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Paul P. Biebel Jr.

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HOME RULE IN ILLINOIS AFTER TWO YEARS: AN UNCERTAIN BEGINNING

by PAUL P. BIEBEL, JR.*

*"Home Rule, many of you might know, is like sex — when it is good, it is very, very good, and when it's bad, it's still pretty good."*¹

*Home Rule is "a paradoxical enigma, attractive and appealing, yet unattainable to any significant degree."*²

INTRODUCTION

The above cited comments bring to mind the close analogy between effective home rule as it fares in the United States and the elusive beauty as it appears in the dreams of many men — eminently desirable, but never quite attainable. The delegates to the Sixth Illinois Constitutional Convention, particularly those on the Local Government Committee, were faced with a difficult problem — to attempt to deal with a concept that is as old as the Magna Charta,³ but one which has not been truly effective in bridging the gap between the desire for local autonomy and effectively implementing that desire.⁴ As one commentator has noted, "Home rule has largely been a disappointment to its supporters."⁵

The framers of the 1970 Constitution accepted the challenge of attempting to create a home rule section which would

* B.A., Marquette University; J.D., Georgetown University Law Center; Assistant State's Attorney of Cook County, Illinois, serving as Supervisor of the Civil Appeals Section. Mr. Biebel has represented Cook County in all home rule litigation in which it has been a party and is also presently serving as Counsel to the Cook County Home Rule Study Commission.

¹ REC. OF PROC., SIXTH ILL. CONST. CONV., *Verbatim Transcripts*, Vol. IV at 3038 (1969-70) (emphasis added) [hereinafter cited as *Verbatim Transcripts*].

² THE CHICAGO HOME RULE COMMISSION, REPORT ON CHICAGO'S GOVERNMENT at 316 (1954) (emphasis added).

³ Ancel, *20th Century Powers for 20th Century Cities: Constitutional Municipal Home Rule in Illinois*, 49 CHI. B. REC. 226 (March, 1968) [hereinafter cited as ANCEL]. See also ANTIEAU, MUNICIPAL CORPORATION LAW 95 (1964) [hereinafter cited as ANTIEAU], quoting *People ex rel. Metropolitan St. Ry. v. Tax Commissioners*, 174 N.Y. 417, 67 N.E. 69, 70-71 (1905).

⁴ See Cohn, *Municipal Revenue Powers in the Context of Constitutional Home Rule*, 51 NW. U. L. REV. 27 (1956) [hereinafter cited as COHN, *Municipal Review Powers*].

⁵ Green, *Home Rule Preemption and the General Assembly* at 1. (One of the background papers prepared for the Illinois Assembly on Home Rule held April 5-7, 1973) [hereinafter cited as GREEN].

avoid the pitfalls that have plagued home rule advocates in states throughout the country. The results of their efforts have met with praise by many informed commentators. The new Illinois home rule provisions have been variously described as "among the most important" of the sections of the new constitution,⁶ "the boldest and most innovative part" of the Local Government Article,⁷ "potentially the most significant departure" in the new constitution⁸ and the "broadest home rule grant in any state in the country."⁹ This article will analyze the broad home rule concept as envisioned and adopted by the members of the recent constitutional convention, with particular emphasis on the problems intended to be avoided. Thereafter, the several early home rule decisions by the Illinois Supreme Court will be considered in order to ascertain whether the hopes of the convention members are being realized in the initial years of home rule in Illinois.

LOCAL GOVERNMENTAL AUTHORITY IN ILLINOIS PRIOR TO THE ADOPTION OF HOME RULE

Before home rule was adopted in this state, drastically altering the relationship between state and local governmental entities, Illinois law required that, absent an express grant of local power in the constitution, local governments were "creatures" of the state — totally dependent upon the General Assembly for authority to act.¹⁰ This theory of "legislative supremacy," first enunciated by Justice John F. Dillon of the Iowa Supreme Court, has commonly come to be known as "Dillon's Rule."¹¹

⁶ Baum, *The Scope of Home Rule: The Views of the Con-Con Local Government Committee*, 59 ILL. B.J. 814 (1971) [hereinafter cited as BAUM, *Home Rule*].

⁷ Parkhurst, *Article VII — Local Government*, 52 CHI. B. REC. 94 (1970) [hereinafter cited as PARKHURST, *Article VII*].

⁸ Mack, *Home Rule Referenda in Illinois* at 1. (One of the background papers prepared for the Illinois Assembly on Home Rule April 5-7, 1973) [hereinafter cited as MACK].

⁹ *Verbatim Transcripts*, vol. IV at 3043.

¹⁰ REC. OF PROC., SIXTH ILL. CONST. CONV., *Committee Proposals*, Vol. VII at 1603 (1969-70) [hereinafter cited as *Committee Proposals*].

¹¹ Justice Dillon noted in *City of Clinton v. Cedar Rapids and Missouri River Ry.*, 24 IOWA 455 (1868):

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purpose of the corporation — not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

In 1872 Justice Dillon repeated this same theory in a treatise which became quite influential in its treatment of Local Government Law: DILLON, *MUNICIPAL CORPORATIONS* ch. V, § 55 (1st ed. 1872).

That rule, which also required a strict construction of legislative grants of authority to local governments,¹² aptly described the extent of state control over local governments which had been established by colonial legislatures in attempting to effectively govern rural communities.¹³

Illinois decisions had embraced that same principal of legislative supremacy¹⁴ (and its effects were not removed until the adoption of home rule). However, the same dissatisfaction in other states with the relationship between local government and uninformed, unresponsive legislatures¹⁵ came to the fore in Illinois. In criticizing this relationship in Illinois, one commentator drew the analogy between parent and child in describing the dependence of local governments upon the legislature.¹⁶ The late professor David C. Baum of the University of Illinois Law School has observed that the system was "terribly frustrating" because local governments were forced to appeal to the General Assembly each time there was doubt as to whether a power existed under the statutes to initiate an activity the local government believed was needed.¹⁷ The City of Chicago was particularly recognized as a victim of forced reliance upon a distant, unsympathetic legislature for its authority.¹⁸ Adding to this dissatisfaction was the realization that population statistics in Illinois had fundamentally changed. At the time the 1870 Illinois Constitution was adopted, the state was populated by

¹² Vitullo, *Local Government: Recent Developments in Local Government Law in Illinois*, 22 DEPAUL L. REV. 85 (1972) [hereinafter cited as VITULLO]; see also, *Committee Proposals*, vol. VII at 1603.

¹³ Small, *Issues for the Illinois Constitutional Convention: Urban Government* at 2 (1969). (One in a series of papers prepared for the Constitutional Convention) [hereinafter cited as SMALL].

¹⁴ The Illinois Supreme Court observed as late as 1964 in *Ives v. City of Chicago*, 30 Ill. 2d 582, 584, 198 N.E.2d 518, 519:

The city must have an express grant of authority from the General Assembly to enact the ordinances unless the power is necessarily implied in or incidental to power or powers expressly conferred.

Cf. Concrete Contractors Ass'n v. Village of La Grange Park, 14 Ill. 2d 65, 150 N.E.2d 783 (1958); *City of Chicago v. Ingersoll Steel & Disk Division*, 371 Ill. 183, 20 N.E.2d 287 (1939).

¹⁵ See Sandalow, *The Limits of Municipal Power under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 655 (1964) [hereinafter cited as SANDALOW]; COHN, *Municipal Revenue Powers*, *supra* note 4, at 30; ANTIEAU, *supra* note 3, at 121-27.

¹⁶ Hodes, *Municipal Home Rule and the State Constitution of Illinois*, 30 CHI. B. REC. 249, 249-50 (1949).

¹⁷ Baum, *The Constitutional Background of Home Rule* at 3. (Second Annual Local Government Law Institute, presented by The Illinois Institute for Continuing Legal Education (1971)) [hereinafter cited as BAUM, *Home Rule Background*].

¹⁸ Professor Sandalow observed in 1964:

The problem [lack of authority to adequately treat day-to-day problems] is more acute when the municipality lacks power to undertake a program designed to meet an important new problem. Chicago, for example, has at times in the past been unable to regulate various occupations and businesses vitally affecting the welfare of its residents or to license automobile operators even though the legislature had provided no

two and one-half million people, eighty percent of whom resided in rural areas. One hundred years later, the population had increased to eleven and one-half million people, eighty-five percent of whom were living in urban areas.¹⁹ The change from a predominantly rural state to one essentially urban in character greatly altered and expanded the need for independent local governmental authority. In 1969, the Sixth Illinois Constitutional Convention presented an opportunity to consider these problems and concerns.

THE LOCAL GOVERNMENT COMMITTEE REPORT

The membership of the Local Government Committee of the Sixth Illinois Constitutional Convention was diverse in its political, geographical, and philosophical composition. Chairman John C. Parkhurst was a Republican from Peoria; Vice-Chairman Philip J. Carey was a Democrat from Chicago. The committee's ranks also included Richard M. Daley, the son of Chicago's mayor; David E. Stahl, former administrative assistant to the mayor of Chicago and later comptroller of the City of Chicago; Robert L. Butler, mayor of downstate Marion; John G. Woods, mayor of Arlington Heights; and Betty Ann Keegan and Joan G. Anderson of the League of Women Voters.

Although there was a great divergence in interests, opinions and constituencies among the members of the Local Government Committee, indeed among the entire membership of the convention, the delegates uniformly believed that a home rule provision was needed. As Vice-Chairman Carey observed, both the majority and minority members of the Local Government Committee favored strong home rule. They differed only in how it could be accomplished.²⁰ Realizing that compromise might be the key to a successful constitutional referendum,²¹ the Local

system of state-wide control to protect the public.
SANDALOW, *supra* note 15, at 653-54 [footnotes omitted]. See also ANCEL, *supra* note 3, at 227.

¹⁹ SMALL, *supra* note 13, at 25.

²⁰ Carey, *Home Rule Preemption by Court Interpretation*, Vol. X, No. 3 at 5, (Local Government Law Newsletter, published by the Illinois State Bar Ass'n (Feb. 1973)) [hereinafter cited as CAREY].

²¹ Ebel, *Issues for the Illinois Constitutional Convention: Local Government Outside Illinois* at 19 (1969). (One of a series of papers prepared by the Constitutional Research Group for the delegates of the Illinois Constitutional Convention) [hereinafter cited as EBEL].

Chairman Parkhurst has commented on the importance of compromise leading to the acceptance of the constitution:

[M]any delegates felt that a complete devolution of autonomous powers to home rule units, including the possibility of a highly unpopular local income tax or payroll tax, would spell the death knell of the proposed Constitution. The ultimate decision finally resolved itself into a broad expression of home rule power, subject to certain specific limitations. PARKHURST, *Article VII*, *supra* note 7, at 99.

Government Committee issued a report²² which struck a politically realistic balance²³ while creating a unique solution to the problem of balancing state and local power.²⁴

The Local Government Article, article VII of the 1970 Constitution, was adopted in a form nearly identical to that submitted by the committee. Accordingly, the report of the Local Government Committee which explains the proposed article is most helpful in ascertaining the intent behind its various provisions.²⁵ Heavy emphasis will consequently be placed upon that report in analyzing the meaning of the new home rule sections.²⁶ Because of the unique quality of Illinois home rule,²⁷ relatively little reliance will be placed upon decisions from other jurisdictions.

THE ESSENCE OF ILLINOIS HOME RULE

In theory, home rule was enacted in Illinois to upset the system created by an acceptance of Dillon's Rule — to constitutionally emancipate local governmental units from the absolute control of the state legislature. Under the new home rule section, a presumption now issues in favor of local authority except for limitations contained within the section itself. As Chairman Parkhurst noted, "Home rule units in Illinois will be able to do virtually anything by local ordinance unless prohibited by the Constitution or preempted by the State Legislature."²⁸

Perhaps the Illinois Supreme Court has best explained this basic alteration in the relationship between state and local authority in the recent case of *Kanellos v. County of Cook*:

The concept of home rule adopted under the provisions of the 1970 constitution was designed to drastically alter the relationship which previously existed between local and State government.

²² *Committee Proposals*, vol. VII at 1567-1773.

²³ GREEN, *supra* note 5, at 5.

²⁴ Cole, *Illinois Home Rule in Historical Perspective*, at 8 (1973). (One of the background papers prepared for the Illinois Assembly on Home Rule [hereinafter cited as COLE].)

²⁵ BAUM, *Home Rule*, *supra* note 6, at 815.

²⁶ The home rule section of the new constitution is contained in Article VII, § 6. Relevant portions are set out in subsequent text and footnotes which treat the individual provisions in detail.

²⁷ Baum, *A Tentative Survey of Illinois Home Rule (Part I): Powers and Limitations*, 1972 U. ILL. L.F. 137, 157 [hereinafter cited as BAUM, *Part I*]. See also VITULLO, *supra* note 12, at 87.

The Supreme Court of Wisconsin has ruled in a manner consistent with this approach:

Cases in other jurisdictions cannot be cited as authority for the conclusion here reached for the reason that no other jurisdiction has a home-rule provision couched in the language of the home-rule amendment of this state.

Van Gilder v. City of Madison, 222 Wisc. 58, 76-77, 267 N.W. 25, 32 (1936).

²⁸ Parkhurst, *Local Government, The Illinois Constitutional Convention*, Weekly Summary No. 32 at 11 (Sept. 3, 1970) [hereinafter cited as PARKHURST, *Local Government*].

Formerly, the actions of local governmental units were limited to those powers which were expressly authorized, implied or essential in carrying out the legislature's grant of authority. Under the home-rule provisions of the 1970 constitution, however, the power of the General Assembly to limit the actions of home-rule units has been circumscribed and home-rule units have been constitutionally delegated greater autonomy in the determination of their government and affairs. To accomplish this independence the constitution conferred substantial powers upon home-rule units subject only to those restrictions imposed or authorized therein.²⁹

The generic form of home rule in Illinois is known as self-executing constitutional home rule. Since there is no inherent dependency upon legislative implementation this form of home rule has been judged to be the most effective in use among the states.³⁰

Furthermore, the members of the Local Government Committee indicated an unequivocal intent to avoid any requirement that local charters be adopted before home rule could be implemented, even though the charter process is commonly used in states having self-executing home rule provisions in their constitutions.³¹ This decision was based on the committee's conclusion that the charter process is unnecessarily complex, placing undesirable impediments in the path of effective rule.³² The committee felt that the municipal structure in Illinois was sufficiently developed to avoid the need for charter approval of home rule authority.³³ Consequently, the constitutional grant of self-executing home rule, unencumbered by the charter process, makes Illinois home rule the most easily implemented of any home rule structure in the United States.³⁴

THE REASONS FOR THE ADOPTION OF HOME RULE

The report of the Local Government Committee cogently expresses the reasons for the inclusion of a home rule section in the Local Government Article:

The Local Government Committee unanimously believes that a

²⁹ *Kanellos v. County of Cook*, 53 Ill. 2d 161, 166, 290 N.E.2d 240, 243 (1972).

³⁰ See *Home Rule: A Solution for Municipal Problems?*, 16 Wyo. L.J. 47, 58 (1961).

It is further observed in that same article:

Thus, if the prime purpose of home rule [which is to prevent legislative interference] is to be achieved, the Constitutional self-executing form is the best if not the only one capable of achieving the desired result.

³¹ *Committee Proposals*, vol. VII at 1617.

³² *Id.* at 1617-18. The Local Government Committee specifically observed in this regard that in states requiring charter adoption of home rule, many municipalities have failed to adopt charters. Colorado is cited as a specific example, with only twenty-two of the forty-six municipalities eligible for home rule having adopted charters.

³³ *Id.* at 1618.

³⁴ COLE, *supra* note 24, at 8. It is estimated by this author that home rule in some form, either constitutional or legislative in nature, presently exists in forty-one states in addition to Illinois.

system of home rule is superior to the existing system of legislative supremacy, and that home rule should be included in the new Constitution.

The fundamental reason for favoring home rule over the existing system of legislative supremacy is this: Local governments must be authorized to exercise broad powers and to undertake creative and extensive projects if they are to contribute effectively to solving the immense problems that have been created by the increasing urbanization of our society. . . . The Committee believes local government should be strengthened because it is closer to the people it serves than are other forms of government and, as a result, on balance is likely to be more responsible to the citizenry, more sensitive to community needs and more efficient and effective in meeting those needs. In addition, broadening the powers of local governments will reduce the number of bills dealing with local matters which now overburden the General Assembly, will strengthen the role of local officials in determining local issues and diminish the power of state legislators who are less familiar with local conditions, and reduce the amount of State control over local affairs.

. . .³⁵

In short, the basic force motivating the adoption of home rule was the desire to limit legislative interference in local affairs.³⁶ Although potential risks and abuses of home rule authority were considered, the committee nevertheless believed that possible shortcomings were far outweighed by the benefits which inhere to increased autonomy in home rule units.³⁷

WHAT'S A HOME RULE UNIT?

Article VII, section 6(a) entrusts home rule authority to any county having a chief executive officer elected by the electors of the county,³⁸ and any municipality having a population in excess of 25,000. All other municipalities are permitted to become home rule units by referendum.³⁹ Section 6(b) provides

³⁵ *Committee Proposals*, vol. VII at 1604-06.

³⁶ See note 30 *supra* at 62.

³⁷ *Committee Proposals*, vol. VII at 1614.

³⁸ It was felt that the requirement of an elected chief executive officer was needed in order to insure visible, responsible and accountable leadership. See MACK, *supra* note 8, at 2 and *Committee Proposals*, vol. VII at 1634. At present Cook County is the only home rule county. In 1972 nine other counties (De Kalb, Du Page, Fulton, Kane, Lake, Lee, Peoria, St. Clair and Winnebago) attempted by referenda to become home rule units and all failed by a margin of at least three to two. See MACK, *supra* note 8, at 7.

In Rock Island County the county board refused even to permit the issue to go to referendum. In Logan County petitions for referenda were circulated, but the issue never made it to the ballot. See *Newsletter on Home Rule*, No. 1 at 10 (Nov., 1972). (Published by the Institute of Government and Public Affairs, University of Illinois) [hereinafter cited as NEWSLETTER].

³⁹ There are presently seventy-two home rule municipalities in Illinois. Fifty-nine municipalities over 25,000 in population received automatic home rule; six municipalities have achieved home rule by special census; and seven municipalities under 25,000 in population have approved home rule by referenda. The smallest municipality in this final category was McCook in Cook County, with a population of 366.

that a home rule unit may elect by referendum to no longer remain a home rule unit.

The figure of 25,000 as the standard for automatic municipality home rule was the result of a compromise reached after long debate and many proposed amendments. A brief discussion of what occurred in committee and during floor debates is indicative of the various philosophical approaches which were voiced on home rule. The Local Government Committee Majority Report contained a proposed population figure of 20,000 for automatic municipal home rule. The majority thought that increased home rule powers were more urgently needed by the larger municipalities in order to achieve a satisfactory quality of life for their citizens.⁴⁰ They were further of the opinion that only the larger municipalities could effectively utilize home rule powers, for only they could have a sufficiently broad revenue base needed to support home rule powers in a meaningful fashion.⁴¹

Six members of the Local Government Committee, including Vice-Chairman Carey and Delegate Richard M. Daley, submitted a minority report wherein they took the position that automatic home rule should be granted to all Illinois municipalities regardless of size.⁴² Noting that the Illinois Municipal League also opposed a classification system and that a survey of mayors of municipalities under 10,000 indicated an overwhelming desire for home rule, the minority contended that home rule was needed to combat the problems of all municipalities.⁴³

These philosophical differences between the "across-the-board" advocates and the "classification" supporters⁴⁴ were carried over and continued during the later debates on the floor of the convention. Proposals for the adoption of population

Six municipalities under 25,000 were unsuccessful in their attempt to attain referendum approval for home rule status. See MACK, *supra* note 8, at 2-3; NEWSLETTER, *supra* note 38, No. 3, at 5 (May, 1973).

