allowed leasing public property to a private individual who wanted to operate a marina. The Indiana Court of Appeals held that section 2(d) of the Powers of Cities Act, which gave cities the power to "[u]se, protect, maintain and dispose of interests in real or personal property owned by the city,"⁶³ did not authorize the lease because a state statute enacted prior to the Powers of Cities Act provided that a fifth class city "may lease all or part of" its interest in real estate to "any private not for profit corporation" for recreational activities.⁶⁴ This state statute, the court held, was not only a mandate but also the result of a "legislative intent to completely occupy the field."⁶⁵

This conclusion ignored the Powers of Cities Act's basic policy against implied preemption and erred in construing "may" as mandatory when its plain meaning is permissive.⁶⁶ The court also defied

⁵⁹*Id.* at 968 (repealed 1973) (emphasis added).

⁶⁰*Id.*

⁶¹*Id.* (emphasis added).

⁶²157 Ind. App. 53, 298 N.E.2d 495 (1973).

⁶³Powers of Cities Act, Pub. L. No. 250, sec. 1, § 2(d), 1971 Ind. Acts 955, 956 (repealed 1980).

⁶⁴Act of Mar. 13, 1969, ch. 182, 1969 Ind. Acts 468, 468-69 (repealed 1980).

⁶⁵157 Ind. App. at 56, 298 N.E.2d at 497.

⁶⁶*Id.* at 57, 298 N.E.2d at 497. See *State ex rel. Oliver v. Grubb*, 85 Ind. 213 (1882) (may is permissive form); see also *Noble v. City of Warsaw*, 156 Ind. App. 618, 297 N.E.2d 916 (1973).

logic by holding that a more specific prior state statute could occupy the field, when a later, more comprehensive state statute addressed the same subject and granted localities the power to determine how to use their land.⁶⁷ The strained interpretation of the prior statute in this case suggests that the court would have been willing to call virtually any prior statute either mandatory or comprehensive in order to invalidate a local ordinance on the same subject.

2. *The 1973 Amendments.*—Wisely, in 1973, the General Assembly repealed the lengthy preemption provision that allowed preemption by mandatory language in a statute.⁶⁸ The two shorter preemption provisions were amended to allow cities to exercise power “to the extent that such power is not by express provision denied by law or by express provision vested” in another governmental entity,⁶⁹ rather than “to the extent. . . vested by any other law” in another governmental entity.⁷⁰ These changes strongly suggest that the General Assembly intended to eliminate implied preemption completely and to reserve decisions to preempt home rule powers for itself. The case law that followed this amendment is likely to affect the court’s future interpretations of the Home Rule Act.

The first preemption case after the 1973 amendment, *City of Richmond v. S.M.O., Inc.*,⁷¹ relied upon *Medias v. City of Indianapolis*.⁷² *Medias*, the seminal Indiana Supreme Court case on state preemption of local law, was decided in 1939, over thirty years prior to home rule legislation in Indiana. The issue in *Medias* was whether Indianapolis could require pawnbrokers to obtain a city license in addition to the state’s licensing requirement. The supreme court upheld the Indianapolis ordinance, establishing a precedent favorable to concurrent state and local legislation:

If a city ordinance undertakes to impose regulations which are in conflict with rights granted or reserved by the Legislature, such ordinance must be held invalid. . . . If, however, the statute does not exclusively occupy the field, the municipi-

⁶⁷157 Ind. App. at 57, 298 N.E.2d at 497.

⁶⁸Powers of Cities Act, Pub. L. No. 250, sec. 1, § 24, 1971 Ind. Acts 955, 968, repealed by Act of Apr. 14, 1973, Pub. L. No. 171, § 3, 1973 Ind. Acts 866, 867. See *supra* text accompanying notes 57-61. Similar provisions for counties and for consolidated cities were not repealed until 1980. See *supra* note 2.

⁶⁹Act of Apr. 14, 1973, Pub. L. No. 171, § 1, 1973 Ind. Acts 866, 867 (repealed 1980).

⁷⁰Powers of Cities Act, Pub. L. No. 250, sec. 1, § 1, 1971 Ind. Acts 955, 955 (amended 1973) (repealed 1980).

⁷¹165 Ind. App. 641, 333 N.E.2d 797 (1975).

⁷²216 Ind. 155, 23 N.E.2d 590 (1939).

pality is not prohibited from imposing additional regulations if they are reasonable and within its legislative authority.⁷³

Under *Medias*, cities could legislate on the same subjects as the state, even imposing additional regulations and restrictions, provided that the local ordinance did not directly conflict with a state statute and that a state statute had not exclusively occupied the field.

After the Powers of Cities Act, *Medias* should have remained good law to the extent that it allowed concurrent state and local legislation. The 1973 amendments to the Powers of Cities Act, however, left only a gap for *Medias* to fill. Because the amendments replaced all of the 1971 occupy-the-field language, which allowed implied preemption, with language requiring express preemption, they overruled that part of *Medias* which would invalidate a local ordinance upon a finding that the state statute had occupied the field. By requiring that powers be expressly denied to the municipality or expressly vested in the state,⁷⁴ the amendments implied that both the state and locality could regulate concurrently. These amendments implicitly approved the *Medias* holding that a locality may impose stricter but consistent regulation in an area where the state has already regulated.⁷⁵ The amendments, however, failed to address what happens when a state statute and a local ordinance so directly conflict that they cannot harmoniously coexist. When such a conflict occurs, *Medias* may be cited for the proposition that the state law must prevail. Because the local government remains a creature of the state government under statutory home rule,⁷⁶ state legislation must prevail in a direct conflict.

In *City of Richmond v. S.M.O., Inc.*,⁷⁷ the Indiana State Highway Commission had granted a restaurant a curb cut onto a state highway. Subsequently, the Richmond Board of Public Works not only denied the right to the cut but also barricaded it. The court of appeals slighted the Powers of Cities Act with the brief statement that a locality's residual powers under the act were only to be exercised by ordinance, even though the Powers of Cities Act provision referred to powers and functions, not ordinances.⁷⁸ Because Richmond had not enacted an ordinance, the court did not apply the act.⁷⁹ The court, nevertheless, arrived at the appropriate position on concurrent legisla-

⁷³*Id.* at 165, 23 N.E.2d at 594.

⁷⁴Act of Apr. 14, 1973, Pub. L. No. 171, § 1, 1973 Ind. Acts 866, 866-67 (repealed 1980).

⁷⁵216 Ind. at 165, 23 N.E.2d at 594.

⁷⁶See *supra* notes 5-12 and accompanying text.

⁷⁷165 Ind. App. 641, 333 N.E.2d 797 (1975).

⁷⁸Powers of Cities Act, Pub. L. No. 250, sec. 1, § 16, 1971 Ind. Acts 955, 964-65 (amended 1973) (repealed 1980).

⁷⁹165 Ind. App. at 645, 333 N.E.2d at 799.

tion. Although it ruled against the city, the court acknowledged that the city could "share in the regulation of a given activity providing that regulation is not exclusively reserved to the state and the municipal regulation does not impose a less stringent requirement than specified by the state."⁸⁰ Like *Medias*, the *S.M.O.* decision supports the proposition that a city and state can legislate harmoniously upon the same subject matter.

If the court in *S.M.O.* had construed the Powers of Cities Act, no justification for implied preemption could have been found. Employing the Powers of Cities Act, the court would have considered only whether the state had expressly denied cities the power to regulate curb cuts or had expressly vested the power in another entity. If the legislature had taken neither action, the conclusion would have been that the local ordinance was not preempted. If the two regulations directly contradicted, on the other hand, and no statute had provided for resolution of the conflict, then *Medias* would have applied to favor the state over the city.

In *City of Indianapolis v. Sablica*,⁸¹ the Indiana Supreme Court finally addressed preemption under the Powers of Cities Act. The *Sablica* holding was based on the Indiana Constitution, which prohibits the enactment of local laws for the punishment of crimes and misdemeanors⁸² and mandates that all penal laws receive uniform application throughout the state.⁸³ Although the Powers of Cities Act specifically allowed cities to establish limited punishments for violations of city ordinances,⁸⁴ it complied with the Indiana Constitution by limiting this power to actions that do not also "constitute a violation of a law by the General Assembly."⁸⁵ In light of the constitutional requirement, it was not surprising that the *Sablica* court held that a local ordinance prescribing punishment for taunting an officer could not coexist with a state statute prescribing punishment for interfering with an officer.⁸⁶ It stated that "an impermissible conflict

⁸⁰*Id.* at 643, 333 N.E.2d at 798. Language in the state statute which recognized possible local regulation of curb cuts bolstered the court's conclusion. *Id.* at 644, 333 N.E.2d at 799.

⁸¹264 Ind. 271, 342 N.E.2d 853 (1976).

⁸²IND. CONST. art. IV, § 22.

⁸³*Id.* § 23.

⁸⁴Powers of Cities Act, Pub. L. No. 250, sec. 1, § 19(b), 1971 Ind. Acts 955, 965 (repealed 1980).

⁸⁵*Id.* The Home Rule Act contains the same prohibition, IND. CODE § 36-1-3-8(8) (1982), and also allows cities to prescribe penalties of no more than \$2,500. *Id.* § 36-1-3-8(10). Unlike the Powers of Cities Act, which allowed up to six months imprisonment for an ordinance violation, Powers of Cities Act, Pub. L. No. 250, sec. 1, § 19(b)(2), 1971 Ind. Acts 955, 965 (repealed 1980), the Home Rule Act denies local units the power to prescribe imprisonment for an ordinance violation. IND. CODE § 36-1-3-8(9) (1982).

⁸⁶264 Ind. at 273, 342 N.E.2d at 854-55.

between a city ordinance and a criminal law of the state will exist whenever the ordinance contradicts, duplicates, alters, amends, modifies or extends the subject matter of the statute"⁸⁷

Although no express constitutional language would have forbidden the *Sablica* court from holding that only direct conflict with a state statute would invalidate a local penal ordinance, thus making the law on state preemption of penal ordinances consistent with the law on preemption of civil ordinances under *Medias* and the Powers of Cities Act, policy considerations would have forbidden that result. Justice dictates that unsuspecting individuals be protected from encountering differing standards of criminal culpability as they travel among Indiana localities. This rationale illuminates the *Sablica* court's further holding that "to the extent that *Medias v. City of Indianapolis* sanctions *penal* ordinances which do not directly contradict a criminal statute, it is hereby overruled."⁸⁸ This reference to *Medias* in *Sablica* has proven unfortunate. As the *Sablica* court's language appears to recognize but does not clarify, *Medias* does not sanction concurrent state and local penal legislation but, rather, concurrent licensing legislation. Therefore, nothing in *Medias* was overruled in *Sablica*. Nevertheless, although the *Sablica* court's statement did not affect the supreme court decision in *City of Indianapolis v. Wright*,⁸⁹ it did confuse the court of appeals in *City of Hammond v. N.I.D. Corp.*⁹⁰

Ignoring the Powers of Cities Act,⁹¹ the Indiana Supreme Court,

⁸⁷*Id.*

⁸⁸*Id.*, 342 N.E.2d at 855 (emphasis added).

⁸⁹267 Ind. 471, 371 N.E.2d 1298 (1978). Other cases which correctly applied *Sablica* include *Setser v. City of Fort Wayne*, 169 Ind. App. 138, 346 N.E.2d 642 (1976), holding that an ordinance which prohibited patronizing a public nuisance was unconstitutional where a statute prohibited frequenting a house of ill fame, and *Massey v. City of Mishawaka*, 177 Ind. App. 79, 378 N.E.2d 14 (1978), holding that the city could prescribe punishment for the sale of obscene literature because the General Assembly had not established a crime on that subject.