Approximately sixty percent of the population in Illinois resides in municipalities over 25,000; BAUM, *Part I, supra* note 27 at 143, n. 23. Over two-thirds of the home rule municipalities are located in the six northeast counties of Illinois; Cole, *Home Rule Use by Local Governments in Illinois: Some Early Trends*. (One of the background papers prepared for the Illinois Assembly on Home Rule in 1973). See also MACK, *supra* note 8, at 3.

See ILL. REV. STAT. ch. 46, §§ 28-4 (1973) where procedures have been established for the conducting of referendums required by the new constitution in respect to units of local government. The legislation specifically provides that such referenda may not be held more often than once in any 23 month period, and further provides that a municipality may not conduct a referendum to cease to be a home rule unit until June 1, 1975 and thereafter may conduct such a referendum only once within any 47 month period.

⁴⁰ *Committee Proposals*, vol. VII at 1629.

⁴¹ *Id.*

⁴² *Id.* at 1868.

⁴³ *Id.* at 1872-73.

⁴⁴ PARKHURST, *Article VII, supra* note 7, at 99.

figures of 20,000;⁴⁵ 30,000;⁴⁶ 40,000⁴⁷ and 200,000⁴⁸ were made and rejected. Although the figure of 10,000 was approved on first reading,⁴⁹ it was later amended to 25,000,⁵⁰ which was the figure approved for the final version of the constitution. In view of the more extreme problems facing larger municipalities, particularly the City of Chicago, Delegate Peter Tomei went so far as to propose that municipalities over 50,000 in population be placed in a separate home rule category, enjoying greater protection from legislative limitation than that afforded to smaller home rule units (*i.e.*, a three-fifths majority would be needed to limit any exercise of home rule authority by such larger municipalities). His approval was also defeated.⁵¹

Despite the wide divergence of opinion as to a suitable classification figure for the automatic grant of home rule authority, the delegates to the Sixth Illinois Constitutional Convention settled upon a population figure of 25,000, thereby indicating the spirit of compromise which led to a politically acceptable constitution.

GENERAL AND SPECIFIC GRANTS OF HOME RULE AUTHORITY

When the delegates to the convention endeavored to define the terms "municipal affairs" or "local concerns" in a manner which sought to avoid the imposition of unreasonable restrictions on local authority, they addressed themselves to perhaps the most difficult and perplexing problem which has confronted the proponents of home rule.⁵² As Professor Sandelow noted:

For better or worse, the use of such phrases constitutes a clear invitation to policy making by judges before whom, in our system of government, all questions as to whether a municipality has exceeded its power must inevitably come.⁵³

Although article VII, section 6(a) does contain similar language entrusting home rule units with broad authority to

⁴⁵ *Verbatim Transcripts*, vol. IV at 3325.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 3080.

⁴⁹ *Id.* at 3324.

⁵⁰ *Verbatim Transcripts*, vol. V at 4167.

⁵¹ *Id.*, vol. IV at 3355-56.

⁵² *Supra* note 30, at 59.

Professor Cohn expressed the problem well when he stated:

Although the reason most frequently offered for this failure to effect desired local autonomy is judicial unenlightenment and conservatism, as exemplified in the adoption of the Dillon Rule of state supremacy and in a persistent insistence upon its current vitality, the reason most nearly in accord with the facts is that the concept of home rule as an instrumentality of allocating powers of municipal autonomy in matters of "local concern" or "municipal affairs," has not been defined in terms capable of precise translation and application.

COHN, *Municipal Review Powers*, *supra* note 4, at 30 [footnotes omitted].

⁵³ SANDALOW, *supra* note 15, at 660 [footnotes omitted].

"exercise any power and perform any function pertaining to its government and affairs," the framers of the 1970 Illinois Constitution attempted to minimize the problem of judicial preemption in a manner not duplicated in any other constitution.⁵⁴ The four most basic and essential powers which fall within the general grant of authority — the powers to tax, license, incur debt and general police powers — were inserted by the constitutional framers to guard against judicial preemption.⁵⁵ In view of the long history of strict construction of local powers in Illinois,⁵⁶ the Local Government Committee felt that the specification of the most important powers included within the general grant of authority was necessary to avoid restrictive interpretation and possible limitation by the courts.⁵⁷

Although each of the four specific powers might well be protected from judicial limitation by the language of section 6(a), construction of the general phrase "pertaining to its government and affairs" promises to plague Illinois home rule units as it has local governments in virtually every other home rule state. Notwithstanding the specific statement in the Local Government Committee Report that the inclusion of the phrases "exercise any power" and "perform any function" were "designed to be the broadest possible description of the powers that the receiving units of local government may exercise,"⁵⁸ and despite the fact that section 6(m) requires a liberal construction of the powers and functions of home rule units, informed commentators have expressed strong misgivings about possible future treatment of powers which fall outside the strict ambit of the four expressly granted powers of section 6(a).⁵⁹ Professor Baum, for example,

⁵⁴ *Committee Proposals*, vol. VII at 1621. Parenthetically, it should also be observed at this time that the inclusion of sections 6(g), 6(h) and 6(i) in article VII as bulwarks against implied legislative preemption, is also totally unique to Illinois. See note 131 *infra* and accompanying text.

⁵⁵ The Local Government Committee Report, in discussing the inclusion of general and specific grants of home rule power, noted:

Together, these two parts of the paragraph are designed to insure that the specified counties and cities receive directly under the constitution the broadest possible range of powers to deal with problems facing them and with demands that are made upon them by their residents and by the greater society.

Committee Proposals, vol. VII at 1619.

⁵⁶ See cases cited at note 14 *supra*.

⁵⁷ *Committee Proposals*, vol. VII at 1622.

⁵⁸ *Id.* at 1621.

⁵⁹ The editors of the *Newsletter on Home Rule* have expressed fear that the use of the term "pertaining to its government and affairs," in an effort to restrict home rule powers to local subjects, may lead to an overly broad assumption of preemptory powers by the General Assembly. NEWSLETTER, *supra* note 38, No. 1, at 15.

Consistent with this observation is the prediction of Arthur C. Thorpe that an interpretation of this term could well suffer the same fate as section 11-1-1 of the Illinois Municipal Code (ILL. REV. STAT. ch. 24 (1971)), which seemed to contain the broad grant of power to "pass and enforce all necessary police ordinances," but which has been so reduced by judicial

has observed, "[y]et these words threaten to produce significant and largely unexpected limitations on the authority of home rule counties and municipalities."⁶⁰ Baum bases this fearful prediction upon an analysis of the Local Government Report wherein it is suggested that the government and affairs of a home rule unit should be more narrowly defined, with more matters considered to be of state or national, rather than local concern.⁶¹ If the examples cited in the report are followed,⁶² the mere fact that long-standing state or federal regulations have governed a certain activity will, by definition, cause that subject to be considered other than local in nature and consequently not within the realm of home rule authority.⁶³ Professor Baum argues that such an approach is inconsistent with the intent of home rule and proposes that a broad and expansive construction should be utilized in determining a local power. In Baum's view of home rule, the courts should enter the picture only in the clearest cases of oppression, injustice or interference by local ordinance with vital state policies.⁶⁴

This author fully concurs with Professor Baum and is of the firm opinion that an expansive approach in defining what is a local function is essential to insure the implementation of a viable home rule system in Illinois. Unfortunately, the Illinois Supreme Court does not appear to share this same view; for in *Bridgman v. Korzen*⁶⁵ the court unanimously determined that Cook County did not possess the home rule authority to alter a statutorily determined method of collecting real property taxes. In *Bridgman* the court reasoned that the collection of taxes on behalf of all taxing bodies in Cook County was not a function which pertained to Cook County's government and affairs.⁶⁶ This decision, described by Professor Cohn as disturbing and failing to possess a very persuasive rationale,⁶⁷ spells trouble for home rule units attempting to exercise a power which fails to fall squarely within the ambit of the four express powers of section 6(a). Hopefully, this attitude will be reconsidered and liberalized when the question of

interpretation that it actually generates very little affirmative power. See Thorpe, *An Analysis of Anticipated Problems Under the New Home Rule Article of the Illinois Constitution*, 50 ILL. MUN. REV. 4 (1971) [hereinafter cited as THORPE].

⁶⁰ BAUM, *Part I, supra* note 27, at 152.

⁶¹ *Id.* at 153.

⁶² *Committee Proposals*, vol. VII at 1652-57.

⁶³ BAUM, *Part I, supra* note 27, at 154.

⁶⁴ *Id.* at 142, 157.

⁶⁵ 54 Ill. 2d 74, 295 N.E.2d 9 (1972). See notes 313-29 *infra* and accompanying text for a discussion of the case.

⁶⁶ *Id.* at 78, 295 N.E.2d at 11.

⁶⁷ Cohn, *Judicial Decision Interpreting Illinois Constitutional Home Rule Provisions* at 10 (1973). (One of the background papers prepared for the Illinois Assembly on Home Rule) [hereinafter cited as COHN, *Judicial Decisions*].

whether an activity is local in nature is again presented to the court.

The result reached in *Bridgman* was predictable because of the illusory nature of the term "local matter." Efforts to clearly define the term did not escape the consideration of convention members. Their conclusion seems to have been that a specific definition of what constitutes a "local matter" was not possible in view of the fact that the term is in a state of continuing flux, with matters of genuine local concern today being of statewide concern tomorrow.⁶⁸ Realizing the possibility that the courts might attempt to limit home rule authority with strict and restrictive definitions of local power, it was determined that at least the four most important functions should be protected from judicial erosion with their specific inclusion in section 6 (a).⁶⁹

Taxation

The home rule power to tax coupled with the power to incur indebtedness were viewed as the most controversial and most important of any of the home rule powers.⁷⁰ As the Local Government Committee noted in its majority report:

The Committee believes that [these powers] are essential if home rule is to enable counties and municipalities to perform the functions demanded of them in this increasingly complex and urbanized world. In the simplest terms, urban areas need more money if they are to survive and grow.⁷¹

⁶⁸ *Verbatim Transcripts*, vol. IV at 3056.

Perhaps the conclusion that their task of definition was impossible explained why the question was not controversial, with even the strongest proponents of home rule not objecting to the inclusion of the general language. BAUM, *Part I, supra* note 27, at 152.

⁶⁹ In initially discussing the proposed section 6(a) Delegate Woods observed:

Now, you see, we have combined a broad general grant with a specific grant of powers; and the lawyers for the Commission on Urban Area Government told us that, in general, they felt that was good. They felt that this was a blending of general language with specific delegation in the four most important areas, so that even if we had adverse judicial interpretation of this article, we would still be retaining the most basic home rule power.

Verbatim Transcripts, vol. IV at 3039-40.

⁷⁰ *Committee Proposals*, vol. VII at 1625; see also BAUM, *Home Rule, supra* note 6, at 822.

⁷¹ *Committee Proposals*, vol. VII at 1625.

The position that adequate revenue powers are essential to effectuate home rule is universally concurred with by the prominent home rule analysts. Professor Baum, for example, has described the home rule power to tax as "crucial" power. BAUM, *Part I, supra* note 27, at 141. He later observed that the view is widely accepted that financial resources are the key to successful home rule. Baum, *A Tentative Survey of Illinois Home Rule (Part II); Legislative Control, Transition Problems and Intergovernmental Conflict*, 1972 U. ILL. L.F. 559, 564 [hereinafter cited as BAUM, *Part II*].

The importance of revenue authority within the context of home rule was perhaps stated even more forcefully by Delegate Wenum in response

Because of the essential nature of the power to tax, it was not only specifically included as a home rule power in section 6(a), but was also given a unique protection from legislative limitation with the adoption of section 6(g), prohibiting the denial or limitation of taxing power except by a vote of three-fifths of the members elected to each house.⁷²

The limitations imposed by section 6(e) require the approval of the General Assembly before a home rule unit can license for revenue or impose taxes upon or measured by income or earnings or upon occupations.⁷³ But, except for this specific limitation, it was intended that the home rule power to tax should be given a liberal and expansive interpretation.⁷⁴ The constitutional delegates often stated their concern that this essential taxing power be free from the erosion that has been experienced in virtually every other home rule state. The Local Government Committee, for instance, included the following observation by Professor Cohn in its report:

[I]t is evident that constitutional home rule provisions have been largely unsuccessful in securing revenue autonomy for municipali-

to a fellow delegate inquiring about the necessity for the specific mention of the power to tax in the constitution:

Because this is such . . . an overriding concern for meaningful home rule to be implemented. Lacking revenue sources — lacking a protection of revenue resources — home rule, which presupposes in most instances that there will be a greater level of action, more functions, more services than probably were, the case before, there is only one way that the higher level of functions and services can be supported and that is by having some additional revenue powers.

REC. OF PROC., SIXTH ILL. CONST. CONV., *Verbatim Transcripts*, vol. IV at 3060 (1969-70).

It has also been observed that without revenue the broad powers granted by section 6(a) have a "hollow ring." Comment, *Home Rule — Identical Tax Levied by Illinois Home Rule County and by Municipalities Creates No Conflict*, 4 LOYOLA U. L.J. 479, 484 (1973).

See also note 30 *supra* at 47; PARKHURST, *Article VII, supra* note 7, at 100; Banovetz, *Issues for the Illinois Constitutional Convention: Urban Problems* at 13 (1968). (The Banovetz paper was one of a series of papers prepared by the Constitutional Research Group for the delegates of the Illinois Constitutional Convention).

⁷² See notes 134-40 *infra* and accompanying text.

⁷³ See notes 187-89 *infra* and accompanying text.

⁷⁴ Chairman Parkhurst expressed this intent quite explicitly and forcefully when he observed during the constitutional debates:

When you talk about home rule powers, you're talking not just about property tax rates, sales tax increases, and gas tax increases — everything else except what is specifically limited by Section 4 [now section 6(e)] — every other conceivable tax except that which is specifically limited by Section 4 [now section 6(e)] which basically is the income tax and licensing for revenue possibilities . . . You're talking about literally hundreds of tax opportunities, and the committee came right to grips with the problem. If you want home rule and if you want local autonomy, you've got to give them money. That was our conclusion, and specifically, you've got to give them the right to tax authority across the board with anything they can think of — hotel rooms or airplanes or motorcars or sales or gasoline or anything that the fertile mind of man can think of; and that's why this is the broadest home rule grant in any state in the country, and none of those taxing powers under this majority proposal and the minority — none of them can be taken away

ties. This conclusion is virtually unanimous among informed analysts of the subject.⁷⁵

At the present time it appears that the home rule power to tax is enjoying a healthy infancy. No legislation has been enacted to limit its effect⁷⁶ and Illinois Supreme Court rulings considering the issues have been favorable.⁷⁷ Furthermore, there has been a great deal of enlightened effort toward listing the taxes acceptable under the new constitution.⁷⁸

Despite the broad nature of this home rule power, several commentators have criticized the extent of the taxing authority as being inadequate for the needs of home rule governments. The influential Illinois Assembly on Home Rule, for instance, has concluded:

The assembly also realizes, however, that the added taxing powers granted home rule units are not necessarily adequate to their needs. Moreover, the taxing powers of home rule units, and indeed of all local governments, must be related to the total fiscal structure of the state, because it is the state government which can utilize more broadly based and equitable taxes.⁷⁹

A similar view has been expressed in an even more forceful manner by University of Illinois Economics Professor Robert U.

unless you get a three-fifths' vote in the General Assembly. *Verbatim Transcripts*, vol. IV at 3043. See also, PARKHURST, *Article VII*, *supra* note 7, at 99, where he reiterates his opinion that the language in section 6(a) is perhaps the broadest in the United States.

⁷⁵ *Committee Proposals*, vol. VII at 1640, quoting COHN, *Municipal Review Powers*, *supra* note 4, at 46. See also Sperling, *Municipal Income Taxation and Home Rule*, 1 URB. LAW 281 (1969).

⁷⁶ H. B. 4680, which was intended to impose a property tax freeze on all property in Illinois, failed to obtain legislative approval during the 78th Session of the General Assembly in 1973.

⁷⁷ In *Bloom v. Korshak*, 52 Ill. 2d 56, 284 N.E.2d 257 (1972), (to be discussed at length later, see notes beginning at 255 *infra*) the City of Chicago cigarette tax was upheld against the contention that said tax was violative of the provisions of section 6(e) prohibiting taxes upon occupations.

In *Jacobs v. City of Chicago*, 53 Ill. 2d 421, 227 N.E.2d 401 (1972) (see notes beginning at 271 *infra*) the supreme court rejected the argument that the Chicago Parking Tax ordinance constituted a license for revenue prohibited by section 6(e) without legislative authorization.

The decision in *Rozner v. Korshak*, Ill. S. Ct. No. 45689, ___ Ill. 2d ___, ___ N.E.2d ___ (1973) (see notes beginning at 277 *infra* and accompanying text) affirmed the constitutionality of the City of Chicago Wheel Tax Ordinance against the claim that the tax actually constituted a license for revenue.

The case of the City of Evanston v. The County of Cook, 53 Ill. 2d 312, 291 N.E.2d 823 (1973) (see notes beginning at 330 *infra*), although involving the question of whether the same type of tax imposed by a home rule *municipality* can create a conflict with a home rule *county* tax within the meaning of section 6(c), nevertheless reiterated that all home rule units, whether counties or municipalities, possess the "broad" power to tax under the provisions of section 6(a).

⁷⁸ Perhaps the most extensive study has been undertaken by the Chicago Home Rule Commission which issued its report wherein twenty-five different taxes are presented as valid exercises of the home rule power to tax. (See *The Chicago Home Commission Report and Recommendations* at 382-482 (December 4, 1972).)

⁷⁹ See *Report of the Illinois Assembly on Home Rule*, summarized in approved form in NEWSLETTER, *supra* note 38, No. 3, at 2 (1973).

Schoeplein. He observed that the "explicit, stringent" limitations⁸⁰ of section 6(e), which prohibit licensing for revenue or taxes upon incomes, earnings or occupations without legislative approval, preclude broad-based taxes related to income. Power to tax in this fashion alone could provide tax revenues sufficient to meet the increasing needs of local governments.⁸¹ Professor Schoeplein pointed out that without this power local officials could be hamstrung to the extent that they may have to appeal to the General Assembly for fiscal relief.⁸²

Yet the fact remains that the home rule section does confer significant taxing authority upon home rule units, at least with regard to consumer taxes and other permissible excise taxes.⁸³ In their efforts to solve revenue problems through the utilization of the home rule power to tax, local governmental officials have received significant assistance from both an excellent study of the home rule taxing power⁸⁴ and favorable opinions rendered by the Illinois Supreme Court regarding this taxing authority.⁸⁵

Debt

The rationale for including the power to incur indebtedness as a specific home rule power in section 6(a) was coincident with that underlying the inclusion of the power to tax, *i.e.*, that governments at the local level must have sufficient financial resources to carry on their essential activities.⁸⁶ Indeed, these two powers were discussed simultaneously by the majority of the Local Government Committee in arguing for their specific inclusion as home rule powers.⁸⁷

However, the ultimate control over these two powers is quite different in scope. While no limitation of any kind can

⁸⁰ Schoeplein, *Home Rule and Local Government Finance: An Economist's Perspective*, at 8 (1973). (One of the background papers prepared for the Illinois Assembly on Home Rule) [hereinafter cited as SCHOEPLEIN].

⁸¹ *Id.* at 11.

In a similar vein, Lee Schwartz, an advisor to the Chicago Home Rule Commission, has observed that the most productive new taxes would be on economic activities measured by gross receipts, but such revenue measures would require legislative approval because of section 6(e). *Local Government Law Newsletter*, vol. X at 3 (Feb. 1973) (Published by the Illinois State Bar Association).

Professor J. Nelson Young has also noted that, although home rule units can utilize their self-executing revenue powers to help alleviate their fiscal needs, any major and substantial federal relief must come from state revenue-sharing, particularly the state-imposed income tax. Young, *Home Rule and Local Government Finance: A Legal Perspective*, at 13 (1973). (One of the background papers prepared for the Illinois Assembly on Home Rule) [hereinafter cited as YOUNG].

⁸² SCHOEPLEIN, *supra* note 80, at 14.

⁸³ YOUNG, *supra* note 81, at 10.

⁸⁴ Note 78 *supra*.