An interesting problem in the *Sablica* logic arose in *Indiana State Bd. of Accounts v. Town of Roseland*, 178 Ind. App. 661 383 N.E.2d 1076 (1978). In that case, the Indiana State Board of Accounts challenged the constitutionality of the city's lowering of the state 30 mile-per-hour speed limit for residential areas and extracting fines for violation of the new limit, thus constituting a penal ordinance. The court of appeals refused to apply the *Sablica* court's strict reading of the constitutional mandate for uniform penal laws. It held that the General Assembly could authorize concurrent legislation of speed limits, provided that the local limits neither duplicated nor exceeded the state limit. *Id.* at 666, 383 N.E.2d at 1080.

⁹⁰435 N.E.2d 42 (Ind. Ct. App. 1982).

⁹¹The Powers of Cities Act granted the cities power to "[r]egulate, inspect, license and prohibit crafts, businesses, professions, and occupations which may affect the public health." Powers of Cities Act, Pub. L. No. 250, sec. 1, § 13(a), 1971 Ind. Acts 955, 962 (repealed 1980). The Home Rule Act only prohibits a city from licensing on subjects delegated to state agencies. IND. CODE § 36-1-3-8(7) (1982).

in *City of Indianapolis v. Wright*,⁹² clarified that the *Sablica* stance on concurrent state and local legislation applies only to penal ordinances. In *Wright*, an Indianapolis ordinance, which enforced the regulation of massage parlors by revocation of license rather than by fine, withstood a constitutional attack. Misapplying *Sablica*, the trial court had held that under the Indiana Constitution, a state statute establishing criminal penalties for public indecency preempted a municipal ordinance authorizing revocation of massage parlor licenses for the same activity.⁹³ The supreme court disagreed: "The enforcement remedies contained in [the local ordinance] authorize the controller to suspend or revoke the license of the licensee. Sec. 17-49 [of the ordinance] does not provide criminal misdemeanor penalties for violation of the duties contained in the ordinance."⁹⁴ As a "licensing plan" rather than a "penal scheme," the ordinance was not an unconstitutional local law.⁹⁵ Apparently, once the court had determined that *Sablica* did not apply to the facts in the case, whether the city had power to license massage parlors under the Powers of Cities Act was not a seriously contested issue since the Act granted cities the power to "[r]egulate, inspect, license and prohibit crafts, businesses, professions, and occupations which may affect the public health."⁹⁶

The Indiana Supreme Court's limitation of the *Sablica* prohibition to local penal ordinances that occupy the same field as a state criminal statute is consistent with home rule policies. A local licensing ordinance that regulates businesses established in the community would not pose the same threat of unforeseeable culpability that a criminal ordinance at variance with a state statute would create for individuals. Rather, a licensing ordinance allows localities to control

⁹²267 Ind. 471, 371 N.E.2d 1298 (1978).

⁹³*Id.* at 472, 371 N.E.2d at 1299.

⁹⁴*Id.* at 474, 371 N.E.2d at 1299.

⁹⁵*Id.* at 475, 371 N.E.2d at 1300.

⁹⁶Powers of Cities Act, Pub. L. No. 250, sec. 1, § 13(a), 1971 Ind. Acts 955, 962 (repealed 1980).

The Powers of Cities Act treated the power to license as distinct from the power to punish crime. It denied cities:

(b) The power to define and provide for the punishment of crime, except that a city may define and provide punishment for the violation of ordinances, subject to the following limitations:

(1) The conduct for which punishment is provided shall not also constitute a violation of a law enacted by the General Assembly; and

(2) No ordinance shall provide for imprisonment in excess of six (6) months, or a fine in excess of one thousand dollars (\$1,000); but a combination of fine and imprisonment not exceeding such limits may be provided.

Id. at 965.

Similarly, the Home Rule Act treats licensing, IND. CODE § 36-1-3-8(5) (1982), and enacting penal ordinances, *Id.* §§ 36-1-3-8(8) to (10), as separate powers.

establishments which pose local problems that the General Assembly cannot adequately address. If the courts were to deny cities this licensing power, available under *Medias*, local powers would be restricted rather than enlarged by the enactment of the Powers of Cities Act.

Unfortunately, the Indiana Court of Appeals hopelessly confused the previous case law on preemption in *City of Hammond v. N.I.D. Corp.*⁹⁷ In *N.I.D.*, a state statute prohibited the sale of fireworks but provided that relatively harmless devices such as sparklers "shall be permitted at all times."⁹⁸ The challenged local ordinance allowed the sale of those devices prohibited by state law as well as those permitted by it, subject to the vendor's obtaining a license and obeying certain regulations in the manner of sale.⁹⁹ This situation confronted the court with a different problem than did *Sablica* or *Wright*. In *Sablica*, the local ordinance and the state statute imposed penalties for similar behavior. In *Wright*, the city revoked a license for behavior similar to that for which the state imposed penalties. In *N.I.D.*, however, the ordinance licensed and permitted behavior for which the state imposed penalties. In addition, the city ordinance restricted behavior which the state permitted at all times.

The appropriate approach to this problem would have been, first, to ask whether the Hammond licensing ordinance was prohibited under the Powers of Cities Act. Because the ordinance was arguably within the grant of power to "[r]egulate, inspect, license and prohibit crafts, businesses, professions, and occupations which may affect the public health"¹⁰⁰ and because the General Assembly had not expressly denied cities the power, nor expressly granted it to another governmental entity, the ordinance would have been valid under the Powers of Cities Act.

The second step would have been to ask whether the local ordinance directly conflicted with the state statute, which would render the former invalid under *Medias*. Because the ordinance permitted the sale of fireworks forbidden under the state statute and restricted the sale of devices which were permitted at all times under the statute, the two regulations could not harmoniously coexist and, thus, directly conflicted. Most likely, the ordinance would have been found invalid on this basis.

If necessary, however, the court finally would have reached the question of whether the ordinance was a penal law, prohibited by the

⁹⁷435 N.E.2d 42 (Ind. Ct. App. 1982).

⁹⁸IND. CODE § 22-11-14-1 (1982).

⁹⁹435 N.E.2d at 45.

¹⁰⁰Powers of Cities Act, Pub. L. No. 250, sec. 1, § 13(a), 1971 Ind. Acts 955, 962 (repealed 1980).