⁸⁵ Note 77 *supra*.

⁸⁶ *Committee Proposals*, vol. VII at 1626.

⁸⁷ *Id.* at 1625-28.

be legislatively imposed upon the power to tax, without the approval of three-fifths of both houses of the General Assembly under section 6(g),⁸⁸ constitutional limitations have been placed upon the debt power by the adoption of sections 6(j) and 6(k). Although both sections will be discussed more fully later in this article,⁸⁹ it might be noted now that the General Assembly possesses the constitutional authority to limit by mere majority vote the amount of debt which home rule units can incur.⁹⁰ Additionally, the legislature can control the home rule municipal debt payable either from ad valorem property tax receipts or from some other source. Regarding the former, the General Assembly has the authority to require referendum approval and impose limitations of debt to be incurred in excess of certain percentages of the assessed value of its taxable property. These percentages vary according to the population of the municipality (an aggregate of three percent for municipalities with a population of 500,000 or more; one percent if the population is between 25,000 and 500,000; and one-half percent if the home rule municipality has less than 25,000 in population).⁹¹ The General Assembly may also totally limit, by a three-fifths vote of both houses, the amount of debt payable from other than ad valorem property tax receipts.⁹²

This apparent inconsistency with the relative freedom from legislative controls afforded to the home rule taxing power is again due to the need for compromise. As the Local Government Committee observed:

Paragraph 4.6 [now article VII, section 6(k)] reflects a compromise between those members of the Local Government Committee who would have the Constitution or the General Assembly regulate the amounts and methods of authorization of *all* local debt and those who, under a home-rule philosophy, would leave this power with the local governing body.⁹³

Despite the potential for placing limitations upon the local power to incur debt, the grant of this power nevertheless represents a significant departure from the prior legislative restrictions which required referendum approval of all local bond issues.⁹⁴ In *Kanellos v. County of Cook*,⁹⁵ the Illinois Supreme

⁸⁸ ILL. CONST. art. VII, § 6(g) (1970), see also notes 135-40 *infra* and accompanying text.

⁸⁹ See notes 191-216 *infra* and accompanying text.

⁹⁰ ILL. CONST. art. VII, § 6(j) (1970). The supreme court has also ruled in *Kanellos v. County of Cook*, 53 Ill. 2d 161, 290 N.E.2d 240 (1972) that the General Assembly can require referendum approval of home rule county indebtedness by a three-fifths vote of both houses of the legislature.

⁹¹ *Id.* at 6(k).

⁹² *Id.* at 6(j).

⁹³ *Committee Proposals*, vol. VII at 1677 (emphasis in original).

⁹⁴ See ILL. REV. STAT. ch. 34, § 306 (1971).

⁹⁵ See note 29 *supra*. For a more extensive discussion of the *Kanellos* case, see notes beginning at 295 *infra* and accompanying text.

Court held that prior referendum approval for the issuance of \$10,000,000 in general obligation bonds by a home rule county was not required by section 6(j) of the home rule section. Since the rendering of this opinion, several municipalities have also exercised their newly granted power of issuing bonds without prior referendum approval.⁹⁶ It is likely that this debt power will be particularly useful to home rule counties as well as home rule municipalities which possess a tax base substantial enough to permit a significant amount of referendum-free debt in fulfilling their long term capital needs.⁹⁷

Police Power

The Local Government Committee discussed only briefly the basis for the specific inclusion of the power to regulate for the public health, safety, morals and welfare as a home rule power in section 6(a). The committee simply stated that police power was among the powers deemed most essential to the effective functioning of local government.⁹⁸ In view of the statement by the Local Government Committee that the provisions of section 6(a) are designed to ensure the "broadest possible range of powers"⁹⁹ and the realization that section 6(m) mandates that powers and functions of home rule units be given a liberal construction, it is suggested that the home rule police power has great potential for assisting local governments in protecting the well-being of their citizens.

Licensing

The power to license granted by section 6(a) is not unlimited in scope, but rather is subject to the restriction of section 6(e) prohibiting licensing for revenue without legislative approval. The distinction between licensing for regulatory purposes (which is permitted by section 6(a) if the amount of the license fee is directly related to the cost of regulation), and

⁹⁶ Oak Park has issued \$4,000,000 in bonds for a new municipal building; Wilmette, \$1,900,000 for the construction of a new municipal building; Glenview, \$1,400,000 for the purchase of land for and construction of a new police administration building. See NEWSLETTER, *supra* note 38, No. 2, at 5 (March, 1973). Additionally, Cook County exercised this home rule function on two other occasions when its Board of Commissioners approved a \$5,000,000 bond issue on June 18, 1973 for the construction of improved jail facilities and a \$7,000,000 bond issue on September 17, 1973 to finance improvements for the criminal court complex. Finally, the City of Chicago has proposed in its 1974 fiscal budget that bonds be issued in the sum of \$22,000,000 for the construction of new sewers and for \$14,000,000 to finance solid waste processing endeavors.

⁹⁷ It is estimated that Chicago can incur up to \$330 million in referendum-free debt. See PARKHURST, *Article VII*, *supra* note 7, at 101.

⁹⁸ *Committee Proposals*, vol. VII at 1623.

⁹⁹ *Id.* at 1619.

licensing for revenue purposes has been well-established in Illinois law.¹⁰⁰

The power to license was specifically included as a home rule power in order to help insure compliance with local regulations through the threat of licensing revocation and as a means of producing revenue to support local regulatory programs.¹⁰¹ Additionally, it was thought that dependence upon the General Assembly, where local governments were often not empowered to license important businesses, should be avoided.¹⁰²

Two possible areas of difficulty exist with regard to the home rule licensing power. First, although the distinction between licensing for revenue and licensing for regulation might be clearly defined,¹⁰³ the actual application of these distinctions is, according to Professor Baum, far from precise. He envisions problems in attempting to determine whether license fees have become so excessive as to be considered licensing for revenue.¹⁰⁴ Second, the power to license may cause controversy because of the burden it may impose upon businesses employing salesmen who might be required to be licensed by several home rule units.¹⁰⁵ Indeed, impact from the controversial nature of this

¹⁰⁰ The Supreme Court of Illinois, in discussing the difference between licensing for regulation and licensing for revenue has stated:

A distinction has been drawn between ordinances enacted under a municipal power to regulate where there is no power to tax, and those enacted pursuant to an express power to tax. As to the regulatory license it is settled that the amount of the fee must bear "some reasonable relation" to the cost of regulation.

Arends v. Police Pension Fund, 7 Ill. 2d 250, 253, 130 N.E.2d 517, 519 (1955); *cf. Metropolitan Theatre Co. v. Chicago*, 246 Ill. 20, 24, 92 N.E. 597, 599 (1910).

The hypothetical questions and answers in the Local Government Report provide excellent concrete examples of the scope of the home rule authority as envisioned by the committee. Specific reference is made in the context of licensing to questions 9 and 10 where the distinctions between licensing for revenue and regulation are described:

No. 9 — Home Rule City adopts an ordinance forbidding lawyers or doctors to practice within the city without first obtaining a license by paying a license of \$500 per year. Since the licensing ordinance has no regulatory purpose but is intended solely to raise revenue, it is specifically forbidden by paragraph 4.5 [now section 6(e)].

No. 10 — Home Rule City adopts an ordinance forbidding anyone to work as a television repairman within the city before obtaining a license, the issuance of which is conditioned upon the meeting of certain minimum standards and the payment of a substantial fee. The ordinance falls within the home rule powers granted in paragraph 3.1(a), [now section 6(a)] but if the fee should exceed the reasonable regulatory expenses incurred by the city, then the fee would be forbidden under paragraph 4.5 [now section 6(e)] because it would be serving a revenue purpose.

Committee Proposals, vol. VII 1654-55.

¹⁰¹ *Committee Proposals*, vol. VII at 1623-24.

¹⁰² *Id.* at 1625, citing *Ives v. City of Chicago*, 30 Ill. 2d 582, 198 N.E.2d 518 (1964) where the City of Chicago was ruled to be unable to license building contractors because of failure to obtain statutory authority.

¹⁰³ See note 100, *supra*.

¹⁰⁴ BAUM, *Part I*, *supra* note 27, at 144-45.

¹⁰⁵ *Committee Proposals*, vol. VII at 1625.

power seems to have already been realized. Legislative action has been taken to preclude all local governments, specifically including home rule units, from the exercise of any regulatory authority (including the licensing power) over thirty occupations among which are funeral directors, real estate brokers, barbers and detectives.¹⁰⁶ Although this statutory enactment is presently the subject of court challenge,¹⁰⁷ the action of the General Assembly in approving this law lends support to the conclusion that home rule licensing power might readily be subject to public pressure seeking to eliminate local regulation.

THE REQUIREMENT THAT HOME RULE POWERS BE LIBERALLY CONSTRUED

A significant aspect of the home rule provision is section 6(m) which requires that "powers and functions of home rule units shall be construed liberally." The rationale for including this constructional guidance, which is found in similar form in other state constitutions,¹⁰⁸ was well stated by the Local Government Committee:

[T]he section makes clear that local powers are to be liberally interpreted in line with the purposes of the Article. As explained in the discussion of Section 3 [now article VII, section 6 — the home rule section], strict and narrow interpretation of local powers is traditional in Illinois but the "home-rule" provisions of Section 3 attempt to reverse this tradition. An express statement favoring liberal construction should be helpful in ensuring that courts and public officials give full effect to the powers granted in Section 3.¹⁰⁹

In short, section 6(m) was included to evidence an intent that Dillon's Rule no longer applies to home rule units.¹¹⁰ Consistent with this intent, it has been suggested that the courts, as final arbiters of the conflict between matters of local and state-wide concern, could ease the effect of this dilemma by

¹⁰⁶ ILL. REV. STAT. ch. 127, §§ 9.01-9.03 (P.A. 77-1818, *eff.* Oct. 1, 1973).

The restrictive nature of this legislation is evidenced by the fact that prior to the adoption of the new constitution, municipalities possessed the statutory authority to regulate certain of these occupations. See Diamond, *A Municipal Lawyer Looks at Home Rule Power, Local Government Law Newsletter*, vol. X at 3 (Feb., 1973).

¹⁰⁷ Two cases are presently being litigated with regard to this statute: *City of Evanston v. Department of Registration and Education of the State of Illinois* (Cook County Circuit Court No. 72 L 7377) challenging the constitutionality of the statute; *Johnson v. City of Urbana* (Champaign County Circuit Court No. 72 C 945) where an Urbana ordinance relating to licensing real estate brokers has been challenged in light of P.A. 77-188.

¹⁰⁸ EBEL, *supra* note 21, at 15, citing N.J. CONST. art. IV, § 7; MICH. CONST. art. VII, § 34; and ALAS. CONST. art. X, § 1.

¹⁰⁹ *Committee Proposals*, vol. VII at 1593-94.

This statement of purpose is consistent with the observation by Professor Antieau that home rule constitutional grants are to be interpreted liberally. ANTIEAU, *supra* note 3, at 103.

¹¹⁰ COLE, *supra* note 24, at 9.

creating a rebuttable presumption which initially characterizes a debatable activity as local in nature.¹¹¹

Section 6(m) has thus far played an important role in supporting the constitutionality of home rule legislation by local governments. In *Bloom v. Korshak*¹¹² and *City of Evanston v. County of Cook*¹¹³ specific mention was made of the requirement that section 6(m) home rule powers be liberally construed. Furthermore, although the Illinois Supreme Court has not cited section 6(m) in upholding the home rule authority in other decisions, the constitutional mandate to liberally construe home rule powers has been presented by counsel in written and oral argument in each home rule case. Consequently, the utilization of section 6(m) has been helpful in reminding the court of the constitutional intent to grant broad and expansive home rule powers to local governments in Illinois.

THE STRUCTURE AND ORGANIZATION OF HOME RULE UNITS

Article VII, section 6(f) contains several provisions regarding the structure and organization of home rule counties and municipalities. This subsection, which grants home rule units the authority to structure and organize themselves, subject to referendum or legislative limitations, provides as follows:

A home rule unit shall have the power subject to approval by referendum to adopt, alter or repeal a form of government provided by law, except that the form of government of Cook County shall be subject to the provisions of Section 3 of this Article. A home rule municipality shall have the power to provide for its officers, their manner of selection and terms of office only as approved by referendum or as otherwise authorized by law. A home rule county shall have the power to provide for its officers, their manner of selection and terms of office in the manner set forth in Section 4 of this Article.

A separate treatment of each of these provisions will aid the reader in understanding these powers.

Power To Change the Form of Government

The first sentence of section 6(f) empowers all home rule units, except Cook County, to adopt, alter or repeal, with referendum approval, any form of government provided by the

¹¹¹ Note 30 *supra* at 64.

¹¹² 52 Ill. 2d 56, 59, 284 N.E.2d 257, 258. See note 255 and text *infra*.

¹¹³ 53 Ill. 2d 312, 316, 291 N.E.2d 823, 826 (1972), *rehearing denied* Jan. 26, 1973. See notes beginning at 330 *infra* and accompanying text for a more extensive discussion of this case. See also *People ex rel. City of Salem v. McMackin*, 53 Ill. 2d 347, 365, 291 N.E.2d 807, 818 (1972).

General Assembly.¹¹⁴ However, this provision creates several ambiguities.

Professor Vincent Vitullo suggests that the inclusion of the word "alter" can fairly be considered to mean that home rule units may be empowered to change the structure of their form of government in a method not specifically contemplated by statute.¹¹⁵ This interpretation is questionable, however, in view of the fact that the term "alter" was also included in the original provision as proposed by the Local Government Committee.¹¹⁶ The committee report described the original provision as "empower[ing] counties and municipalities to adopt various differing forms of government which are provided by the General Assembly, and thereby implies that the General Assembly should provide alternative forms of government. . . ."¹¹⁷

Additionally, although the basic intent of the provisions is clear,¹¹⁸ there is a problem in determining their scope of applicability. This difficulty results from the failure to specifically define the meaning of the term "form of government." The Local Government Committee Report observed that this term not only contemplates various methods for the election of county and municipal officials, but also embraces the relationship between local legislative and executive authority.¹¹⁹ Yet, as Professor Baum has noted, through the years the General Assembly has prescribed many matters of local concern other than those merely involving the election of officials and the defining of intra-governmental relationships.¹²⁰ If such other matters are to be considered within the definition of the term

¹¹⁴ With regard to the statutorily approved forms of municipal government, see ILL. REV. STAT. ch. 24, §§ 3-11-1 to 3-11-30; §§ 4-1-1 to 4-10-1; §§ 5-1-1 to 5-6; §§ 6-1-1 to 6-5-1 (1971).

¹¹⁵ VITULLO, *supra* note 12, at 90.

Professor Baum also suggests this same possibility of interpretation, but dismisses it as unsound and contrary to the intent of the Constitutional framers. See BAUM, *Part I, supra* note 27, at 148-50.

¹¹⁶ Paragraph 4.3 as proposed by the Local Government Committee, provided in relevant part:

Any unit of local general government may by referendum adopt, alter, and repeal alternative forms of government provided by general law
Committee Proposals, vol. VII at 1665.

¹¹⁷ *Id.*

¹¹⁸ In discussing the meaning of section 6(f), Professor Baum has observed:

The intention here is to preserve for cities the existing system of relative flexibility of statutory control of alternative forms of government — the council-manager form, the aldermanic form, the commission form, and so on — and extend that kind of statutory system to counties which have not been very flexible up to this time.
BAUM, *Home Rule Background, supra* note 17, at 8. See also *Committee Proposals*, vol. VII at 1665-67.

¹¹⁹ *Id.* at 1667.

¹²⁰ Professor Baum specifically mentions the prohibition against local officials holding dual office, the quorum requirements for the city council, the vote required for city council enactment of ordinances and the voting power of the mayor as matters relating to the procedural details of local

“form of government,” they thereby become subject to legislative and referendum control. As a result, the home rule authority in this area would be severely limited and home rule governments would be unduly restricted in the independent operation of governmental functions.

The authority of Cook County over its form of government is controlled by both sections 3(a) and 3(c) of article VII. Section 3(a) basically empowers all counties, within limitations, to fix the number of members of the county board. Section 3(c) makes specific reference to Cook County:

Members of the Cook County Board shall be elected from two districts, Chicago and that part of Cook County outside Chicago, unless (1) a different method of election is approved by a majority of votes cast in each of the two districts in a county-wide referendum or (2) the Cook County Board by ordinance divides the County into single member districts from which members of the County Board resident in each district are elected. If a different method of election is adopted pursuant to option (1) the method of election may thereafter be altered only pursuant to option (2) or county-wide referendum. A different method of election may be adopted pursuant to option (2) only once and the method of election may thereafter be altered only by county-wide referendum.

Cook County was singled out for special treatment because of its disproportionate population as compared with every other county in the state,¹²¹ because this population disparity has created political and operational problems unique to the County of Cook. The basic intent of section 3(c) was to continue the political system of checks and balances existing between the City of Chicago and the suburban areas with regard to the determination of Cook County structure.¹²²

Power To Provide for Municipal Officers

The second provision encompassed within section 6(f) empowers home rule municipalities to determine the number, nature and duties of their own officers, subject to referendum and/or statutory control. However, an interpretative problem may also arise with this provision if an action taken by a municipal authority pursuant to statutory authorization is challenged by a subsequent referendum vote.

governments which are controlled by statute. See BAUM, *Part I, supra* note 27, at 148-49.

¹²¹ The 1970 census figures indicate that 49.4 percent of the population of Illinois resides in Cook County (5,492,369 of a total state-wide population of 11,113,976). See *Counties and Incorporated Municipalities of Illinois*, published March 6, 1972 by the Office of the Illinois Secretary of State.

¹²² The Local Government Committee obviously recognized the political realities of requiring referendum approval of both segments of the population of Cook County when it observed:

This provision recognizes that a county-wide referendum throughout the entire county and not split between Chicago and the rest of the county would not be politically acceptable.

Committee Proposals, vol. VII at 1699.

Although no consideration of this potential problem is indicated by the language of the provision, the Local Government Committee Report or the floor debates, Professor Baum suggests that the conflict should be resolved in favor of city authorities acting pursuant to statute.¹²³ He bases this preference upon the conclusion that such an approach would provide greater flexibility in the control of local offices. Furthermore, this view is consistent with the general broad grant of home rule authority which is not dependent upon referendum approval.¹²⁴ This author is of a differing opinion. The manifest intent of the voters of a home rule governmental unit should be deemed to prevail over the action of local officials taken pursuant to statute. The essence of home rule is freedom of action at the local level. Under Professor Baum's theory, however, the problem of legislative control sought to be avoided by home rule would again be present, albeit by the action of municipal officials. Furthermore, article VII, section 4(c) establishes a hierarchy of authority with regard to county officers whereby constitutional county offices can be created or eliminated only by referendum. This classification of power would seem to lend support to the conclusion that a decision by referendum should override a contrary statutory provision pertaining to home rule municipal officials.

Power To Provide for County Officers

The final sentence of section 6(f) relates to the authority which home rule counties possess with regard to their officials. It requires that any determination be based upon the applicable provisions of article VII, section 4, which state:

Section 4(c) :

Each county shall elect a sheriff, county clerk and treasurer and may elect or appoint a coroner, recorder, assessor, auditor and such other officers as provided by law or by county ordinance. Except as changed pursuant to this Section, elected county officers shall be elected for terms of four years at general elections as provided by law. Any office may be created or eliminated and the terms of office and manner of selection changed by county-wide referendum. Offices other than sheriff, county clerk and treasurer may be eliminated and the terms of office and manner of selection changed by law. Offices other than sheriff, county clerk, treasurer, coroner, recorder, assessor and auditor may be eliminated and the terms of office and manner of selection changed by county ordinance.

Section 4(d) :

County officers shall have those duties, powers and functions provided by law and those provided by county ordinance. County

¹²³ BAUM, *Part I, supra* note 27, at 150.

¹²⁴ *Id.*

officers shall have the duties, powers or functions derived from common law or historical precedent unless altered by law or county ordinance.

A consideration of these sections was recently made by the Illinois Supreme Court in *People ex rel. Hanrahan v. Beck*.¹²⁵ In that case the court determined that Cook County had the authority to supplant an existing statute by removing the statutorily granted function of county comptroller from the county clerk and placing those functions in the hands of a comptroller appointed by the county board. This action was sanctioned notwithstanding the provisions of section 4(d), which seem to grant counties the power to merely supplement the statutory authority given to their officials. Quoting the *Kanellos*¹²⁶ case, the court held that a home rule county has the authority to enact local legislation superseding a statute which antedates the present constitution, thereby permitting the county to transfer the duties and functions of officials without pre-existing legislative limitation.¹²⁷

In short, it would appear that home rule *counties* enjoy substantially more authority than home rule *municipalities* in determining the functions of their officials. While home rule counties possess the authority to effect a change in local functions, even by superseding statutes, home rule municipalities must depend upon either referendum or statutory authority in order to alter the functions, powers and duties of their officials. However, in view of the expansive ruling in the *Beck* case, it is conceivable that the Illinois Supreme Court may also assign a liberal interpretation to municipal home rule authority in this regard, thereby permitting them to act in a self-executing manner, similar to home rule counties.

LEGISLATIVE CONTROL OVER LOCAL AFFAIRS

The general grant of home rule authority found in section 6(a) is subject to the limiting language in that same provision, "except as limited by this Section." Specific restrictions upon the exercise of home rule powers are included in several of the subsequent subsections which will be treated later in this article.

The original limiting provision drafted by the Local Government Committee was accepted by the constitutional convention in virtually unaltered form. In explaining this restriction the committee commented upon the need for some residual legislative control:

Even the most determined proponents of home-rule recognize that

¹²⁵ *People ex rel. Hanrahan v. Beck*, 54 Ill. 2d 561, 301 N.E.2d 281 (1973).

¹²⁶ 53 Ill. 2d 161, 290 N.E.2d 240 (1972).

¹²⁷ 54 Ill. 2d 561, 566, 301 N.E.2d 281, 283 (1973).

many matters of concern to local governments should be left to the determination of the state legislature [T]he Advisory Commission on Intergovernmental Relations has warned that for a state to give broad grants of power to local governments without reserving the right of legislative control, 'all kinds of problems would arise out of a lack of responsibility and prudence or from placing local decisions above the general interest.'¹²⁸

Although the committee emphasized the need to preserve legislative control over most, if not all, home rule subjects, the members nevertheless stressed the need to avoid excessive legislative limitations:

On the other hand, there is a great danger of undue legislative restriction of home rule powers if the legislature is authorized to act on all matters affecting local governments. As one commentator has written, under such a system 'the cities are left to legislative grace and good judgment. If the legislators wish to delimit seriously the powers of all home rule charter municipal corporations they may do so. . . .'¹²⁹

The problem, therefore, was to achieve the "delicate balance"¹³⁰ between local autonomy and state sovereignty. The difficulty in striking this balance involved harmonizing two principal factors: first, the desire to achieve maximum local authority in critical areas of concern, and second, the recognition that in order to prevent abuse of local authority and treat problems of statewide concern, the state had to maintain ultimate authority.

The Local Government Committee attempted to meet these concerns through the creation of a system unique to Illinois¹³¹ and more specific than any other state constitution in its description of the relationship of authority between state and local governments.¹³² In relevant part the section provides:

6(g) The General Assembly by a law approved by the vote of three-fifths of the members elected to each house may deny or limit the power to tax and any other power or function of a home rule unit not exercised or performed by the State other than a power or function specified in subsection (l) of this section.

6(h) The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit other than a taxing power or a power or function specified in subsection (l) of this section.

6(i) Home rule units may exercise and perform concurrently

¹²⁸ *Committee Proposals*, vol. VII at 1637-38 quoting A.C.I.R., *State Constitutional Statutory Restrictions upon the Structural, Functional and Personnel Powers of Local Government* 73 (1962). Professor Antieau has noted that all home rule constitutional provisions contain some degree of legislative control, whether expressly or inferentially. ANTIEAU, *supra* note 3, at 137.

¹²⁹ *Committee Proposals*, vol. VII at 1638-39, quoting Bromage, *Home Rule — NML Model*, 44 NAT. MUN. REV. 132, 133 (1955).

¹³⁰ *Verbatim Transcripts*, vol. IV at 3326, quoting Delegate Wenum.

¹³¹ BAUM, *Part II, supra* note 71, at 653.

¹³² PARKHURST, *Article VII, supra* note 7, at 100.

with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive.

Except for the provisions contained in section 6(l),¹³³ excluding legislative action with regard to special assessments and special service districts, the above-quoted subsections clearly indicate that the General Assembly has the authority to limit any home rule activity. The vote needed to authorize legislative action, however, depends upon the nature of the local power affected and the intention of the General Assembly to exclusively govern that area of activity. An analysis of this preemption system will be made according to important subject headings.

Taxation

As noted earlier in the discussion of the home rule taxing power, the power to tax was viewed as the most important governmental power.¹³⁴ The realization of its essential nature was also considered in fashioning the Illinois constitutional preemptive system. Observing that balancing local autonomy against state sovereignty is perhaps most difficult when considering the question of taxation, the Local Government Committee stated:

Home Rule is a mere skeleton without flesh and muscle if revenue powers are lacking or can be taken away by the legislature. As Dean Fordham has stated, 'Home rule powers are not very meaningful if there be not the means of financing their exercise. There can hardly be any doubt about this. . . .'¹³⁵

At the same time, however, the committee recognized that the fear of permitting local autonomy over revenue matters has resulted in precious little local revenue authority in other states.¹³⁶

Drawing upon the experience of other home rule states and realizing that effective operation of local government requires adequate revenue, the members of the convention determined that greater protection should be given from legislative control over taxation than had been given in other states.¹³⁷ Moreover, it was determined that a protection should be afforded which would restrict legislative interference with the power to tax to a greater extent than with any other home rule power. The result was the enactment of section 6(g), which requires a three-fifths vote of both houses of the General

¹³³ See notes 170-86 *infra* and accompanying text.

¹³⁴ See note 70 *supra*.

¹³⁵ *Committee Proposals*, vol. VII at 1639, quoting Fordham, *Home Rule — AMA Model*, 44 NAT. MUN. REV. 137, 142 (1955).

¹³⁶ *Id.* at 1640, quoting COHN, *Municipal Review Powers*, *supra* note 4, at 46.

¹³⁷ *Id.*

Assembly before any denial or limitation can affect the home rule power to tax. This provision, which has been aptly described as perhaps the single most important part of the Illinois home rule,¹³⁸ is, in the opinion of this author, the backbone of the home rule section. As noted by Chairman Parkhurst, home rule without money is meaningless.¹³⁹ Further, due to the close division in the General Assembly between the democratic and republican camps, the requirement of a sixty percent majority of both houses to override the home rule taxing authority is essential in order to guarantee that this most necessary power will be limited only when the need is manifestly shown. The importance of the three-fifths rule regarding taxation was demonstrated when a bill designed to freeze local property taxes for two years received majority approval in the House, but failed to achieve the three-fifths majority needed to affect home rule units. Failing in his attempt to extend coverage to home rule units, the sponsor withdrew the bill.¹⁴⁰ Restated, the three-fifths rule represents a meaningful protection, which should prove to be an effective bulwark against future legislative attempts to limit home rule taxing power.

Powers Other Than Taxation

The home rule section includes yet another "three-fifths rule" relating to the authority of the General Assembly to deny or limit home rule powers or functions. Section 6(g) provides that if the power or function sought to be limited be one which the state does not intend to exercise or perform, and if it not be a power specified in section 6(l)¹⁴¹ (which involves special assessment and special service authority), then the limitation can be effected only by a three-fifths vote of both houses of the General Assembly. However, where the state intends *exclusively* to govern a certain area, section 6(h) provides that the General Assembly can assume control over the local function by a mere majority vote of both houses, so long as the power or function involved is not a taxing power or a power or function specified in section 6(l).

The rationale for this novel¹⁴² treatment of local powers according to whether the state intends to exercise those same powers was stated well by Professor Baum:

The distinction between powers and functions exercised by the state and those not so exercised is crucial. The basis for this

¹³⁸ BAUM, *Home Rule Background*, note 17 *supra*, at 10.

¹³⁹ PARKHURST, *Article VII*, *supra* note 7, at 100.

¹⁴⁰ See BAUM, *Part II*, *supra* note 71, at 564.

¹⁴¹ See notes 170-86 *infra* and accompanying text.

¹⁴² *Committee Proposals*, vol. VII at 1645.

distinction is that where the state is acting on its own, its interests are very strong. Thus it should be able to prevent local governments from acting in conflicting ways or in ways that inefficiently duplicate state programs. . . .¹⁴³

Yet, the distinction between the "denial" and the "exercise" of a power by the General Assembly, described as the key to solving the preemption problem,¹⁴⁴ has been criticized by Professor Baum for a lack of clarity in defining the terms.¹⁴⁵ He is particularly critical of the language in the Local Government Committee Report which appears to imply that the state can express exclusivity by merely enacting procedural requirements for local governments to follow.¹⁴⁶ Baum contends that the language gives rise to the implication that almost any general legislative act affecting local governments can be considered an act of exclusivity, requiring a mere majority vote and thereby rendering the three-fifths requirement of section 6(g) virtually meaningless, except for home rule taxing powers.¹⁴⁷

However, this author is of the opinion that Professor Baum's concern is somewhat misplaced. It should be noted that at the time the Local Government Committee Report was written, its proposals also included a "standards and procedures" clause.¹⁴⁸ In one of the few victories for the minority members of the committee, the convention as a whole deleted that clause¹⁴⁹ and resisted two subsequent attempts to have it reinstated as part of the home rule section.¹⁵⁰ The primary reason for the rejection was that the proposal presented a legislative opportunity to control local functions by mere majority vote without the General Assembly actually entering the field of endeavor itself.¹⁵¹

Admittedly, the distinction between the exclusive and non-exclusive exercise of state powers may be difficult to ascertain in many instances. Yet, this may not truly present a problem if the constitutional intent demonstrated by the rejection of the "standards and procedures" clause is realized and the re-

¹⁴³ BAUM, *Part II*, *supra* note 71, at 569; see also *Committee Proposals*, vol. VII at 1641-43.

¹⁴⁴ Parkhurst, *How the New Constitution Affects the Practice of Law: The 1970 Illinois Constitution Affects Local Government*, at 5-3 (1971). (published by the Illinois Institute for Continuing Legal Education) [hereinafter cited as PARKHURST, *How the Constitution Affects the Practice of Law*].

¹⁴⁵ BAUM, *Part II*, *supra* note 71, at 569-71; see also THORPE, *supra* note 59, at 5.

¹⁴⁶ *Committee Proposals*, vol. VII at 1644.

¹⁴⁷ BAUM, *Part II*, *supra* note 71, at 570.

¹⁴⁸ Paragraph 3.2(d), as proposed by the majority of the Local Government Committee, provided:

The General Assembly may by general law provide standards and procedures for the exercise of powers and performance of functions granted by paragraph 3.1(a) [now section 6(a)].

Committee Proposals, vol. VII at 1578.

¹⁴⁹ See *Verbatim Transcripts*, vol. IV at 3118-19.

¹⁵⁰ *Id.* vol. V at 4181, 4194.

¹⁵¹ *Id.* at 4179 (Delegate Stahl's comments).

quirement of section 6(i),¹⁵² that a presumption of concurrent action be made in the absence of a specific statement of exclusivity by the General Assembly, is understood. In view of the two factors, it is believed that Illinois courts will carefully scrutinize state action to insure that the state actually intends to exclusively govern the field before permitting legislative limitation by a mere majority vote.

*Presumption of Concurrent Action in the Absence of a
Specific Statement of Exclusivity*

Article VII, section 6(i) provides that home rule units may exercise any home rule power or function concurrently with the state to the extent that the General Assembly does not specifically limit by statute the concurrent exercise or specifically declare the state's exercise to be exclusive. Read in conjunction with sections 6(g) and 6(h), this provision mandates that before a home rule function can be considered to be denied or limited, a statement of exclusivity is required *in addition* to the requisite majority, be it three-fifths or mere majority. The obvious purpose of this requirement is to insure that the General Assembly actually intends to affect a local function. As the Local Government Committee noted:

The purpose of distinguishing between statutes which express exclusively [sic] and those which do not is to minimize the area where courts might have to struggle to find legislative intent. It is a guideline to the courts that concurrent local action is to be permitted unless a contrary legislative intent is expressed.¹⁵³

In view of the problems experienced in many states with implied legislative and judicial preemption, the requirement of an express statement of exclusivity by the General Assembly before legislation can be deemed to affect home rule powers is an enlightened and reasonable method of assuring true legislative intent.

¹⁵² Note 153 *infra* and accompanying text.

¹⁵³ *Committee Proposals*, vol. VII, at 1645.

Professor Baum has analyzed the purpose of section 6(i) in a similar fashion:

Unless local power is specifically excluded, section 6(i) guarantees home rule units the authority to act concurrently with the state. The purpose and probable effect of these provisions is to eliminate or at least reduce to a bare minimum the circumstances under which local home rule powers are preempted by judicial interpretation of unexpressed legislative intention.

BAUM, *Part II, supra* note 71, at 571.

This requirement was recently emphasized in *Rozner v. Korshak*, 55 Ill. 2d 430, 303 N.E.2d 389 (1973) where the Illinois Supreme Court reiterated the need for an express statement of legislative intent to limit home rule authority before a newly passed statute or amendment can be deemed to have a restrictive effect. See text at note 277 *infra*.

Implied Preemption

One of the major concerns of several of the members of the Local Government Committee was the problem of implied preemption, *i.e.*, the denial or limitation of a local power merely because state legislation has been passed relating to the same area of activity. In essence, the courts imply a legislative intent to limit local activity merely because of the passage of similar legislation. This concern was succinctly stated by Vice-Chairman Carey: "Preemption is the name of the game as far as home rule is concerned."¹⁵⁴

Carey and other minority members of the Local Government Committee waged a determined but unsuccessful effort to apply the protection of the "three-fifths" rule to every home rule function in the same fashion as it now applies to the taxing power.¹⁵⁵ Though unsuccessful in this endeavor, Carey nevertheless was able to forcefully articulate to the convention the problems other states have experienced with implied preemption.¹⁵⁶ He thereby aided in the defeat of an amendment which would have permitted the denial or limitation of any home rule power by a mere majority vote of both legislative chambers.¹⁵⁷

Consistent with Mr. Carey's comments, Chairman Parkhurst stated that the clarification of the preemption problem is the key to effective home rule¹⁵⁸ and further observed that whatever success home rule has had in other states has been directly related to the preemption interpretation by the courts.¹⁵⁹ According to Parkhurst, most decisions considering the state-local

¹⁵⁴ CAREY, *supra* note 20, at 5.

¹⁵⁵ See *Verbatim Transcripts*, vol. IV at 3341-46.

¹⁵⁶ In response to his prime adversary on the question of preemption Carey stated:

Mr. Butler in his summation said that thirty states have chosen home rule and only one or perhaps none didn't have a requirement for an extraordinary majority and he wanted to know why Illinois should be different.

I think it's a fair question and my answer is that Illinois must be different if it is to have — really have — home rule because home rule has not been effective in any state of the fifty states; and we will be the first state to have successful home rule if we require the extraordinary majority.

Verbatim Transcripts, vol. IV at 3089.

Carey then went on to discuss the way in which preemption by implication had adversely affected home rule in Texas, California and particularly Ohio.

Id. at 3090-91.

With specific reference to the preemption problem in Ohio, see Glander & Dewey, *Municipal Taxation — A Study of the Preemptive Doctrine*, 9 OHIO ST. L.J. 72 (1948); Glander, *Analysis and Critique of State Preemption of Municipal Excise and Income Taxes Under Ohio Home Rule*, 21 OHIO ST. L.J. 343 (1960).

¹⁵⁷ See *Verbatim Transcripts*, vol. IV at 3328-41.

¹⁵⁸ PARKHURST, *How the Constitution Affects the Practice of Law*, *supra* note 144, at 5-3.

¹⁵⁹ PARKHURST, *Local Government*, *supra* note 28, at 12.

conflict have unfortunately upheld the sovereign power of the state, thereby emasculating the home rule concept.¹⁶⁰

It was in an effort to minimize or perhaps even eliminate this problem that sections 6(g), (h) and (i) were drafted.¹⁶¹ Utilizing provisions more precise and specific than those of any other state constitution,¹⁶² the framers created a preemption system intended to reduce judicial interpretation to a minimum. Indeed, if the preemption provisions are construed as intended, then any limitations upon home rule action would be imposed by the General Assembly, with the courts acting only in the most extremely arbitrary or oppressive cases caused by legislative inaction or oversight.¹⁶³ In short, when the question is posed whether a function or power sought to be exercised is local in nature so as to permit home rule action, a strong presumption should issue in favor of the "local" alternative, which could be overcome only in the most compelling circumstances. Although the Illinois Supreme Court appears to have avoided an application of this presumptive test in the *Bridgman* case,¹⁶⁴ it is hoped that a greater realization of the liberal view of home rule demonstrated by the constitutional framers will, in the future, cause the court to expand its view of what constitutes a "local" function and thereby aid in the realization of truly effective home rule in Illinois.

The Effect of Pre-existing Statutes on Home Rule Authority

One of the most important questions affecting home rule is whether the limitations imposed by statutes enacted prior to the adoption of the 1970 Constitution may be considered to place restrictions upon the exercise of home rule authority. Despite the magnitude of the problem, the question received only cursory attention by both the Local Government Committee and the constitutional convention as a whole. Subsequent commentary regarding Illinois home rule as well as decisional statements by the Illinois Supreme Court indicate, however, that pre-existing statutory limitations cannot restrict the activity

¹⁶⁰ *Id.*

¹⁶¹ Professor Vitullo goes so far as to state that the effect of these sections is to eliminate the possibility of implied preemption as a doctrine limiting the role of home rule action. VITULLO, *supra* note 12, at 91.

Although this position mirrors the intent of the framers of the new constitution, the present author questions whether the possibility of preemption has, in fact, been eliminated, particularly in view of the unanimous decision declaring tax collection to be outside the ambit of home rule authority as not pertaining to Cook County's government and affairs. See text accompanying note 65 *supra* and notes beginning at 313 *infra* and accompanying text for a discussion of the *Bridgman* case.

¹⁶² PARKHURST, *Article VII, supra* note 7, at 100.

¹⁶³ See BAUM, *Part I, supra* note 27, at 157.

¹⁶⁴ 54 Ill. 2d 74, 295 N.E.2d 9 (1972).

of home rule units absent affirmative action subsequent to the adoption of the new constitution, pursuant to the provisions of sections 6(g), h) or (i). As Professor Baum noted:

[T]he language of the home rule section suggests that only legislation enacted after the effective date of the constitution can restrain home rule powers. Section 6(g) speaks of the General Assembly denying or limiting any power or function of a home rule unit by three-fifths vote. No legislative act of this extraordinary sort is likely to take place nor to make any sense until home rule powers actually exist. . . .¹⁶⁵

This same view has thrice been enunciated by the Illinois Supreme Court in considering the effect of pre-existing statutes upon attempts to exercise home rule authority:

We therefore hold that this statute is inapplicable as applied to a home rule county. It was enacted prior to and not in anticipation of the Constitution of 1970 which introduced the concepts of home rule and the related limitation of Sections 6(g) and 6(h). Such considerations were totally foreign in the contemplation of legislation adopted prior to the 1970 Constitution. The statute is therefore inconsistent with the provisions of Section 6(g) and the Transition Schedule.¹⁶⁶

In view of this statement, it appears that trial court decisions upholding limitations imposed by pre-existing statutes upon the exercise of home rule authority were wrongly decided.¹⁶⁷

Although pre-existing statutes cannot be considered to limit

¹⁶⁵ BAUM, *Part II, supra* note 71, at 578.