Indiana Constitution.¹⁰¹ This question would have applied only to the aspect of the ordinance which regulated sales prohibited by the state because, once the state imposes penalties, the constitution forbids local penal laws and requires that all criminal laws be uniform.¹⁰²

The court of appeals, however, relied on *Sablica* as authority for Hammond's inability to regulate all fireworks.¹⁰³ The court failed to recognize that *Sablica* addressed a statute and ordinance which penalized similar behavior rather than a criminal statute and a directly conflicting licensing ordinance. Ignoring *Wright* altogether, the court said that *Sablica* established a "new rule of total preemption," overruling *Medias*.¹⁰⁴

In 1979, *Board of Public Safety v. State ex rel. Benkovich*¹⁰⁵ raised a similar but even more difficult problem than did *N.I.D.* In *Benkovich*, firemen challenged an East Chicago ordinance requiring subsequently hired firemen to reside in the city and forbidding the promotion of previously hired firemen who resided out of the city beyond a certain distance. This ordinance potentially conflicted with two state statutes. The first statute provided that:

Members of the police and fire departments of cities of the second, third, fourth and fifth classes shall reside within the county in which said city is located and said residence shall be within fifteen (15) miles of the corporate limits of such city: provided however, that . . . in cities of the fifth class, the city council may require policemen and firemen to reside within the corporate limits of such city¹⁰⁶

The second statute established the criteria for promotions of firemen in cities of a population category that included East Chicago, using language such as "[a]ll promotions shall be made pursuant to written and oral examinations and based on seniority."¹⁰⁷

To determine whether the state statutes would preempt the local ordinance would require analysis similar to that suggested for the *N.I.D.* controversy. The first question would be whether the local ordinance was prohibited by the Powers of Cities Act. Because the state statutes neither expressly denied to local government nor expressly granted to another governmental entity the power to establish

¹⁰¹IND. CONST. art. IV, §§ 22-23.

¹⁰²*Id.* § 23.

¹⁰³435 N.E.2d at 47.

¹⁰⁴*Id.*

¹⁰⁵388 N.E.2d 582 (Ind. Ct. App. 1979).

¹⁰⁶Act of Apr. 13, 1975, Pub. L. No. 199, § 1, 1975 Ind. Acts 1096, 1096 (repealed 1981).

¹⁰⁷Act of Jan. 21, 1972, Pub. L. No. 4, sec. 1, § 10, 1972 Ind. Acts 16, 26 (repealed 1982).

residency and promotion requirements for firemen, the Powers of Cities Act would not prohibit the local ordinance. The second question would be whether a direct conflict between the ordinance and the state statutes would invalidate the ordinance under *Medias*. Because the ordinance could harmoniously coexist with both statutes, no direct conflict existed. A direct conflict should be found only when, as in *N.I.D.*, one would be incapable of complying with both laws when acting on the subject. Invalidation of an ordinance upon a finding of a conflict only in the policies of the regulations, but not in their substance, would constitute implied preemption and, thus, violate the policy disfavoring implied preemption in the Powers of Cities Act.¹⁰⁸ Because East Chicago's additional residence and promotion restrictions did not hamper compliance with the state statutes, they should have been held valid.

The court's major error in *Benkovich* was that, although it cited the mandate for express preemption in the Powers of Cities Act, it nevertheless relied on *Medias* as authority for an occupy-the-field analysis¹⁰⁹ which the 1973 amendment of the Powers of Cities Act had overruled.¹¹⁰ The *Benkovich* court cited *Sablica* as if it somehow revalidated *Medias*, even though *Sablica* only authorized occupy-the-field analysis for penal statutes and ordinances.¹¹¹ The court of appeals determined that the legislature had intended to govern every aspect of a fireman's employment in its statutes, and that such legislative intent to occupy the field constituted an express vesting of power in the state, rendering unnecessary an express denial of power to the municipality:¹¹² "The power to regulate the residence of municipal firemen vested in the State when it enacted a statute setting forth specific residence requirements."¹¹³ Although the General Assembly may never have anticipated that East Chicago would enact additional residence and promotion requirements, both the legislature and the courts are bound by the Powers of Cities Act requirements for express preemption.

In contrast, *Suburban Homes Corp. v. City of Hobart*¹¹⁴ demonstrates a proper reading of the Powers of Cities Act's provision requiring preemption where a disputed local power is "by express provision vested" in another entity.¹¹⁵ In that case, a builder contended

¹⁰⁸See *supra* notes 68-70 and accompanying text.

¹⁰⁹388 N.E.2d at 585.

¹¹⁰See *supra* notes 68-70 and accompanying text.

¹¹¹See *supra* notes 86-87 and accompanying text.

¹¹²388 N.E.2d at 585.

¹¹³*Id.*

¹¹⁴411 N.E.2d 169 (Ind. Ct. App. 1980).

¹¹⁵Act of Apr. 14, 1973, Pub. L. No. 171, § 1, 1973 Ind. Acts 866, 867 (repealed 1980).

that he need only comply with the state and not the local building code. As the court properly recognized in its declaratory judgment, the state building code expressly provided that it would supersede more stringent local codes.¹¹⁶ Such a provision expressly allocates power between cities and the state.¹¹⁷ A statute which simply establishes regulations without addressing power allocation, like the one in *Benkovich*, does not expressly vest power in any entity. The *Suburban Homes* court, therefore, complied with the General Assembly's intent to eliminate judicially implied preemption; whereas, the *Benkovich* court defied that intent.

Although the Indiana legislature attempted to prevent judicially implied preemption of municipal powers by requiring express preemption in the 1973 amendments to the Powers of Cities Act, the courts continued to misapply or ignore the preemption provisions. The next question is whether the courts will continue to defy legislative intent when they construe the Home Rule Act.