The Local Government Committee Report included a reference to the problem of pre-existing statutory limitation with regard to home rule taxation, with its hypothetical question and answer No. 20:

Home Rule City levies a property tax yielding an amount which would exceed existing statutory limits on rates of municipal property taxation. The levy is valid. The power to levy a property tax falls within the home-rule powers granted by paragraph 3.1(a) [now section 6(a)] and the pre-existing statutory limitation is not effective to diminish this power. The General Assembly could impose new property tax rate limitations only by enacting a new statute by a three-fifths vote of each house under paragraph 3.2(a) [now section 6(g)].

Committee Proposals, vol. VII, at 1656-57.

¹⁶⁶ *Kanellos v. County of Cook*, 53 Ill. 2d 161, 166-67, 290 N.E.2d 240, 243-45 (1972), quoted subsequently in *People ex rel. Hanrahan v. Beck*, 54 Ill. 2d 561, 565, 301 N.E.2d 281, 283 (1973). The "Transition Schedule" referred to in the *Kanellos* quote is section 9 of the Transition Schedule of the 1970 Constitution, which provides in relevant part:

The rights and duties of all public bodies shall remain as if this Constitution had not been adopted with the exception of such changes as are contained in this Constitution. All laws, ordinances, regulations and rules of court not contrary to or inconsistent with, the provisions of this Constitution shall remain in force, until they shall expire by their own limitation or shall be altered or repealed pursuant to this Constitution. . . .

This same position was subsequently taken in *Rozner v. Korshak*, Ill. S. Ct. No. 45689, 55 Ill. 2d 430, 434, 303 N.E.2d 389, 391 (1973) where Mr. Justice Schaefer held that pre-existing statutes would "of course" be superseded by local legislation passed pursuant to home rule authority.

¹⁶⁷ In *Peters v. City of Springfield*, Sangamon County No. 210-72, (appeal allowed directly to Illinois Supreme Court May 17, 1973; now supreme court docket No. 45766), the trial court held that the city of Spring-

the use of home rule powers, it does not follow that such statutes were automatically abrogated when the new constitution and its home rule provisions became effective on July 1, 1971. Instead, most experts believe that because of the provisions of the Transition Schedule,¹⁶⁸ prior statutes continue in effect until supplanted by affirmative home rule action.¹⁶⁹

*Exceptions to Legislative Control
Over Home Rule Functions*

It is undisputed that the preemptive provisions, sections 6(g), (h) and (i), were intended to indicate legislative authority over all home rule powers or functions except those specified in section 6(l), which provides:

The General Assembly may not deny or limit the power of home rule units (1) to make local improvements by special assessment and to exercise this power jointly with other counties and municipalities, and other classes of units of local government having that power on the effective date of this Constitution unless that power is subsequently denied by law to any such other units of local government or (2) to levy or impose additional taxes upon areas within their boundaries in the manner provided by law for the provision of special services to those areas and for the payment of debt incurred in order to provide those special services.

The inclusion of the special assessment power was intended to be an extension of the authority which, under the 1870 Constitution, was granted only to cities, towns, villages¹⁷⁰ and

field was without the home rule authority to reduce the mandatory retirement age for firemen as established by a statute existing prior to the new constitution. Although recognizing the language in the *Kanellos* case quote above, Circuit Judge J. Waldo Ackerman merely described that holding as distinguishable, without explaining how the cases were different.

In *Environmental Protection Agency v. McHugh Construction Company*, 4 P.C.B. 511 (1972), the Illinois Pollution Control Board rejected the claim of the City of Chicago that it was immune from the jurisdiction of the Environmental Protection Agency because of its home rule powers. In so rejecting, the board stated that the purpose of home rule is to confer governmental authority on local governments and not to limit state authority. Consequently, the pre-existing pollution statute was deemed to be effective without re-enactment subsequent to the effective date of the new constitution.

¹⁶⁸ See note 166 *supra*.

¹⁶⁹ In this context, Louis Ancel and Stuart H. Diamond have observed: To exercise its new powers a municipality must take some affirmative action. Thus, while a home rule municipality now, for the first time, may license general contractors, that power will only spring to life when a local ordinance so providing is passed. On the other hand, even if a home rule municipality took no new action, its licensing of restaurants, for example, would still be valid.

ANCEL & DIAMOND, *PROCEDURES AND PRACTICES OF ILLINOIS CITY COUNCILS AND VILLAGE BOARDS* 88 (Springfield, Illinois Municipal League, Rev. Ed. 1972-73).

See also BAUM, *Part II, supra* note 71, at 576-77; Kratovil & Ziegweid, *Illinois Municipal Home Rule and Urban Land — A Test Run of the New Constitution*, 22 DEPAUL L. REV. 359, 365 (1972) [hereinafter cited as KRATOVIK & ZIEGWEID].

¹⁷⁰ ILL. CONST. art. IV, § 9 (1870).

drainage districts.¹⁷¹ Because court decisions interpreting those provisions had determined that counties and townships could not be authorized by statute to levy special assessments,¹⁷² the Local Government Committee proposed to vest special assessment powers in *all* units of general local government. Not only were home rule counties included as such units of government in section 6 (l), but all non-home rule counties and municipalities were also empowered by article VII, section 7(1), to make local improvements by special assessment.¹⁷³ Furthermore, the committee intended to alter the judicial restriction placed upon special assessment power under the 1870 Constitution which limited a local improvement to one unit of government,¹⁷⁴ by specifically permitting the joint exercise of special assessment powers by two or more governmental units.

The grant of the power to levy taxes upon certain areas within a home rule unit for the maintenance of special services, such as sewage treatment and fire protection,¹⁷⁵ was intended to be a total departure from the uniformity requirements contained in the 1870 Constitution.¹⁷⁶ The inclusion of this new provision was viewed as a method of introducing further flexibility in governmental activity, particularly regarding counties in their unincorporated areas. This provision also sought to stem the proliferation of special districts in Illinois.¹⁷⁷

Section 6(l) provides the highest degree of constitutional

¹⁷¹ *Id.* § 31 (1870).

¹⁷² See *People ex rel. N.C. Van Slooten v. The Bd. of Comm'rs of Cook County, et al.*, 221 Ill. 493, 77 N.E. 914 (1906); *Comm. of Local Improvements of the Town of Algonquin v. Objectors to the Assessment*, 39 Ill. 2d 255, 234 N.E.2d 778 (1968).

¹⁷³ The Local Government Committee explained the inclusion of all counties as recipients of the power to levy special assessments in the following manner:

The Committee believes that there is no reason why special assessments should not be employed in unincorporated territories of the state, and that the county, as the largest and most fully organized governmental unit affecting unincorporated areas, is the proper unit of government to exercise this power.

Committee Proposals, vol. VII at 1660.

¹⁷⁴ See *Loeffler v. City of Chicago*, 246 Ill. 43, 92 N.E. 586 (1910).

¹⁷⁵ *Verbatim Transcripts*, vol. V at 4247.

¹⁷⁶ The constitution basically required that all taxes imposed by a taxing authority had to be uniform with respect to the persons and property within its jurisdiction. ILL. CONST. art. IX, §§ 9-10 (1870).

¹⁷⁷ The Local Government Committee, in commenting upon the need to remove the limitations of the uniformity requirement, observed:

Deletion of the uniformity requirement and addition of the proposed provision permitting differential taxation will be most significant to counties operating in their unincorporated areas. At the present time, as noted by the Commission on Urban Area Government, the uniformity clause is "deterrent to counties providing public services to the unincorporated areas where much of the current urban growth in Illinois is occurring." . . . Because of this deterrent effect, the Uniformity Clause is also an important reason for the proliferation of special districts in this state.

Committee Proposals, vol. VII at 1663. The proposal made reference to the

protection¹⁷⁸ to the special assessment and special service authority by the inclusion of the language, "The General Assembly shall not deny or limit the power of home rule units to" However, the basis for this absolute limitation upon legislative interference has been described as "mysterious" in origin,¹⁷⁹ having been added on third reading with little explanation for its inclusion.¹⁸⁰

Adding to the problem of analysis is the troublesome phrase in section 6(l), "in the manner provided by law," which is included with reference to the special service taxes. In light of the supreme court's recent decision in *Oak Park Federal Savings and Loan Association v. The Village of Oak Park*,¹⁸¹ Professor Vitullo was apparently correct in predicting that this phrase would tend to dilute the initial prohibition against legislative interference — "The General Assembly may not deny or limit"¹⁸² In a decision marred by the strongly worded dissent of three justices, the court held that the phrase "in the manner provided by law" mandates enabling legislation before special service authority can be exercised by home rule units.¹⁸³ In so holding, the court rejected the contention that the procedures already established regarding other types of taxation could be utilized.¹⁸⁴

It is this author's opinion that the *Oak Park* case was wrongly decided and constitutes a severely restrictive interpretation of home rule authority. Hopefully, the court's position will be modified when it renders its opinion in *Gilligan v. Korzen*.¹⁸⁵ The *Gilligan* case brings into issue the

Commission on Urban Area Government, Policy Recommendations for Modernization, issued in January of 1970.

It is essential to note that this concern for proliferation of special districts was one of the basic reasons compelling the convention to adopt a home rule structure. Indeed, the Local Government Committee in the introduction to its report, observed that the large number of local governments has led to a "pattern of overlapping jurisdictions, pyramided taxing powers, fragmented public services and divided responsibility" causing a "complex and complicated tangle of governments at the local level." *Committee Proposals*, vol. VII at 1571.

Much has been written on the problem of the high number of special districts and many statistics have been cited. For example, Illinois had, in 1967, 6,453 local government units, which was 92.1 percent higher than any other state and 296.9 percent higher than the average state. EBEL, *supra* note 21, at 3. Illinois also has 2,313 special districts, which is also more than any other state. COLE, *supra* note 24, at 3. In short, Illinois has more *governments* (one for every 1,600 persons) than *dentists* (one for every 1,800 persons). KRATOVIL & ZIEGWEID, *supra* note 169, at 386.

¹⁷⁸ See VITULLO, *supra* note 12, at 89.

¹⁷⁹ BAUM, *Part II*, *supra* note 71, at 562.

¹⁸⁰ BAUM, *Home Rule Background*, *supra* note 17, at 9.

¹⁸¹ VITULLO, *supra* note 12, at 89.

¹⁸² 54 Ill. 2d 200, 296 N.E.2d 344 (1973). See notes beginning at 354 *infra* and accompanying text for a more extensive discussion of this case.

¹⁸³ See notes 343-44 *infra* and accompanying text.

¹⁸⁴ *Id.*

¹⁸⁵ *Gilligan v. Korzen*, Ill. S. Ct. No. 45488.

authority of Cook County under section 6 (l) to impose special service taxes. Oral arguments were presented to the Illinois Supreme Court on September 18, 1973, with the author representing Cook County. Since there was an obvious division of opinion among the members of the court, with Mr. Justice Schaefer (a member of the majority in the *Oak Park* case) specifically stating that he did not feel that the *Oak Park* decision applied to the *Gilligan* question, it is hoped that a more expansive view toward special service authority will be realized when the *Gilligan* decision is rendered.

However, the problem caused by a lack of enabling legislation recently became moot with the signing of two bills by Governor Walker which constitute the enabling enactments necessary to permit the special service power to become effective.¹⁸⁶

CONSTITUTIONAL LIMITATIONS UPON HOME RULE AUTHORITY

The grant of home rule authority found in section 6(a) is not absolute in scope, but rather is subject to the limitations expressed in the remaining provisions of the home rule section. An analysis of these limitations will be made according to the home rule power affected.

Taxation and Licensing

Section 6(e) imposes several restrictions upon the power to tax and the power to license granted by section 6(a). In relevant part section 6(e) provides:

A home rule unit shall have only the power that the General Assembly may provide by law . . . (2) to license for revenue or impose taxes upon or measured by income or earnings or upon occupations.

These several restrictions are directed toward the prevention of both direct and indirect taxes upon income except with legislative approval. Once again, the spirit of compromise was clearly evidenced at the convention, for the delegates were fully aware of the public distaste for such taxes. This is particularly true when it is imposed in the form of a payroll tax by the municipality in which the employee works but does not reside.¹⁸⁷ Thus, the decision requiring General Assembly approval of such

¹⁸⁶ H.B. 369 approved September 21, 1973 as P.A. 78-893; H.B. 1359 also approved on September 21, 1973 as P.A. 78-901.

¹⁸⁷ See BAUM, *Part I, supra* note 27, at 145. The City of Chicago has attempted to avoid the restriction of section 6(e) with the passage of the Chicago Employer's Expense Tax Ordinance on December 21, 1973 (CHICAGO, ILL. MUN. CODE, § 200.3 (1973)) which imposes a tax on an employer having more than 15 employees at the monthly rate of \$3.00 per employee.

a taxing scheme was perhaps the most important compromise made by the Local Government Committee.¹⁸⁸

The restriction upon licensing for revenue was also designed to avoid the imposition of an indirect tax on income or occupation. However, as was noted earlier,¹⁸⁹ home rule units do possess the authority to license for regulatory purposes, provided that the proceeds from the license fees do not exceed the costs of the regulation.

Debt

The power of home rule units to incur debt is subject to general constitutional restrictions. The first limitation is imposed upon all home rule entities by section 6(d), which provides that a home rule unit does not have the power to incur debt payable from ad valorem property tax receipts maturing more than forty years from the time it is incurred. Although no rationale for the forty year limitation is contained in the Local Government Committee Report, the basis for its inclusion is found in the debates wherein it was observed that it was intended that the twenty year limitation as established by the 1870 Constitution be extended so that the costs of public improvements, which often last forty years or more, are shared by future generations who will have the benefits of their use.¹⁹⁰

Section 6(j) imposes the following limitations with regard to the home rule power to incur indebtedness:

The General Assembly may limit by law the amount of debt which home rule counties may incur and may limit by law approved by three-fifths of the members elected to each house the amount of debt, other than debt payable from ad valorem property tax receipts, which home rule municipalities may incur.

The initial clause in section 6(j), which permits home rule counties to incur debts payable from both ad valorem and non-ad valorem property sources, presented a difficult problem of interpretation for the Illinois Supreme Court in *Kanellos v. County of Cook*.¹⁹¹ Although the constitutional language merely states that the General Assembly may limit the amount of debt which can be incurred by counties, the version initially proposed by the Local Government Committee additionally empowered the legislature to require referendum approval, if desired.¹⁹² To

¹⁸⁸ BAUM, *Home Rule Background*, *supra* note 17, at 6.

¹⁸⁹ See notes 100-107 *supra*.

¹⁹⁰ See *Verbatim Transcripts*, vol. IV at 3219 citing ILL. CONST. art. IX, § 12 (1870).

¹⁹¹ 53 Ill. 2d 161, 290 N.E.2d 240 (1972).

¹⁹² Paragraph 4.7 as proposed by the Local Government Committee concerned the restrictions on debt to be incurred by all governmental units other than home rule municipalities:

The General Assembly may by general law limit the amount of debt

complicate the matter, the debates are silent as to any reason for the removal of the referendum requirement by the Committee on Style, Drafting and Submission.¹⁹³ The supreme court held that since the language of section 6(j) was unambiguous, it must be given effect.¹⁹⁴ However, the court also held that in the future the General Assembly could impose a referendum requirement by a three-fifths vote of both houses.¹⁹⁵ At this writing, no restrictive legislation has been enacted¹⁹⁶ and Cook County has utilized power to issue \$22,000,000 in referendum-free bonds.¹⁹⁷

Section 6(j) also entrusts a wide grant of authority to home rule municipalities, for it permits such units to incur debt payable from non-ad valorem property tax sources with the maximum amount subject only to the difficult limitation of three-fifths vote of both houses. Once again, the irregular treatment of non-ad valorem municipal debt at the convention prevents an entirely clear analysis of the subject. Similar to the provisions of section 6(k),¹⁹⁸ the Local Government Committee Report proposed limitations only upon debts payable from ad valorem property sources. On first reading of this proposal, no amendments were made by the convention as a whole. Only after first reading, when home rule municipal debt was considered by the Committee on Style, Drafting and Submission, was a provision included to cover debt payable from sources other than ad valorem property receipts.¹⁹⁹ This provision was subsequently adopted in substantially identical form as section 6(j) of the new constitution. The inclusion of this provision was apparently made in an effort to express an intention that the general power to incur debt found in section 6(a) not be limited to debt payable from ad valorem property tax receipts,²⁰⁰ and further-

which other units of local government and school districts may incur. Limits may vary according to functions performed and services provided. The General Assembly may require referendum approval of such debt.

Committee Proposals, vol. VII at 1677.

¹⁹³ *Id.* at 1989, 1991.

¹⁹⁴ 53 Ill. 2d 161, 164, 290 N.E.2d 240, 242.

¹⁹⁵ *Id.* at 165, 290 N.E.2d at 243.

¹⁹⁶ Three attempts were made in this legislative session to impose referendum requirements upon the issuance of bonds by home rule counties. Two of the bills (S.B. 204 and S.B. 275) were tabled after first reading in the Senate, but a more serious challenge was posed by a bill in the House (H.B. 804) which was sponsored by over forty Republicans and which failed to pass only after reaching third reading in the House.

¹⁹⁷ See note 96 *supra*.

¹⁹⁸ See paragraph 4.6 of the Local Government Article, *Committee Proposals*, vol. VII at 1676.

¹⁹⁹ See paragraph 8(h) as proposed by the Committee on Style, Drafting and Submission. *Committee Proposals*, vol. VII at 1989, 1991.

²⁰⁰ During the constitutional debates, Chairman Parkhurst commented on the need for liberalization of the power to incur debt at the local level:

I think you might agree with me that some liberality — some kind of

more, since this was not a power exclusively belonging to the General Assembly, its limitation or denial could only be accomplished by a three-fifths vote of both houses.²⁰¹

The underlying rationale of this provision appears to have been the determination that percentage limitations based upon assessed valuation of property were outmoded, ineffective and costly methods of limiting statutory debt authority; and that, in an industrial economy, property is neither the major source of individual wealth nor an accurate measure of governmental ability to raise revenue.²⁰² Additionally, the committee realized that the elimination of personal property taxes²⁰³ would ultimately reduce debt limits based on assessed value of property by nearly twenty percent.²⁰⁴

The removal of the requirement that municipal debt be supported by a direct ad valorem property tax presents an excellent opportunity for innovation at the local level to create novel methods of financing needed capital improvements and thereby help to alleviate the heavy financial burden of underwriting general obligation bond issues, imposed primarily upon property owners.²⁰⁵

grant of power — in the area of capital improvements is just as necessary as taxing power and maybe more so.

Now, one other point: This, of course, goes to the matter of ad valorem property taxes, and I said when we started to present this matter to you, friends and delegates, that we have conceived, I think a system of capital improvements by deletion of certain sections of the 1870 Constitution, notably the deletion of the second phrase in the present section 8 of Article IX, which says that every — every — indebtedness must be supported by a direct annual tax on the property in that district to pay it off. We have freed up local governments, I believe, to find other ways to pay for capital improvements other than the property tax source.

Verbatim Transcripts, vol. IV at 3378.

²⁰¹ See *Committee Proposals*, vol. VII at 1991 for an explanation by the Committee on Style, Drafting and Submission for the inclusion of a specific section dealing with municipal home rule debt payable from non-ad valorem property tax sources.

²⁰² *Id.* at 1682-83.

²⁰³ The personal property tax structure was indeed altered in November, 1970 with the referendum approval of section IX-A of the 1870 Constitution which established a prohibition against personal property taxation as to individuals. Approximately a month later, December 15, 1970, the 1970 Illinois Constitution was also approved by a referendum vote. Article IX, section 5(b) of that new document prohibited the reinstatement of personal property taxes abolished on or before the effective date of the new constitution (*i.e.*, as to individuals). Section 5(c) established the requirement that the General Assembly abolish all ad valorem personal property taxes by January 1, 1979, and concurrently, to replace all revenue lost by imposing state-wide taxes, other than ad valorem real estate taxes, solely on those classes relieved of the burden of the ad valorem personal property taxes.