3. *The Home Rule Act.*—The Home Rule Act reaffirms the General Assembly's position in the Powers of Cities Act that preemption should remain within the state legislature's express direction. The Act changes the preemption provisions in the Powers of Cities Act in only two ways. First, the vested power provision now permits a locality to exercise its power to the extent that such power is "not expressly granted to another entity"¹¹⁸ rather than not "by express provision vested by any other law" in another entity.¹¹⁹ Second, the Home Rule Act denies to local units all powers granted to a state regulatory agency.¹²⁰ Powers expressly denied by constitution or statute still invalidate home rule powers under the Home Rule Act.¹²¹

The courts should interpret the language change in the vested powers provision in conjunction with the new provision granting exclusive powers to regulatory agencies as reinforcing the conclusion that the General Assembly intends to occupy the field only when it expressly says so. Delegation of a subject to an administrative agency is an expressed intent to occupy the field. Otherwise, state statutes, like the residence and promotion requirements in *Benkovich*, should not preempt local legislation on the same subject, even though the two are similar in their specificity and comprehension. In other words, whether a locality like East Chicago can establish residency and promotion requirements concurrent with the state's requirements should

¹¹⁶411 N.E.2d at 171 (citing IND. CODE § 22-11-1-11 (1976)).

¹¹⁷411 N.E.2d at 171.

¹¹⁸IND. CODE § 36-1-3-5(2) (1982).

¹¹⁹Act of Apr. 14, 1973, Pub. L. No. 171, § 1, 1973 Ind. Acts 866, 867 (repealed 1980).

¹²⁰IND. CODE § 36-2-3-8(7) (1982).

¹²¹*Id.* § 36-1-3-5(1).

not be an issue for the courts but for the General Assembly. By honoring the policy against implied preemption, the Indiana courts would encourage the General Assembly, when it enacts a new law, to consider whether expressly to deny localities powers on the same subject. If the General Assembly inadvertently fails to deny a power expressly, it can always amend the statute. By forcing an amendment, the courts would leave with the General Assembly the policy decision of what powers localities can exercise.¹²²

Preemption should only pose a question for the courts when an ordinance directly conflicts with a statute. Where an ordinance and a statute cannot harmoniously coexist, *Medias* should apply for the proposition that when "a city ordinance undertakes to impose regulations which are in conflict with rights granted or reserved by the Legislature, such ordinance must be held invalid."¹²³ Although the General Assembly has not expressly provided a mechanism with which courts may resolve a direct conflict between a local ordinance and a state statute, the statute must prevail over the ordinance because the local power that created the ordinance ultimately was derived from the state.¹²⁴ The General Assembly has determined that local ordinances are valid unless expressly preempted, thus reserving for itself the decision of how to allocate state and local power as each subject arises. The courts should honor that intent.

B. Local Power to Affect Private Relationships

The Powers of Cities Act denied to localities "[t]he power to enact laws governing private or civil relationships, except as an incident to the exercise of an independent municipal power."¹²⁵ The belief that issues traditionally adjudicated in suits at law require statewide uniformity prevails largely without dispute from commentators and without challenge in the courts.¹²⁶ Traditionally, the common law governs private relationships and operates uniformly throughout a state. To allow each city free rein to alter the rights and liabilities of these private relationships would create chaos in the state courts, disrupt a private individual's ability to plan his conduct in accordance

¹²²The 1970 Illinois Constitution shares Indiana's disfavor of implied preemption. For a discussion of the relevant provisions, see generally Baum, *supra* note 32, at 559, 571-73. The Illinois courts, moreover, have honored the fair intent of these provisions. *E.g.*, *County of Cook v. John Sexton Contractors Co.*, 75 Ill. 2d 494, 389 N.E.2d 553 (1979).

¹²³216 Ind. 155, 165, 23 N.E.2d 590, 594 (1939).

¹²⁴See *supra* notes 5-12 and accompanying text.

¹²⁵Powers of Cities Act, Pub. L. No. 250, sec. 1, § 19(a), 1971 Ind. Acts 955, 965 (repealed 1980).

¹²⁶Baum, *supra* note 33, at 153; Sandalow, *supra* note 1, at 674; Sato, "Municipal Affairs" in *California*, 60 CALIF. L. REV. 1055, 1097 (1972); Note, *supra* note 38, at 497. note 38, at 497.

with the law, and subject unsuspecting nonresidents to multitudes of varying and even conflicting liabilities.¹²⁷

Some disagreement does exist, however, over what the parameters of private common law should be and when the indirect impact of a local ordinance on private legal relationships should be prohibited.¹²⁸ The private law provision in Indiana's Powers of Cities Act, has been described as susceptible of three interpretations:¹²⁹ 1) the strict interpretation that a city can neither define nor affect legal relationships among private persons; 2) the liberal interpretation that a city can regulate private relationships which are in some way related to matters of traditional municipal concern; and 3) the moderate interpretation that a city can affect private relationships only "in aid of some municipal policy or program which is expressed . . . by means other than the regulation of purely civil relationships."¹³⁰ The private law provision has been criticized for not focusing on "the importance of private law regulation to the municipality's total program and the extent to which the regulation trenches upon state law."¹³¹ Ideally, a home rule grant should prohibit localities from creating a chaos of differing private liabilities within the state.¹³² On the other hand, a home rule grant should not allow a negligible impact upon private legal relationships to invalidate valuable municipal programs.¹³³

The first of only two Indiana home rule cases concerning private law relationships, *Barrick Realty, Inc. v. City of Gary*,¹³⁴ arose in federal court in 1973. One issue in *Barrick Realty* was whether the city possessed the power to forbid homeowners from erecting "for sale" signs. The court emphasized that the Powers of Cities Act,¹³⁵ like the later Home Rule Act,¹³⁶ required a liberal construction favoring local powers,¹³⁷ and apparently without concern for the ordinance's impact on the private legal relationship between realtor and vendor, the court concluded that, because the plaintiff had identified no state statute which expressly denied the city's power to enact such an ordinance, the municipal ordinance was not preempted.¹³⁸

¹²⁷Sandalow, *supra* note 1, at 675.

¹²⁸See generally *id.* at 675-79.

¹²⁹These interpretations apply to the American Municipal Association Model Home Rule Act, MODEL CONSTITUTIONAL PROVISIONS FOR MUN. HOME RULE § 6 (American Municipal Association 1953), which was the model used for the Powers of Cities Act.

¹³⁰Sandalow, *supra* note 1, at 676-77.

¹³¹*Id.* at 678.

¹³²*Id.* at 675.

¹³³*Id.* at 679.

¹³⁴354 F. Supp. 126 (N.D. Ind. 1973).

¹³⁵Powers of Cities Act, Pub. L. No. 250, 1971 Ind. Acts 955 (repealed 1980).

¹³⁶IND. CODE § 36-1-3-3 (1982).

¹³⁷354 F. Supp. at 131.

¹³⁸*Id.*

Even if the district court had addressed the possibility that the ordinance prohibiting "for sale" signs violated the Powers of Cities Act private law provision, it should have reached the same result under the moderate and liberal interpretations of the provision.¹³⁹ Although the ordinance would violate a conservative interpretation of the provision because it did indeed affect a private law relationship, the ordinance would be valid under a moderate interpretation of the private law provision because it temporarily affected the private legal relationship between realtor and vendor to aid the specific municipal policy of community stabilization. In addition, the ordinance would not test the limits of the liberal interpretation because it was not an attempt to regulate directly a private relationship related to a traditional local concern. The Gary ordinance did not create new private liabilities nor redefine private legal relationships. Its effect on private relationships exemplified "an incident to the exercise of an independent municipal power."¹⁴⁰ If such ordinances were invalidated for their indirect effects on private relationships, cities could not respond to many specifically local problems that the General Assembly is ill qualified to address because of the constitutional prohibition against special legislation for individual cities and because of lack of time and information to address local problems.

The only state court case construing the private law provision in the Powers of Cities Act, *City of Bloomington v. Chuckney*,¹⁴¹ addressed a more aggressive ordinance than did *Barrick Realty*. In *Chuckney*, Bloomington had adopted a comprehensive ordinance based upon the Uniform Residential Landlord and Tenant Act.¹⁴² This ordinance specified, for example, when a landlord must permit a tenant to entertain guests and when a landlord may enter rented premises. It also created a presumption of pre-existing damage when a landlord failed to conduct an initial inventory of the premises. Although the city contended that the ordinance's purpose was "to enforce municipal housing and safety codes . . . by giving tenants a private cause of action,"¹⁴³ the Indiana Court of Appeals held that portions of the ordinance would "so directly affect the landlord-tenant relationship that they cannot be upheld as an incident to the exercise of an independent municipal power."¹⁴⁴

Only a court applying the most liberal of the three possible interpretations of the private law provision would have upheld the Bloom-

¹³⁹See *supra* notes 128-30 and accompanying text.

¹⁴⁰Powers of Cities Act, Pub. L. No. 250, sec. 1, § 19(a), 1971 Ind. Acts 955, 965 (repealed 1980).

¹⁴¹165 Ind. App. 177, 331 N.E.2d 780 (1975).

¹⁴²UNIF. RESIDENTIAL LANDLORD AND TENANT ACT, 7A U.L.A. 499 (1972).

¹⁴³165 Ind. App. at 181, 331 N.E.2d at 783.

¹⁴⁴*Id.* at 182, 331 N.E.2d at 783.

ington ordinance. Under the conservative interpretation, the ordinance would have failed because it directly defined and affected the private legal relationships between landlord and tenant by creating new causes of action, redefining old causes of action, and transferring rights from the landlord to the tenant. Under the moderate interpretation, the ordinance would have failed because it directly regulated the purely private landlord-tenant relationship rather than temporarily affecting the relationship to aid a local program. Under the liberal interpretation, the ordinance might have stood, however, because it related to the traditional local concern of housing, even though it directly affected a private relationship. Because the Bloomington ordinance ventured too far into the traditional landlord-tenant relationship to be saved as an "incident to the exercise of an independent municipal power" under the Powers of Cities Act,¹⁴⁵ the court's decision required little discussion of where to draw the line between state and local concerns. Consequently, the Indiana courts will encounter the new private law provision in the Home Rule Act without having developed a method for analyzing it.

The Home Rule Act provision, which denies localities "[t]he power to prescribe the law governing civil actions between private persons,"¹⁴⁶ is more concrete, easier to apply, and less susceptible to independent judicial policymaking than was the broader Powers of Cities Act provision. The prior provision denied municipalities "[t]he power to enact laws governing private or civil relationships, except as an incident to the exercise of an independent municipal power."¹⁴⁷ The Home Rule Act provision clarifies that localities are prohibited only from redefining the duties and liabilities between private individuals in civil actions at law, although the Act is strict in this prohibition. Under the Powers of Cities Act, the courts would have had to determine whether the ordinance's effect on private relationships was direct and substantial, both difficult determinations subject to the court's independent policy decisions.

If the Indiana courts are hereafter faced with an ordinance affecting private relationships, they should accept the plain meaning of the new Home Rule Act provision and determine whether the ordinance redefines the duties and liabilities between private parties in civil actions. Only if it does so should the courts find the ordinance in violation of the Home Rule Act's private law provision. In making this determination, the courts should be mindful of the General Assembly's complete rejection of the language in the Powers of Cities Act that

¹⁴⁵Powers of Cities Act, Pub. L. No. 250, sec. 1, § 19(a), 1971 Ind. Acts 955, 965 (repealed 1980).

¹⁴⁶IND. CODE § 36-1-3-8(2) (1982).

¹⁴⁷Powers of Cities Act, Pub. L. No. 250, sec. 1, § 19(a), 1971 Ind. Acts 955, 965 (repealed 1980).

suggested that the court could balance state and local interests whenever a local ordinance affected private legal relationships. Thus, the Gary "for sale" sign ordinance would survive under the Home Rule Act. Regulations of rental housing also would survive if, unlike the Bloomington ordinance, they did not attempt to affect private liabilities between landlords and tenants. Further, if the courts accept the plain language of the Act, localities will be able to address their problems without fear that a negligible impact on private relationships could defeat their efforts. The private law provision of the Home Rule Act gives the courts a clear test for upholding or invalidating local ordinances. Consequently, the courts should follow this legislative test and refrain from exercising independent judicial tests that could erode home rule.