The removal of the personal property tax as to individuals has resulted in a series of complex and confusing decisions by both the Illinois Supreme Court and United States Supreme Court, lending further support to the decision permitting methods other than percentage of assessed valuation for determining debt limitations for home rule municipalities.

²⁰⁴ *Committee Proposals*, vol. VII at 1683. See notes 207-16 *infra*.

²⁰⁵ See notes 207-16 *infra* and accompanying text.

Section 6(k) relates to municipal home rule debt payable from ad valorem property tax receipts, and establishes a system of referendum-free debt, on a scale determined by the population of the home rule municipality:

The General Assembly may limit by law the amount and require referendum approval of debt to be incurred by home rule municipalities, payable from ad valorem property tax receipts, only in excess of the following percentages of the assessed value of its taxable property: (1) if its population is 500,000 or more, an aggregate of three percent; (2) if its population is more than 25,000 and less than 500,000, an aggregate of one percent; and (3) if its population is 25,000 or less, an aggregate of one-half percent. Indebtedness which is outstanding on the effective date of this Constitution or which is thereafter approved by referendum or assumed from another unit of local government shall not be included in the foregoing percentage amounts.

Once again, a conflict existed and this subsection represents a compromise between two competing factions — those who would have entrusted the regulation of local debt to the General Assembly and those strong supporters of home rule who would have left the power entirely in the hands of home rule governments.²⁰⁶

The intention of this subsection was to permit home rule municipalities to incur debt payable from property tax receipts in amounts which range from the nominal (for small home rule municipalities) to an estimated \$330,000,000 (for the City of Chicago)²⁰⁷ without confronting the possibility of legislative limitation or the requirement of referendum approval. The maximum limit would be computed exclusively on the basis of debt incurred after the effective date of the constitution. Furthermore, limitations on the amount of such debts, as well as a referendum requirement, could be imposed only on amounts in excess of those constitutionally specified. Significantly, the adoption of this provision constituted removal of the limitation found in the 1870 Constitution which prohibited an indebtedness exceeding five percent of the taxable property in the taxing unit.²⁰⁸ The 1870 limitation was one of the prime reasons underlying the most extensive governmental fragmentation found in the United States,²⁰⁹ and it inevitably resulted in a system of overlapping

²⁰⁶ See *Verbatim Transcripts*, vol. IV at 3377; PARKHURST, *Article VII*, *supra* note 7, at 101.

²⁰⁷ PARKHURST, *Article VII*, *supra* note 7, at 101.

²⁰⁸ ILL. CONST. art IV § 12 (1870). See *Committee Proposals*, vol. VII at 1680-81.

²⁰⁹ EBEL, *supra* note 21, at 1; see note 177 *supra* for a discussion of the facts involving the number of governmental units in Illinois which far surpasses the total of any other state.

taxing districts which inhibited the formation of a rational overall taxing structure.²¹⁰

In addition to the undesirable nature of the existing tax structure, another economic factor influenced the adoption of section 6(k). In order to circumvent the five percent constitutional debt limits, which pertained only to general obligation bonds of full-faith and credit bonds based on property tax revenues, local governments began to rely heavily on revenue bond financing, which was neither constitutionally nor legislatively limited, but which required higher interest rates and longer maturities.²¹¹ As a consequence of the need to issue revenue and other non-property bonds as opposed to full-faith and credit bonds, the total indebtedness incurred reached 9.04 percent of the assessed value of all property in Illinois, with this figure running as high as twenty percent in the City of Springfield.²¹² By the adoption of the municipal home rule debt provisions, sections 6(j) and (k), it was hoped that the high levels of indebtedness, which many citizens of Illinois have had to shoulder, would be eased by the reduction of unwarranted multiplicity and confusion in local financing.²¹³

A removal of the unlimited power to impose referendum requirements was effected by the constitutional framers because of the historical realization that desirable bond issues have often been defeated by a "tyranny of the minority," *i.e.*, few voters usually vote on debt referenda, and many of those who do, cast their ballots against needed bond issues because of their disapproval of unrelated local expenditure policies.²¹⁴ As was noted earlier,²¹⁵ several municipalities have taken advantage of this opportunity to issue bonds without referendum approval. It is hoped that future exercising of this power will be made in a reasonable fashion with only obvious needs as the object of such financing, so as to permit the possibility of referendum free debt in amounts exceeding the constitutional scale of section 6(k). As one leading commentator has observed, the ultimate test of a home rule unit is to impose upon itself reasonable restraints in order to prevent undue legislative or judicial interference with the fragile provisions of the constitution.²¹⁶

²¹⁰ *Committee Proposals*, vol. VII at 1682.

²¹¹ *Id.* at 1678, 1681.

It was estimated, for example, that the total costs of interest payable on revenue bonds exceed that of general obligation bonds by fifty percent. *Id.* at 1682.

²¹² *Id.* at 1682.

²¹³ *Id.* at 1681, 1682.

²¹⁴ *Id.* at 1687.

²¹⁵ See note 96 *supra*.

²¹⁶ THORPE, *supra* note 59, at 8.

Police Power

Two constitutional limitations are imposed upon the general grant of police power contained in section 6(a):

Section 6(d) provides in relevant part:

A home rule unit does not have the power . . . (2) to define and provide for the punishment of a felony.

Section 6(e) includes the provision that:

A home rule unit shall have only the power that the General Assembly may provide by law (1) to punish by imprisonment for more than six months

The felony provision of section 6(d) was included to make clear the intention that the punishment of major crimes remain a matter of exclusive state control, the home rule section notwithstanding.²¹⁷

The relevant portion of section 6(e), unlike section 6(a), reserves to the General Assembly some measure of discretion by empowering it to determine whether home rule units may increase the punishment for misdemeanors with sentences exceeding a six month jail term.²¹⁸ This latter provision was added as an amendment during the floor debates, for there was an expressed concern that a home rule unit could impose lengthy jail sentences merely by classifying a crime as a misdemeanor rather than a felony.²¹⁹

*Conflicts Between Municipal Ordinances
and Home Rule County Ordinances*

Article VII, section 6(c) provides:

If a home rule county ordinance conflicts with an ordinance of a municipality, the municipal ordinance shall prevail within its jurisdiction.

This subsection, enacted pursuant to a general recognition that municipalities are more important within the structure of Illinois government than counties,²²⁰ unequivocally provides that in the event of a conflict, the ordinances of *all* municipalities,

²¹⁷ *Committee Proposals*, vol. VII at 1650; see also BAUM, *Home Rule Background*, *supra* note 17, at 6.

²¹⁸ With regard to misdemeanors, the present criminal code prohibits any punishment exceeding one year in a jail other than a penitentiary. ILL. REV. STAT. ch. 38, §§ 1.7(f), 2-7 (1971).

²¹⁹ *Verbatim Transcripts*, vol. IV at 3360.

²²⁰ 53 Ill. 2d 312, 318, 291 N.E.2d 823, 828.

²²¹ In justifying a determination that municipal ordinances should prevail over county home rule ordinances in cases of conflict, the Local Government Committee noted:

The preference thereby given to municipal legislation is based upon practical and historical grounds. At this point in the development of local government in Illinois, municipalities are by far the most important form of general-function government unit. Counties are relatively weak, less organized and limited in authority. Although one purpose of this Article is to strengthen county government so that it will become

whether home rule or non-home rule,²²¹ will be deemed to prevail over ordinances passed pursuant to a county's home rule authority.

However, this provision is applicable only when a conflict arises as a result of the exercise of a home rule function by a county. The Local Government Committee took pains to emphasize that section 6(c) does not mean that municipalities can prevent home rule counties from performing their county-wide functions, since such authority flows directly from statute and not from home rule.²²² Cited examples of such functions included the county sheriff in the exercise of his law enforcement authority²²³ and the functioning of home rule counties as agencies for the state in dealing with subjects such as sewage disposal and air pollution, which may require a broader treatment than can be provided by municipalities.²²⁴

A serious problem of interpretation arises, however, in determining what constitutes a "conflict" within the definition of section 6(c), for no explanation of the term is provided either in the wording of the constitution or in the Report of the Local Government Committee, whose proposed paragraph 3.3 was nearly identical to section 6(c).²²⁵ But there were extensive debates on the subject. Relying primarily on the words of Chairman Parkhurst during those debates, Professor Baum concluded that the term "conflict" was intended to have an expansive definition, including not only situations of direct contradiction but also instances where municipal legislation merely occupies the same field as county legislation.²²⁶

This author differs with Professor Baum's conclusion for several reasons. First, the language of Chairman Parkhurst as cited by Baum²²⁷ does not suggest that such an expansive reading of the term "conflict" was intended. Second, one of the criticisms leveled at the Local Government Article was that

a useful adjunct, and in some cases even a useful alternative to municipal government, we do not believe that the Constitution should permit home rule counties to unilaterally assume the functions and powers of municipalities which lie within the county's borders.

Committee Proposals, vol. VII at 1648.

²²² *Id.* at 1649.

²²³ *Id.*

²²⁴ *Id.* at 1649-50.

²²⁵ Paragraph 3.3 as proposed by the Local Government Committee stated:

If a county ordinance adopted pursuant to paragraph 3.1(a) [now section 6(a)] conflicts with a municipal ordinance within the corporate limits of the municipality, the municipal ordinance shall prevail.

Committee Proposals, vol. VII at 1578.

Indeed the term "conflict" in the context of local-state relations in other states has presented severe problems of interpretation. See SATO & VAN ALSTYNE, *infra* note 254, at 257-59.

²²⁶ BAUM, *Part II*, *supra* note 71, at 584-85.

²²⁷ *Id.* at 584, citing *Verbatim Transcripts*, vol. IV, at 3026, 3049, 3123.

it did not deal with the difficulty of regionalism, *i.e.*, situations where the problem extends beyond municipal borders.²²⁸ Such regional problems may not assume the proportion of statewide concern which would preclude the exercise of county home rule authority under section 6(a). However, Baum's interpretation may well lead to a shackling of a home rule county's ability to deal with problems impacting areas outside the municipality which are also confronted with the same problem, because municipal action under section 6(c) could be employed to override county action.²²⁹

An example which readily comes to mind involves air pollution.²³⁰ If a municipality has an air pollution ordinance, then, according to Baum's theory, the county would be powerless to act within the borders of that municipality pursuant to county home rule power. This would be true notwithstanding the fact that the municipal ordinance may be wholly inadequate in scope to effectively combat the pollution problem or that the municipality may be unwilling to enforce the ordinance. Such a problem is readily possible with municipalities strongly dependent upon commercial and industrial residents to support their tax base. Since the effects of pollution obviously extend beyond municipal boundaries, it is suggested that the expansive definition of the term "conflict" as proposed by Professor Baum is ill-suited to the realities of urban existence. The preferable approach may be to analyze the municipal ordinance together with the county home rule ordinance in order to ascertain whether an irreconcilable dilemma is created in attempting to comply with the terms of both ordinances. In short, would compliance with the terms of either ordinance result in a violation of the other? If such a dilemma has not been created, then it is suggested that the theory of concurrent authority, as established by section 6(i) for state/home rule action, should apply as well in the home rule county/municipal action context.²³¹

Additionally, in the only decision thus far rendered con-

²²⁸ NEWSLETTER, *supra* note 38, No. 3, at 3 (May, 1973), quoting Norman Elkin.

²²⁹ Father Joseph Small has noted that the key factor toward the future solution of metropolitan problems might well be a strong county government. SMALL, *supra* note 13, at 10.

²³⁰ Cook County has been involved in pollution litigation wherein the "conflict" provision was raised in an effort to preclude county enforcement in these cases. See *Village of Melrose Park v. County of Cook*, Cook County Circuit Court No. 72 L 7689; *County of Cook v. Max Factor, Inc.*, Docket Nos. Z00577, Z00591.

²³¹ For example, Arthur C. Thorpe has suggested that if a county building code or licensing regulation be substantially similar to that of a municipality, it would be enforceable in the municipality concurrently with municipal regulations. See THORPE, *supra* note 59, at 5.

struing section 6(c), the Illinois Supreme Court appears to have rejected Baum's mechanical approach. In *City of Evanston v. County of Cook*,²³² the supreme court, with three justices dissenting, ruled that identical taxing ordinances passed by Cook County and six municipalities, did not create a conflict within the meaning of section 6(c). Rather, the court determined that the case simply presented a situation where separate and distinct units of local governments were exercising the power which they possessed by virtue of article VII, section 6(a) —to tax the same transaction.²³³

In short, the question of conflict between such local governmental entities is not easily resolved, and this author fully concurs with Professor Baum in his assessment that the "conflict" dilemma will be the subject of much future judicial interpretation.²³⁴

EXTRA-TERRITORIAL APPLICATION OF HOME RULE AUTHORITY

Article VII, section 6(a) permits home rule units, within the limitations of that section, to "exercise any power and perform any function pertaining to its government and affairs." Since this expansive grant of authority contains no territorial limits upon the powers given to home rule units (which is an essential change from the first draft of the section restricting home rule authority to the corporate limits of the governmental unit)²³⁵ the question is posed whether the adopted change was

²³² 53 Ill. 2d 312, 291 N.E.2d 823 (1973). See text at note 330 *infra*.

²³³ *Id.* at 319, 291 N.E.2d at 826.

²³⁴ BAUM, *Part II, supra* note 71, at 585.

It might also be noted parenthetically that the confusion and uncertainty resulting from this conflict doctrine is not nearly as pronounced as the problems of conflict between other types of local governments, where nothing is contained in the constitution to solve such problems. See *City of Des Plaines v. Metropolitan Sanitary District*, 48 Ill. 2d 11, 268 N.E.2d 428 (1971), where the supreme court permitted the Sanitary District to construct a water reclamation plant within the City of Des Plaines, despite a clear conflict with the city's zoning ordinance; and *O'Connor v. City of Rockford*, 52 Ill. 2d 360, 288 N.E.2d 432 (1972) where the supreme court held that the City of Rockford could not construct and operate a sanitary landfill in the unincorporated area outside its city limits, not because it violated a Winnebago County zoning ordinance, but because this was an environmental issue beyond the control of either Rockford or Winnebago County and solely within the authority of the State Environmental Protection Agency.

²³⁵ Paragraph 3.1(a) of the proposed Local Government Article as submitted by the Local Government Committee provided:

Any county which has a chief executive officer elected by the voters of the county and any municipality which has a population of more than 20,000 may, within its corporate limits, exercise any power and perform any function pertaining to its government and affairs, including, but not limited to, the power to regulate for the protection of the public health, safety, morals, and welfare; to license; to tax; and to incur debt.

Committee Proposals, vol. VII at 1577.

intended to suggest extra-territorial applicability of home rule authority.

Professor Baum has opined that the final draft appearing in the new constitution represents no substantial change from the territorial limitations originally imposed in the proposed Local Government Article.²³⁶ The Illinois Supreme Court has apparently accepted a modified version of that theory.

In *People ex rel. City of Salem v. McMackin*²³⁷ the supreme court ruled, over a strongly worded dissent by Mr. Justice Schaefer,²³⁸ that the constitutional grant of home rule authority is of sufficient scope to permit home rule municipalities to purchase land outside of their territorial limits.²³⁹ However, the court restricted its ruling to an approval of the extra-territorial exercise of proprietary authority, specifically noting that the question of the extra-territorial exercise of sovereign authority may well be beyond home rule authority.²⁴⁰

This ruling seems to suggest the conclusion that the problem of conflict arising under section 6(c) between a municipal and a home rule county ordinance in areas outside the municipal borders will be minimized. Although section 6(c) permits a municipal ordinance to prevail *within its jurisdiction* when it conflicts with a home rule county ordinance, it appears that the term "within its jurisdiction" is not to be read any more broadly in a home rule context than the interpretation given section 6(a) by the supreme court in the *Salem* case. Although the proposed Local Government Article originally restricted the applicability of the conflict provision to the corporate limits of the municipality involved,²⁴¹ certain members of the convention objected to such a limitation; for their feeling was that its inclusion might result in the removal of the extra-territorial jurisdiction given to municipalities by statute.²⁴² The resulting deletion of the

²³⁶ BAUM, *Part II, supra* note 71, at 582.

²³⁷ 53 Ill. 2d 347, 291 N.E.2d 807 (1972). See note and accompanying text beginning at note 376 *infra* for a more extensive discussion of this case.

²³⁸ *Id.* at 369-74, 291 N.E.2d at 820-23.

Justice Schaefer dissented on the theory that the power of a home rule unit does not include the purchase of land outside its governmental limits.

²³⁹ *Id.* at 365, 291 N.E.2d at 818.

²⁴⁰ *Id.* at 365-66, 291 N.E.2d at 818.

²⁴¹ Paragraph 3.3, as proposed by the Local Government Committee, provided:

If a county ordinance adopted pursuant to paragraph 3.1(a) [now article VII, section 6(a)] conflicts with a municipal ordinance within the corporate limits of the municipality, the municipal ordinance shall prevail.

Committee Proposals, vol. VII at 1578.

²⁴² Chairman Parkhurst, speaking in support of an amendment by Delegate Elward to remove the territorial limitation of paragraph 3.3, stated:

Now what this says in the conflict situation is that the home rule powers which can be exercised by a county under the provision here of

territorial limitation was therefore based on a desire to preserve extra-territorial control granted by statute to municipalities, rather than to permit the broad exercise of home rule municipal powers beyond corporate borders.²⁴³

INTERGOVERNMENTAL COOPERATION

The home rule section of the new constitution has been criticized for its failure to provide adequate methods by which to deal with problems extending beyond the geographic limits of the home rule unit.²⁴⁴ However, this inadequacy has been met, at least in part, with the inclusion in the 1970 Constitution of one of the most far-reaching, self-executing intergovernmental cooperation provisions in the country. This provision permits local governments of all types to accomplish almost anything in concert, without specific legislative authority.²⁴⁵ Article VII, section 10(a) of the intergovernmental cooperation section provides:

Units of local government and school districts may contract

3.3 before us simply are pre-empted by the enactment of a municipal ordinance within the county; and the Elward amendment says that that municipal ordinance can drive away the home rule power of the county within municipal limits, or outside the municipal limits if the statute has given the municipality the right to have that extraterritorial jurisdiction, as they have in the zoning situation.

Verbatim Transcripts, vol. IV at 3120 (emphasis added).

²⁴³ Parkhurst also observed during the debates on the conflict provision: Now, what we were saying there — and I think, quite properly — was that you can't exercise home rule powers extraterritorily, unless the statute says you can. . . . You can't by — under home rule reach out and scare everybody to death that you are going to incorporate somebody or annex somebody or erect some kind of metropolitan government under the guise of home rule by reaching outside your corporate limits.

Id.

²⁴⁴ Elkin, NEWSLETTER, *supra* note 38, No. 3, at 4 (May, 1973).

The Local Government Committee, in presenting arguments against home rule, included statements questioning the ability of the typical governmental unit to deal with many of the pressing urban problems. For instance, the advisory Commission on Intergovernmental Relations was quoted as saying:

Recent developments in metropolitan areas have divested the concept of home rule of much of the sanctity it possessed at various times in the past. The values of maximum citizen participation and local control implicit in home rule are in tension with the limited ability of small units of government to meet modern science standards, with the spread of public policy concerns to the metropolitan scale, and with the poor public performance that often results from divided authority. Effective local control — the goal of home rule advocates — often requires a larger jurisdiction than the typical local unit in a metropolitan area.

Committee Proposals, vol. VII at 1611.

²⁴⁵ PARKHURST, *Article VII*, *supra* note 7, at 97.

Intergovernmental cooperating provisions are commonplace in the United States, with all fifty states permitting such activity by statute. Additionally, eight states have constitutional provisions for cooperative activity among governments. See *Committee Proposals*, vol. VII at 1752.

In his paper prepared for use as the constitutional convention, Father Small argued for the inclusion of a provision concerning intergovernmental relations:

It may be argued that such an article is unnecessary, and it is inconceivable that cooperative service or governmental arrangements mutually

or otherwise associate among themselves, with the State, with other states and their units of local government and school districts, and with the United States to obtain or share services and to exercise, combine, or transfer any power or function, in any manner not prohibited by law or by ordinance. Units of local government and school districts may contract and otherwise associate with individuals, associations, and corporations in any manner not prohibited by law or by ordinance. Participating units of government may use their credit, revenues, and other resources to pay costs and to service debt related to intergovernmental activities.

Although intergovernmental cooperation was not prohibited by the 1870 Constitution, the influence of the limiting theory of Dillon's Rule led to the belief that specific statutory authorization was needed before intergovernmental activity was possible.²⁴⁶ The persistence of Judge Dillon's philosophy, coupled with the existence of many statutory provisions limiting such activity, led to the realization that a definitive statement on intergovernmental cooperation was necessary in the new constitution.²⁴⁷ The result was the adoption of article VII, section 10, the purpose of which was explained by the Local Government Committee:

The purpose of this proposed new section is to provide maximum flexibility to units of local government in working out solutions to common problems in concert with other units of government at all levels. . . . Intergovernmental cooperation is a workable alternative to the formation of larger units of government by encouraging existing units of local government to innovate solutions to common problems. It will afford the participating units of local government the economies of scale which are only available with size while preserving local autonomy. In some instances, intergovernmental cooperative agreements and contracts will permit the initiation and administration of projects which no single unit could undertake. Expanded intergovernmental cooperation by general purpose local governments will eliminate, to some extent, the need for new special purpose governments which cross existing governmental boundaries.²⁴⁸

Despite the obvious advantages of the intergovernmental cooperation section, it has been subjected to some criticism.

agreed to by local governments would be denied by the state government. Yet as we become increasingly interdependent particularly in our metropolitan areas, and as we evolve new life styles beyond the imagination of an earlier generation (and even beyond our present imagination) it is important that a constitution that may govern the State of Illinois for the next century should be worded so as to allow its citizens to fashion local governmental structures and services that may come to be recognized as needed by the new and more complex urban living.

SMALL, *supra* note 13, at 11.

²⁴⁶ *Committee Proposals*, vol. VII at 1750-51.

²⁴⁷ *Id.* at 1751.

²⁴⁸ *Id.* at 1747, 1751-52.

As was noted earlier in this article, the same concern for the proliferation of special districts which was evidenced with the adoption of the intergovernmental cooperation section was a basic reason for the creation of the home rule section. See note 177 *supra*.

For example, David G. Heeter has complained that the brevity of section 10 has resulted in a failure to touch upon some questions while conversely raising others.²⁴⁹ A specific inquiry has surfaced, for example, as to the meaning of the phrase "in any manner not prohibited by law or by ordinance," found in the second sentence of the section. The Report of the Chicago Home Rule Commission has noted that although the phrase speaks in terms of legislative prohibition of intergovernmental cooperation and not of legislative limitation, nevertheless a limitation could easily be drafted in prohibitory language.²⁵⁰ Furthermore, the second sentence of section 10(a) treats agreements with non-governmental entities and permits local governments and school districts to "contract and otherwise associate" with such entities. Since the first sentence is phrased in broad language (*i.e.*, "may contract and otherwise associate . . . to obtain or share services and to exercise, combine or transfer any power or function"), but the second sentence is phrased in limiting language (*i.e.*, "in any manner not prohibited by law or by ordinance") the questions raised are whether the lack of limiting language in the first sentence clearly constitutes a broad grant of authority or whether the limiting language of the second sentence confines the authority apparently granted in the first sentence. The Chicago Home Rule Commission opined that the language referring to activity with non-governmental entities should be read in a narrow sense, but the report questions whether the provision should be read with a strict and literal interpretation, thereby ignoring the obvious necessity to obtain services from non-governmental entities such as the sale and purchase of pencils and paper.²⁵¹

Despite the shortcomings in the language of the intergovernmental cooperation provision, it should be reiterated that the section was clearly intended to be an expansive grant of authority to governments so that they are able to work with one another for the best interests of each entity.²⁵² Should this intent be considered by the courts and the General Assembly, then this author fully concurs with the Chicago Home Rule Commission that the intergovernmental cooperation section will play an increasingly important role in the effective implementation of

²⁴⁹ Heeter, *Home Rule: Intergovernmental Cooperation — Government by Contract* at 15. (Second Annual Local Government Law Institute, presented by the Illinois Institute for Continuing Legal Education (1971)).

²⁵⁰ *The Chicago Home Rule Commission Report and Recommendation*, *supra* note 78, at 73.

²⁵¹ *Id.* at 73-74.

²⁵² See PARKHURST, *Article VII*, *supra* note 7, at 97.

home rule authority,²⁵³ and will lead to greater local government ability to combat problems of area-wide concern.²⁵⁴

ILLINOIS JUDICIAL DECISIONS CONCERNING HOME RULE

Several opinions have been rendered by the Illinois Supreme Court, as well as trial courts throughout the state, interpreting the provisions of the home rule section. Although all of the supreme court decisions have been briefly considered throughout this article, they are of such crucial importance in analyzing home rule in Illinois that a more detailed discussion of each is desirable.

*Bloom v. Korshak*²⁵⁵

This initial Illinois case challenging the exercise of home rule authority was later viewed as having a limited but significant impact on the home rule issue.²⁵⁶ The plaintiffs in the two consolidated class actions (*Bloom v. Korshak*, and *Ryan v. Korshak*) attacked the constitutionality of the Chicago cigarette tax ordinance.²⁵⁷

The *Ryan* suit was brought on behalf of all persons who purchased cigarettes in the City of Chicago. Plaintiffs contended that article VII, section 6(e), which prohibits taxes imposed upon or measured by income or earnings or upon occupations without legislative approval, should be interpreted as excepting any privilege or nonproperty taxes from the general grant of home rule authority conferred by section 6(a).²⁵⁸ In speaking for a unanimous court, Mr. Justice Ward rejected this restrictive interpretation, emphasizing the mandate of section 6(m) to liberally construe the powers of home rule units, and further stated that it would be unreasonable to read limitations into section 6(e) beyond the plain words of that provision.²⁵⁹ To so interpret the words of the section would be inconsistent with the "broad authority" given to home rule units under section 6(a) and would be contrary to the express intent of the constitutional convention to permit taxing schemes such as those upon the sale of cigarettes.²⁶⁰

²⁵³ *The Chicago Home Rule Commission Report and Recommendations*, *supra* note 78, at 91.

²⁵⁴ Professors Sato and Van Alstyne have observed that today most of the significant problems of local government are not of local concern alone, but reach beyond artificial political boundary lines. See SATO & VAN ALSTYNE, *STATE AND LOCAL GOVERNMENT LAW*, at 221 (1970).

²⁵⁵ 52 Ill. 2d 56, 284 N.E.2d 257 (1972).

²⁵⁶ COHN, *Judicial Decisions*, *supra* note 67, at 8.

²⁵⁷ CHICAGO, ILL. MUN. CODE § 178.1 (1972).

²⁵⁸ 52 Ill. 2d at 59, 284 N.E.2d at 260.

²⁵⁹ *Id.*

²⁶⁰ *Id.* See *Committee Proposals*, vol. VII at 1656.

Plaintiffs also contended that if the restrictions of section 6(e) were limited only to taxes on income, earnings or occupation, it followed that the due process and equal protection standards of both the state and federal constitutions would be violated because, while these nonproperty or privilege taxes would be subject to prior legislative approval before imposition, other home rule nonproperty or privilege taxes would not be.²⁶¹ The court also differed with this contention, stating that there was no constitutional intention to restrict classification of taxes to property and nonproperty categories.²⁶² Rather, the court held that the limitations as established by a plain reading of section 6(e) are reasonable and non-arbitrary in nature, with no suggestion of non-uniform application.²⁶³

Plaintiff's final claim in *Ryan* was that the provisions of section 6(e) are contrary to article IX, section 2 of the 1970 Constitution which requires that the classification of the *objects* of nonproperty taxes shall be reasonable. The court deemed this position to be without merit because article IX, section 2 speaks to the treatment of the *subjects* or *objects* of taxes, whereas *Ryan* was claiming that the *types* of taxes were being treated unequally. Since due process and equal protection are concepts which protect only the rights of persons, they may not be invoked to assail a classification of taxes.²⁶⁴

Bloom took a different approach. Plaintiffs, who represented various classes of sellers and purchasers of cigarettes in the City of Chicago, alleged the city ordinance was a tax on occupations which requires prior legislative approval under section 6(e). This theory was based upon a claim that the legal incidence of the tax falls upon either the wholesaler or retailer who are required to purchase tax stamps from the city collector before the cigarettes can be sold in Chicago, and to thereafter remit the funds monthly to the city with an accompanying report. Furthermore, the ordinance stated that any penalties for violations of the ordinance are imposed solely on the wholesaler or retailer.²⁶⁵

The Illinois Supreme Court saw things differently. It was the court's view that the impact of the tax is ultimately borne by the consumer, and not the wholesalers or retailers. In so concluding, the court relied upon the wording of the ordinance itself which explicitly declared an intention that incidence of the tax be placed upon the consumer, with the wholesalers and

²⁶¹ 52 Ill. 2d at 59-60, 284 N.E.2d at 260.

²⁶² *Id.* at 60, 284 N.E.2d at 260.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 61, 284 N.E.2d at 261.

retailers being merely collection agents for the tax.²⁶⁶ In essence, the court declared that the tax was a sales or excise tax rather than a tax upon occupations,²⁶⁷ and therefore was within the general authority to tax contained in section 6 (a) which requires no enabling legislation.

The court's reliance upon the language of the tax and ordinance in order to ascertain the nature of the tax and its legal ramifications has been criticized. Two commentators contend that such a method of analysis reduces the question of constitutionality to one of legislative form and not substance;²⁶⁸ one of them specifically noted that the prior cigarette ordinance on its face was termed an occupation tax.²⁶⁹

However, the cases cited by the court make it clear that the determination of the incidence of a tax has long been based on the wording of the legislation in question.²⁷⁰ Consequently, the treatment afforded the ordinance in *Bloom* is consistent with the former analyses of legislation by the Illinois Supreme Court as well as the Supreme Court of the United States.

The *Bloom* case is therefore important not only for its expansive language regarding the home rule taxing power, but also

²⁶⁶ *Id.* at 62, 284 N.E.2d at 262, quoting CHICAGO, ILL. MUN. CODE, § 178.1-2(c) (1972).

²⁶⁷ See VITULLO, *supra* note 12, at 88.

²⁶⁸ *Id.* See also *Recent Decisions*, 61 ILL. B.J. 328, 329 (Feb. 1973) where it was observed in a student article analyzing the *Bloom* case:

The Illinois Supreme Court's reliance on the language of the ordinance results in a formalistic test being applied to determine the constitutionality of a tax imposed by a home rule unit. This criteria allows cities to alter the characteristic of a tax by redrafting it in language similar to that which was relevant in determining the incidence of the Chicago cigarette tax.

²⁶⁹ *Id.* at 329.

The provisions in question of the former Chicago cigarette tax ordinance, CHICAGO, ILL. MUN. CODE, § 178.1 (1971) stated:

An occupation tax is imposed upon all retail tobacco dealers at the rate of one cent per package of twenty cigarettes sold, offered, displayed or kept for sale in the course of his business.

²⁷⁰ Two cases cited by the Illinois Supreme Court were of particular relevance to the questions presented in the *Bloom* case. In *First National Bank of Maywood v. Jones*, 48 Ill. 2d 282, 269 N.E.2d 494 (1971) the contention was asserted that while the statute does not direct the seller to pass the tax on to the purchaser, in fact this is done. The court rejected the resulting conclusion that the incidence of the tax was upon the purchaser, stating:

The practice does not change the character of the tax. . . . The retailers' occupation tax is levied upon the seller and the custom of passing the burden to the buyer by means of a price increase does not alter its nature. It is the legal incidence of the tax that controls.

Id. at 288, 269 N.E.2d at 496.

In *Heyman v. Mahin*, 49 Ill. 2d 284, 275 N.E.2d 421 (1971), the Cigarette Tax Act, which previously had been an occupation tax on distributors, was amended in 1963 to become an occupation tax upon cigarette retailers, with the enforcement machinery left unamended. The court held that the amendment of the statute had changed the incidence of the tax:

We think the language of the Act is clear. The tax is no longer an occupation tax imposed upon distributors of cigarettes but is an occupation tax imposed upon those engaged in business as retailers of

for its reaffirmance of the principle that the wording of legislative provisions may determine the legal incidence of a tax. Thus, if home rule units draft legislation which clearly states that the tax shall ultimately be borne by the consumer, then, if future opinions remain consistent with *Bloom*, the tax will be considered a proper exercise of the self-executing home rule authority to pass excise or sales taxes, rather than an occupation tax requiring prior legislative approval.

*Jacobs v. City of Chicago*²⁷¹

In a case presenting issues much like those in *Bloom v. Korshak*, the plaintiffs in *Jacobs* challenged the constitutionality of the Chicago Parking Tax Ordinance²⁷² which became effective January 1, 1972. Their main contention was that the tax was actually an attempt to license for revenue, which requires enabling legislation under the provisions of section 6(e) of article VII.²⁷³ The basis for this argument was similar to one of the points raised in *Bloom*, *i.e.*, that the ordinance required the operator of parking facilities to collect the tax and remit the funds to the tax collector, with the failure to do so justifying revocation of any city licenses held by the operator.²⁷⁴

However, consistent with *Bloom*, the court, in a unanimous opinion by Mr. Justice Ryan, looked to the wording of the ordinance to ascertain its character. In holding that the ordinance was not a license for revenue levied upon the operator of the parking facility, the court noted that section 2(b) of the ordinance provided that the ultimate incidence of and liability for the tax is to be borne by the person seeking the privilege of occupying space within the parking facility.²⁷⁵ The fact that the operator is required to collect the tax and remit the money merely makes the operator a collection agent for the city and not the object of the tax itself, despite his possible liability for failure to collect the tax.²⁷⁶

Thus, the standard of legislative construction applied in *Bloom v. Korshak*, which determines the incidence of a tax

cigarettes in this state. Since the statute specifically requires that the distributor pass the tax on to the retailer, no incidence of the tax falls upon the distributor.

Id. at 288, 275 N.E.2d at 424.

²⁷¹ 53 Ill. 2d 421, 227 N.E.2d 401 (1973).

²⁷² CHICAGO, ILL. MUN. CODE, §§ 156.1 *et seq.* (1972).

²⁷³ 53 Ill. 2d at 424, 227 N.E.2d at 403.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* The court cited *Bloom v. Korshak*, 52 Ill. 2d 56, 63, 284 N.E.2d 261, to emphasize that the provision for penalties upon the collector of the tax does not cause said tax to become a license for revenue: "[Such penalties] are but provisions to insure the integrity of the collection procedure."

claimed to be a tax upon occupations, was utilized in *Jacobs* where the tax was assailed as being a license for revenue. Consequently, the same remarks made in the *Bloom* commentary regarding the need for carefully drawn ordinances to support the self-executing exercise of home rule taking authority are equally applicable to *Jacobs* type situations.

*Rozner v. Korshak*²⁷⁷

In *Rozner*, the City of Chicago Wheel Tax License Ordinance²⁷⁸ was assailed as in *Jacobs* upon the claim that it was a license for revenue and therefore invalid.²⁷⁹ Writing for a unanimous court, Mr. Justice Schaefer rejected this contention, observing that plaintiffs' position was based upon a misunderstanding of the meaning of the phrase "to license for revenue."²⁸⁰ The imposition of a license fee can be based upon either of two distinct powers: the power to regulate *or* the power to tax. The phrase "to license for revenue" has historically come into play when a governmental unit which did not possess the power to tax attempted to raise revenues through the exercise of its regulatory or police power.²⁸¹

Though recognizing that the prohibition against the utilization of the police power has been maintained in article VII, section 6(e), the court determined that the wheel ordinance was passed pursuant to Chicago's home rule taxing power, rather than regulatory power, despite the fact that the ordinance is entitled "Wheel Tax Licenses."²⁸²

Alternatively, the *Rozner* plaintiffs maintained that even if the ordinance were a proper exercise of the city's home rule power, its authority to act was rescinded by legislative amendments to the Motor Vehicle Code, approved by the vote of three-fifths of the members elected to each house.²⁸³

In analyzing this contention, Mr. Justice Schaefer makes a forthright comment on a matter of extreme importance to the consideration of home rule authority, *i.e.*, the effect of pre-existing statutes upon the exercise of home rule powers:

The limitations contained in these sections [the amendments to the State Motor Vehicle Code] were, of course, superseded with

²⁷⁷ Ill. S. Ct. No. 45689, 55 Ill. 2d 430, 303 N.E.2d 389 (1973).

²⁷⁸ CHICAGO, ILL. MUN. CODE, §§ 29-1 *et seq.* (1972).

This ordinance makes it unlawful for any motor vehicle owner residing in the City of Chicago to operate the vehicle upon the public ways of the city unless it is licensed according to the terms of the ordinance.

²⁷⁹ 55 Ill. 2d 430, 431, 303 N.E.2d 389, 390.

²⁸⁰ *Id.* at 432-33, 303 N.E.2d at 390.

²⁸¹ *Id.* at 433, 303 N.E.2d at 390.

²⁸² *Id.* at 433, 303 N.E.2d at 390-91.

²⁸³ *Id.* at 433, 303 N.E.2d at 391.

respect to home-rule units by the adoption of the Constitution of 1970.²⁸⁴

Although similar statements were made at greater length in two earlier opinions, *Kanellos v. County of Cook*²⁸⁵ and *People ex rel. Hanrahan v. Beck*,²⁸⁶ it is important to note that the solution to the crucial question of the effect of pre-existing legislation has apparently evolved into a self-evident pronouncement needing no authority to support it.

The *Rozner* plaintiffs further contended, however, that even if the force of such legislation were removed with the enactment of the new constitution, pre-existing legislative limitations were reinstated by a later amendment to the Motor Vehicle Code,²⁸⁷ which was approved by three-fifths of both houses of the General Assembly.²⁸⁸ The court also declined to accept the theory that any amendment by a three-fifths approval would *per se* effect limitations upon home rule authority. Instead, using language unmistakably intended to require an express and unequivocal statement that home rule powers are to be restricted, Mr. Justice Schaefer noted:

The powers which those units have received under section 6 of article VII of the constitution of 1970 are in addition to the powers heretofore or hereafter granted by the General Assembly to other municipalities. The kind of inadvertent restriction of the authority of home-rule units for which the plaintiff contends can be avoided if statutes that are intended to limit or deny home-rule powers contain an express statement to that effect.²⁸⁹

Viewing the amendment in question, the court observed that the words "or motor bicycles" were deleted and the phrase "of a motor vehicle" was added.²⁹⁰ When this change was analyzed in the context of other provisions in the Motor Vehicle Code, the court ruled that the amendment was made merely to clarify a possible misreading of the immediately preceding two paragraphs.²⁹¹ Since there was no indication in the amendment

²⁸⁴ *Id.* at 434, 303 N.E.2d at 391.

²⁸⁵ 53 Ill. 2d 161, 290 N.E.2d 240 (1972). See also notes 295-312 *infra* and accompanying text.

²⁸⁶ 54 Ill. 2d 561, 301 N.E.2d 281 (1973). See also notes 392-408 *infra* and accompanying text.

²⁸⁷ ILL. REV. STAT. ch. 95½, ¶ 11-211 (1972).

²⁸⁸ See 55 Ill. 2d at 434, 303 N.E.2d at 391.

²⁸⁹ *Id.* at 435, 303 N.E.2d 392.

²⁹⁰ ILL. REV. STAT. ch. 95½, ¶ 11-211 (1972).

²⁹¹ The Illinois Statute concerned the regulation of motor vehicles in parking areas connected with hospitals, shopping centers and the like and defined the "owner" as the actual legal owner of the property or the person who manages or controls said property. ILL. REV. STAT. ch. 95½, ¶ 11-211 (1972).

ILL. REV. STAT. ch. 95½, ¶ 11-210 (1971) is concerned with the authority of the owner of real property who permits the public to use said property for the purposes of vehicular travel.