C. *The Local Affairs Limitation*

The Home Rule Act contains one serious flaw in draftsmanship: it provides that a locality has "(1) all powers granted it by statute; and (2) all other powers necessary or desirable in the conduct of its affairs, even though not granted by statute."¹⁴⁸ The Powers of Cities Act contained a similar provision, limiting cities to those powers "necessary or desirable in the public interest of its inhabitants."¹⁴⁹ This type of broad language in home rule grants forces the court to define independently what constitutes local overreaching¹⁵⁰ and may lead to the erosion of home rule powers. Fortunately, the Indiana courts have not used this provision to test the limits of local power in the past, presumably because they regard local officials as better judges of what is necessary and desirable for effective local government. It is hoped that the legislature's enumeration of powers denied in the Home Rule Act¹⁵¹ will leave little room for the use of this provision in the future.

Broad home rule provisions that vaguely grant cities all power over their municipal affairs require the courts to decide what is "necessary or desirable" for the localities to govern.¹⁵² To make this decision the courts must distinguish what the locality should control

¹⁴⁸IND. CODE § 36-1-3-4(b) (1982).

¹⁴⁹Powers of Cities Act, Pub. L. No. 250, sec. 1, § 1, 1971 Ind. Acts 955, 955 (amended 1973) (repealed 1980).

¹⁵⁰See generally Andersen, *supra* note 26; Sandalow, *supra* note 1; Sato, *supra* note 126; Vanlandingham, *supra* note 13; Winter, *supra* note 23; Note, *supra* note 38.

¹⁵¹IND. CODE § 36-1-5-8 (1982).

¹⁵²Courts tend to construe local affairs provisions less strictly when the only issue is whether a locality may exercise a particular power. When a conflict in the exercise of powers between city and state arises, the courts interpret local affairs provisions more rigidly in deciding which of the two governmental units prevails. Sato, *supra* note 126, at 1062.

from what the state should control.¹⁵³ Because most subjects ultimately affect both state and locality, the test under these broad provisions often degenerates into a determination of whether a concern is *purely* local;¹⁵⁴ if not, then it lies outside of home rule powers. Consequently, home rule powers are eroded because subjects which are predominantly local and fairly within a grant of power over local affairs do not qualify as purely local. Additionally, distinguishing local from state affairs often produces case-by-case analysis, creating uncertainty over what powers the localities actually possess.¹⁵⁵

Even if the Indiana courts regard the "necessary or desirable in the conduct of its affairs" provision as a test for the limits of local power, they will seldom need to venture into that quagmire under the Home Rule Act. The General Assembly has absolved the Indiana courts of that responsibility by enumerating powers denied and granted to localities.¹⁵⁶ Only *Board of Public Safety v. State ex. rel. Benkovich*¹⁵⁷ has opened the door to a local affairs test by characterizing a residency requirement for firemen as "a matter which is [not] simply one of municipal concern."¹⁵⁸ That statement actually constitutes a purely local affairs test which lacks statutory sanction because a necessary and desirable exercise of local power may minimally affect the state. If this reasoning were widely applied, few local powers could survive. Whether an East Chicago fireman resides within city limits concerns East Chicago much more than it does the rest of Indiana.¹⁵⁹ The Indiana courts should not use the local affairs test under the Home Rule Act but should allow local officials to determine what constitutes local affairs and what is necessary and desirable to regulate those affairs.

The Indiana courts may have to use the local affairs provision, however, where local exercises of power have an excessive extraterritorial impact. The Home Rule Act addresses extraterritorial jurisdiction but not extraterritorial impact.¹⁶⁰ A power that operates only

¹⁵³Winter, *supra* note 23, at 616; Note, Sonoma County Organization of Public Employees v. County of Sonoma: *The Contract Clause and Home Rule Powers Revitalized in California*, 68 CALIF. L. REV. 829, 842 (1980); Note, *supra* note 38, at 490 n.46.

¹⁵⁴Winter, *supra* note 23, at 616. The municipal affairs-state interest dichotomy can erode home rule powers to the point of absurdity. See *Omaha Parking Authority v. City of Omaha*, 163 Neb. 97, 77 N.W.2d 862 (1956). In *Omaha Parking Authority*, the Nebraska Supreme Court reasoned that parking areas are connected to streets which are, in turn, connected eventually to state highways; therefore, local parking areas are a state concern. *Id.* at 105, 77 N.W.2d at 869.

¹⁵⁵Andersen, *supra* note 26, at 134; Note, *supra* note 153, at 842.

¹⁵⁶See generally IND. CODE §§ 36-1-3-1 to -9 (1982).

¹⁵⁷388 N.E.2d 582, (Ind. Ct. App. 1979).

¹⁵⁸*Id.* at 585.

¹⁵⁹See *supra* text accompanying notes 105-113.

¹⁶⁰IND. CODE § 36-1-3-9 (1982). A commendable feature of this section of the Home

within the boundaries of a locality may, nevertheless, adversely affect surrounding residents and communities.¹⁶¹ Ordinances which discriminate against commuting workers, for example, may qualify as unnecessary and undesirable in the conduct of a unit's affairs. Nevertheless, because nearly every ordinance has some impact upon surrounding communities, the Indiana courts should allow local ordinances a strong presumption of validity when they are challenged for their extraterritorial impact.¹⁶²

A local affairs test erodes home rule powers by limiting local authority to purely local concerns. Therefore, the Indiana courts should never use the "necessary or desirable" language of the Home Rule Act when more specific provisions suffice. Only in clear cases of abuse, such as extraterritorial overreaching, should the courts open the door to the local affairs line of analysis. Also, before construing the "necessary or desirable in its own affairs" provision of the Home Rule Act as a test for the courts rather than for local officials to implement, the courts should consider whether they would thereby defeat reasonable ordinances which promote effective local government by requiring these ordinances to affect only purely local affairs.¹⁶³

V. A ROLE FOR THE COURTS IN PRESERVING LOCAL POWERS UNDER THE HOME RULE ACT

The General Assembly's adoption of the Home Rule Act signifies a reaffirmation of its support for local self-government. This reaffirmation should notify the courts that the General Assembly wants local government to address local problems. Specifically, the recodification should remind the courts that the principles used for allocating state and local powers prior to the Powers of Cities Act no longer apply.¹⁶⁴ The courts should now operate exclusively within the framework of the Home Rule Act.

The courts usually failed to give full recognition to the Powers of Cities Act.¹⁶⁵ At times, they even employed language associated with Dillon's Rule,¹⁶⁶ even though both the Powers of Cities Act and

Rule Act is the mechanism it establishes for settling extraterritorial disputes. It provides that a local unit may exercise extraterritorial jurisdiction only by express statutory authorization plus either an agreement from the affected local unit or a court order.

¹⁶¹See Andersen, *supra* note 26, at 136; Clark, *supra* note 15, at 662; Sato, *supra* note 126, at 1062.

¹⁶²See Clark, *supra* note 15, at 670.

¹⁶³Andersen, *supra* note 26, at 134-36.

¹⁶⁴See *supra* notes 72-76 and accompanying text.

¹⁶⁵See *supra* text accompanying notes 63-80, 91-104; see *infra* text accompanying notes 168-69.

¹⁶⁶See *supra* notes 9-12 and accompanying text.

the Home Rule Act provided that Dillon's Rule was no longer applicable.¹⁶⁷ Even under Dillon's Rule, Indiana municipalities could exercise powers implied by their incorporation.¹⁶⁸ These implied powers, called "police powers," were those powers necessary "to promote the comfort, health, convenience, good order and general welfare of the inhabitants,"¹⁶⁹ thus conferring a form of local self-government by incorporation alone or aside from a home rule statute. "Police powers," in other words, belong to a conception of the allocation of state and local powers which terminated when the General Assembly passed home rule legislation. Therefore, the courts should have avoided police power rhetoric when addressing local powers after the Powers of Cities Act.¹⁷⁰

Rather than sidestepping the home rule statute whenever possible, the courts should honor legislative intent by assuming the role of home rule protector. Because the General Assembly always can expressly deny a local power or expressly grant that power to another entity, the courts should adhere to the legislative policy against implied preemption. Adherence to legislative intent will prevent the gradual erosion of local powers that results when courts make home rule policy decisions independently. In accordance with this principle, courts should exercise care not to inject new rules into those already required under the Act for the valid exercise of local powers.¹⁷¹

The courts should also diligently observe the Home Rule Act's mandate that "[a]ny doubt as to the existence of a power of a unit shall be resolved in favor of its existence."¹⁷² This mandate justifies requiring a strong burden of proof for those who seek to invalidate local initiatives.¹⁷³ A strong burden of proof would help the courts resolve the preemption, private law, and extraterritorial impact issues likely to arise under the Home Rule Act. Although this presumption of validity might occasionally produce what the court considers an undesirable result,¹⁷⁴ such a result may only indicate that an allocation of powers issue which the legislature needs to address has surfaced. Moreover, the courts' tenacity in following the Home Rule Act

¹⁶⁷Powers of Cities Act, Pub. L. No. 250, sec. 1, § 23, 1971 Ind. Acts 955, 967 (repealed 1980); IND. CODE § 36-1-3-4(a) (1982).

¹⁶⁸City of Crawfordsville v. Braden, 130 Ind. 149, 152-55, 28 N.E. 849, 850-51 (1891).

¹⁶⁹*Id.* at 154, 28 N.E. at 851.

¹⁷⁰In State *ex rel.* Town of Cedar Lake v. Lake Superior Court, 431 N.E.2d 81 (Ind. 1982), the Indiana Supreme Court, without so much as a reference to the home rule statute, found that an ordinance ordering an adult outdoor movie theater to modify its facilities was a valid exercise of the town's police powers. *Id.* at 83.

¹⁷¹See Winter, *supra* note 23, at 615.

¹⁷²IND. CODE § 36-1-3-3(b) (1982).

¹⁷³See Clark, *supra* note 15, at 669.

¹⁷⁴See *supra* text accompanying notes 105-13.

provision even to an undesirable result would prevent the implied judicial erosion of home rule powers and serve the broader goals of clarifying the home rule law and encouraging local initiative.

VI. CONCLUSION

In order to foster local initiatives for solving local problems and making improvements without obstructing necessary statewide uniformity, home rule powers must be protected from legislative and judicial erosion, must be allowed to coexist harmoniously with state powers, and must be responsive to a growing complexity and interdependence within the state.

As a statutory grant, the Indiana Home Rule Act allows adaptability to change at the General Assembly's discretion. Its enumerations of powers granted and powers denied provides enough clarity and specificity to forestall judicial erosion and promote confident local action. Realization of the Act's virtues, however, requires that the Indiana courts faithfully observe its underlying policies.

Specifically, the courts should guard against eroding home rule powers in the three problematic areas of state preemption, private law, and local affairs. First, when confronting concurrent state and local legislation, the courts should honor the Home Rule Act's disfavor of implied preemption and leave to the General Assembly the decision of whether the laws can coexist. Only when faced with concurrent regulations that cannot harmoniously coexist should the courts resort to common law. Second, when confronted with an ordinance that affects private relationships, the courts should strictly construe the private law provision of the Home Rule Act to disallow interference with lawsuits between private persons but not to disallow other effects upon private relationships. Finally, the courts should diligently avoid applying the provision of the Act that allows a local unit to exercise only those powers "necessary and desirable in the conduct of its affairs," except where a local ordinance has an unjustifiable, adverse, extraterritorial impact.

The success of local self-government under the Indiana Home Rule Act requires the courts to assume a role as protector of home rule powers. To do so, the Indiana courts should adopt the framework provided in the Home Rule Act, imposing a strong burden of proof upon those seeking to invalidate home rule powers. Most importantly, the Indiana courts should approach their cases with an awareness of how each judicial decision affects the survival and successful operation of home rule in Indiana.

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