Paragraph 11-211 originally read in relevant part "No owner shall be limited as to speed upon any public place. . . ." In light of the two preceding paragraphs, an obvious problem of interpretation arose as to the

of an intent to restrict home rule authority, the amendment was determined to have no restrictive effect.²⁹²

It is the opinion of this author that the *Rozner* decision was correctly decided and is totally consistent with section 6 (i) which requires that, in the absence of a specific statement of exclusivity by the General Assembly, home-rule units are empowered to exercise functions concurrently with the state.²⁹³ This judicial approach is an encouraging one and appears to indicate that the supreme court will closely scrutinize new legislation in order to insure that the General Assembly actually intends to limit home rule authority. If this approach is maintained in future cases, the problem of judicial preemption which has hampered home rule in virtually every state will be greatly minimized.²⁹⁴

Kanellos v. County of Cook ²⁹⁵

The *Kanellos* case, which initially involved a very limited issue of constitutional interpretation, resulted in an opinion of great significance.²⁹⁶ The decision contains expansive language supporting the proposition that the exercise of home rule authority can result in the superseding of pre-existing statutory limitations.

Plaintiff Kanellos brought a class action suit on behalf of himself and all other citizens and taxpayers of Cook County, challenging the constitutionality of a Cook County Board resolution which provided for the issuance of \$10,000,000 of general obligation bonds without obtaining referendum approval by the voters of Cook County. Kanellos based his challenge upon article VII, section 6(j) which provides that "The General Assembly may limit by law the amount of debt which home rule counties may incur . . ." and also upon the fact that the General Assembly had long required referendum approval for the issuance of such bonds.²⁹⁷

In a unanimous opinion, Mr. Justice Kluczynski rejected plaintiff's contention, noting that according to the plain language

term "owner." This was subsequently cured with the 1972 amendment. The language presently reads: "No owner of a motor vehicle shall be limited as to speed upon any public place. . . ."

²⁹² 53 Ill. 2d at 435, 303 N.E.2d at 392.

²⁹³ See note 153 *supra*.

²⁹⁴ See notes 154-64 *supra*.

²⁹⁵ 53 Ill. 2d 161, 290 N.E.2d 242 (1972).

²⁹⁶ COHN, *Judicial Decisions*, *supra* note 67, at 10.

²⁹⁷ 53 Ill. 2d at 163-64, 290 N.E.2d at 242.

The statute which had imposed referendum requirements upon county indebtedness was first passed in 1874 and is presently still applicable to non-home rule counties. That provision, ILL. REV. STAT. ch. 34, § 306 (1971), provides in pertinent part:

When the county board of any county shall deem it necessary to issue county bonds to enable them to perform any of the duties imposed upon

of section 6(j) the power to incur debt granted to Cook County by section 6(a) is not subject to any referendum requirement:

The language of Section 6(j) as applied to home-rule counties is unambiguous (People ex rel. Keenan v. McGuane, 13 Ill. 2d 520, 527) and the records of the convention provide no persuasive basis for not giving it effect. Section 6(j) authorizes the General Assembly to limit by law only the amount of debt which a home-rule county may incur and does not pertain to a referendum. It is therefore inapplicable.²⁹⁸

The court further observed that section 6(k), involving the power to incur home-rule municipal debt from ad valorem property taxes, specifically mentions the authority of the General Assembly to impose a referendum requirement. This was seen as further proof of the intention of the convention; for had the framers wished to impose a referendum requirement upon county indebtedness, "it would have been a simple procedure to specifically include such a provision in section 6(j) as was accomplished for home-rule municipalities in section 6(k)."²⁹⁹

Consequently, the court held that the statute enacted prior to the 1970 Constitution, which imposed a referendum requirement upon county indebtedness,³⁰⁰ was invalid in view of section 9 of the Transition Schedule of the new constitution, which basically permitted only laws not contrary to, or inconsistent with the new constitution to remain in force.³⁰¹ The language the court utilized to explain this ruling is set out in full below because of the importance of this holding in the context of the fundamental changes created by the home rule section:

The concept of home rule adopted under the provisions of the 1970 constitution was designed to drastically alter the relationship which previously existed between local and State government. Formerly, the actions of local governmental units were limited to those powers which were expressly authorized, implied or essential in carrying out the legislature's grant of authority. Under the home-rule provisions of the 1970 constitution, however, the power of the General Assembly to limit the actions of home-rule units has been circumscribed and home-rule units have been constitutionally delegated greater autonomy in the determination of their government and affairs. To accomplish this independence the constitution conferred substantial powers upon home-rule units subject only to those restrictions imposed or authorized therein.

We therefore hold that this statute is inapplicable as applied to a home-rule county. It was enacted prior to and not in antici-

them by law, they may, by an order entered of record, specifying the amount of bonds required, and the object for which they are to be issued, submit to the legal voters of their county, at any general or special election, the question of issuing such county bonds. . . .

²⁹⁸ 53 Ill. 2d at 164-65, 290 N.E.2d at 242-43.

²⁹⁹ *Id.* at 165, 290 N.E.2d at 243.

³⁰⁰ ILL. REV. STAT. ch. 34, § 306 (1971), quoted at note 297 *supra*.

³⁰¹ See note 166 *supra* for the exact language of the pertinent parts of the Transition Schedule.

pation of the constitution of 1970 which introduced the concepts of home rule and the related limitation of sections 6(g) and 6(h). Such considerations were totally foreign in the contemplation of legislation adopted prior to the 1970 constitution. The statute is therefore inconsistent with the provisions of section 6(g) and the Transition Schedule.³⁰²

In the words of Chairman Parkhurst, this language "put an end to the lingering doubts about the continuing effect of limiting statutes enacted *before* home rule."³⁰³

However, after issuing this broad ruling that the pre-existing statutory requirement of referendum approval for county indebtedness does not apply to Cook County, the court took an apparently contradictory position with respect to the power of the General Assembly to enact future legislation in this regard. This posture was taken despite the lack of any constitutional language permitting the enactment of legislation which imposes future referendum requirements. The court nevertheless ruled that the General Assembly possessed such authority. In support of this holding, the court relied upon the language in the official explanation sent to each voter prior to the ratification of the 1970 Constitution. The explanation stated that "Home Rule counties may incur debt subject to limitation or referendum requirements imposed by the General Assembly."³⁰⁴ Furthermore, the court noted that this official explanation was also consistent with the initial intent of the Local Government Committee as expressed in its report.³⁰⁵ Consequently, the court ruled that the provisions of section 6(g) of article VII applied, thereby permitting the General Assembly to impose a referendum requirement by a three-fifths vote of the members elected to both houses.³⁰⁶

³⁰² 53 Ill. 2d at 166-67, 290 N.E.2d at 243-44 (authorities omitted).

³⁰³ Parkhurst, *Two Years Later: The Status of Home Rule in Illinois*, at 5 (1973). (One of the background papers prepared for the Illinois Assembly on Home Rule) [hereinafter cited as PARKHURST, *Status of Home Rule*].

³⁰⁴ 53 Ill. 2d at 165, 290 N.E.2d 243, quoting P.A. 76-40, § 13, Laws of 1969, vol. I, at 65.

³⁰⁵ *Id.*

Paragraph 4.7 of the Local Government Article as proposed by the Local Government Committee concerned the incurring of debt by local governments other than home rule municipalities, and provided:

The General Assembly may by general law limit the amount of debt which other units of local government and school districts may incur. Limits may vary according to functions performed and services provided. The General Assembly may require referendum approval of such debt.

Committee Proposals, vol. VII at 1581.

³⁰⁶ 53 Ill. 2d at 165, 290 N.E.2d at 243.

It was felt by the court that the "three-fifths" provision of section 6(g) applied to the limitation in debt authority rather than the "majority" standard of section 6(h) because "The power of a home rule county to incur debt is singularly of local concern and has not been exercised or performed by the state." *Id.*

The court took a seemingly contradictory position, inasmuch as it considered that the lack of any constitutional language regarding a referendum requirement precluded the applicability of pre-existing statutory limitations, but concurrently ruled that the General Assembly possessed the implied authority to impose such a requirement with the passage of new legislation by a three-fifths vote. It is the opinion of this author, who represented Cook County in this litigation, that the apparent contradiction was the result of a compromise reached on the basis of information not appearing in the written decision. Proposed paragraph 4.7³⁰⁷ was approved on first reading in exactly the same form as proposed by the Local Government Committee.³⁰⁸ However, the Committee on Style, Drafting and Submission (whose function was to make only *stylistic* changes of the textual material as approved after each reading by the convention as a whole) deleted the language authorizing the General Assembly to require referendum approval of debt incurred by governmental units, including home rule counties.³⁰⁹ A problem of interpretation arose not only because the creation of such an essential change was beyond the authority of this committee, but also because the committee failed to provide an adequate explanation for the alteration.³¹⁰ Additionally, since nothing was included in subsequent debates to shed any light on the basis for this action, the court was literally searching for a black hat in a dark room when it attempted to ascertain the constitutional intent in this regard. Accordingly, it appears that the ultimate decision in *Kanellos* was the product of compromise

³⁰⁷ See note 305 *supra*.

³⁰⁸ See *Committee Proposals*, vol. VII at 1977-78.

³⁰⁹ Section 8(h) as proposed by the Committee on Style, Drafting and Submission after first reading included language in the exact form as now found in article VII, section 6(j), except that the term "home rule municipalities" as now appears in 6(j) read as "other home rule units" in proposed section 8(h). *Id.* at 1973.

³¹⁰ The report of that committee merely stated in explanation:

The debt provisions are somewhat complicated: (a) Home Rule counties may incur debt but the General Assembly may impose a limit on that debt by law.

Id. at 1991.

It should also be noted that this author personally attempted during the lower court litigation to informally ascertain the rationale for this essential change by speaking with Wayne W. Whalen, Chairman of the Committee on Style, Drafting and Submission, Vice-Chairman Philip J. Carey of the Local Government Committee, and Delegate David E. Stahl, also of the Local Government Committee. None of them could provide me with the basis for this modification.

It is my feeling that the resulting confusion was primarily due to the fact that the Local Government Article was the last article considered by the convention, and the extreme press of time precluded adequate discussion and analysis in some instances. Several convention delegates have privately noted to me that they felt that the convention should have been allowed to continue another month in order to afford the time for sufficient final deliberation.

whereby a middle position was taken between the demand for the continuing application of the pre-existing statutory requirement of referendum approval of all county debt (an interpretation supported by the official explanation) and the claim that the lack of any specific constitutional language precluded any legislative authority to impose a referendum requirement.

However, as was noted earlier,³¹¹ the General Assembly has not yet imposed any such referendum requirements and Cook County has been able to pass \$22,000,000 in referendum-free bonds. The *Kanellos* compromise, therefore, has not yet affected the ability of home rule counties to incur debt without referendum, and it is predicted that in the absence of any radical change in the composition of the membership of the General Assembly, this authority will continue in an unaltered fashion.³¹²

*Bridgman v. Korzen*³¹³

The Cook County Board of Commissioners enacted an ordinance on February 7, 1972,³¹⁴ which expressly purported to supersede the provisions of the Illinois Revenue Act dealing with the collection of real estate taxes.³¹⁵ The essence of the ordinance was to alter the statutory method of tax collection, which provides for two payment dates (May 1 and September 1), by substituting a four-installment system. Under the county plan, the first three installments would be on estimated amounts computed on the basis of one-sixth each of the preceding year's bill, with these payments due respectively on January 15, March 15, and May 15.³¹⁶ The final installment was to be due on July 15, thirty days after the actual bill was to be mailed, reflecting the total amount of the yearly tax and the amount remaining to be paid.³¹⁷

The reason underlying the modification of the collection procedure so as to require earlier payments of real estate taxes, was to avoid the necessity of selling large amounts of tax-anticipation warrants, which, in the past, had been costly in terms of the interest payments.³¹⁸

³¹¹ See notes 96 and 196 *supra*.

³¹² As observed in note 196, two bills introduced in the Senate to impose referendum requirements upon home rule county debt power were recently tabled after first reading.

³¹³ 54 Ill. 2d 74, 295 N.E.2d 9 (1972).

³¹⁴ Cook County Ordinance 72-1 effective March 1, 1972.

³¹⁵ ILL. REV. STAT. ch. 120, §§ 569, 593, 644, 645, 675 & 705 (1971).

³¹⁶ 54 Ill. 2d at 75, 295 N.E.2d at 9-10.

³¹⁷ *Id.*

³¹⁸ The appendix to the brief of Cook County in the Illinois Supreme Court contained a report stating that, based on the responses of 561 of the total of 642 taxing bodies in Cook County which replied to a county questionnaire, taking into consideration only those taxing bodies paying more than \$100,000 per year in interest, the total amount of interest paid on tax-

In addressing itself to a taxpayer class action challenge to the county ordinance, the Illinois Supreme Court unanimously³¹⁹ issued a "disturbing" decision.³²⁰ In the opinion of this author, the decision could portend severe problems for the effective exercise of home rule authority in the future.

As the court properly analyzed, the issue of the case was "whether the power which it [Cook County] exercises and the function which it performs in the process of collecting property taxes pertain 'to its government and affairs'" within the definition of section 6(a).³²¹ Though initially seeming to conclude that such an activity could be termed a local function (*i.e.*, "... a review of the pertinent legislation shows a definitive trend toward making the collection of taxes exclusively a county function . . ."),³²² the court avoided such a determination by noting that there still exist statutory provisions regarding the election of township collectors.³²³ Following this statement, Mr. Justice Goldenhersh included an admittedly irrelevant discussion of the history of the township collector system:

In 30 townships in Cook County lying outside the city of Chicago there are 29 *de jure* town collectors, but by reason of our prior opinions in *Flynn v. Kucharski*, 45 Ill. 2d 211, *Flynn v. Kucharski*, 49 Ill. 2d 7 and *Flynn v. Kucharski*, 53 Ill. 2d 88, these officials are not collecting property taxes and the collection process, presently is being performed by the county.³²⁴

Despite the obvious concession that the only governmental entity collecting real estate taxes is Cook County, the court nevertheless rejected the contention that the activity is a local function so as to qualify it as a proper exercise of home rule authority under section 6(a):

Although obviously there are powers and functions of county government which pertain to its government and affairs within the contemplation of section 6 of article VII (*Kanellos v. County of Cook*, 53 Ill. 2d 161), the collection of property taxes is not one of them. In the process of collecting and distributing tax monies the county acts both for itself and the other taxing bodies authorized to levy taxes on property within the county, and the function

anticipation warrants in 1971 by such taxing districts exceeded \$32,000,000.

The reason for such a high interest figure is that many taxing bodies have fiscal years which begin months prior to the actual collection of taxes. The fiscal year of Cook County commences, for example, on December 1, and the payment of taxes is not due under the statutes (ILL. REV. STAT. ch. 120, § 705 (1971)) until May 1. In recent years that initial payment date has been delayed because of the late issuance of tax bills. The first installment of the 1972 taxes, for example, was not due and owing until July 1, 1973.

³¹⁹ Mr. Justice Ward initially dissented, with no written comments, as evidenced by the slip sheet opinion, but later withdrew his dissent when the opinion was published.

³²⁰ COHN, *Judicial Decisions*, *supra* note 67, at 9.

³²¹ 54 Ill. 2d at 75-76, 295 N.E.2d at 10.

³²² *Id.* at 76, 295 N.E.2d at 10.

³²³ *Id.*

³²⁴ *Id.* at 78, 295 N.E.2d at 10-11.

thus performed does not pertain to its government and affairs to any greater extent than to the government and affairs of the other taxing bodies for whose benefit it acts. We find no provision in the constitution of 1970 or in the proceedings of the convention which leads us to believe that the collection of property taxes is a home-rule power or function within the contemplation of section 6 of article VII.³²⁵

This author fully concurs with the analysis of Professor Cohn when he observed that the *Bridgman* rationale is "not very persuasive."³²⁶ The only government in Cook County possessing the authority to collect taxes is Cook County, through its county treasurer as *ex-officio* county collector.³²⁷ Consequently, by definition, its tax collecting authority is a function which is local to Cook County and one that is solely its affair. The fact that it performs this service for all the other taxing bodies located within Cook County should be irrelevant, so long as it is solely the county's function.

The court's notion that merely because an activity has an impact on other governmental entities renders it other than local in character, promises a partial return to the "Dillon" philosophy. As Mr. Parkhurst has noted, in *Bridgman* "the court followed the familiar and traditional judicial habit of trying to define and circumscribe 'local affairs.'"³²⁸

As I have observed throughout this article, the most serious reservation I have regarding the home rule section is that it permits the possibility of undue judicial limitation of the concept of home rule. The "preemption provisions" of sections 6(g), (h) and (i), as well as the mandate of section 6(m) to liberally construe powers and functions of home rule units, go a long way in providing insurance against judicial limitation. But the preemption question never arises if the threshold issue is not resolved in the affirmative (*i.e.*, does the power or function pertain to the home rule unit's "government and affairs"). The Illinois Supreme Court took an unduly restrictive approach in its analysis in *Bridgman*, but it is hoped that a more expansive view will prevail in future decisions considering the exercise of authority for the benefit of other governments as well as for the benefit of the home rule units themselves.³²⁹ In view of the court's generally positive approach toward home rule, it is felt that a more liberal attitude in defining the contours of the phrase "pertaining to its government and affairs" might well be forthcoming.

³²⁵ *Id.*

³²⁶ COHN, *Judicial Decisions*, *supra* note 67, at 10.

³²⁷ ILL. REV. STAT. ch. 120, ¶ 688 (1971).

³²⁸ PARKHURST, *Status of Home Rule*, *supra* note 303, at 8.

³²⁹ Professor Cohn has also taken this same hopeful position. See COHN, *Judicial Decisions*, *supra* note 67, at 10.

*City of Evanston v. County of Cook*³³⁰

The *City of Evanston* decision was the first of four cases which included dissenting opinions that evidenced serious splits of opinion relating to some aspects of the home rule question.

Cook County, pursuant to its home rule authority to tax, adopted an ordinance effective January 1, 1972,³³¹ which imposed a tax upon the purchasers of new motor vehicles in Cook County. The amount of the tax was determined according to a classification of different types of vehicles.³³²

Six home rule municipalities located within Cook County, including Evanston, subsequently passed ordinances imposing a similar tax in the same amounts. On its face, each ordinance declared that it was in conflict with the county ordinance and, therefore, pursuant to the terms of section 6(c), must be deemed within its municipal borders to prevail over the county ordinance.³³³

In considering the question of whether section 6(c) applied to a situation where substantially identical taxes are passed by a home rule county and a home rule municipality, the supreme court ruled in the negative, in a four to three opinion written by Mr. Justice Ryan. Initially addressing itself to the reverse of an argument that had been made earlier, in the *Bloom* case,³³⁴ the court ruled that the power to tax conferred by section 6(a) is not limited to nonproperty taxation.³³⁵ The court observed that the only limitations imposed upon the power to tax are found in section 6(e), which prohibits taxes upon income, earnings and occupation without legislative approval, and in section 6(g) which permits the General Assembly to limit the power by a three-fifths vote. In view of the requirement of liberal construction of home rule authority found in section 6(m) as well as the examples found in the Local Government Report wherein property taxes were viewed as within the home rule power, the court ruled that the restrictive construction as urged by the plaintiffs could not be accepted.³³⁶ In short, there is simply no distinction between property and nonproperty taxes when considering the general home rule power to tax found in section 6(a).

In considering the primary issue presented in *City of Evanston* (i.e., whether the passage of the same type of tax by Evanston and Cook County created a conflict within the defini-

³³⁰ 53 Ill. 2d 312, 291 N.E.2d 823 (1973).

³³¹ See Cook County Ordinance entitled "An Ordinance to Provide for a Tax on the Retail Sale of New Motor Vehicles," passed on January 1, 1972.

³³² 53 Ill. 2d at 314, 291 N.E.2d at 824.

³³³ *Id.*

³³⁴ See 52 Ill. 2d 56, 59, 284 N.E.2d 257, 260.

³³⁵ 53 Ill. 2d at 316, 291 N.E.2d at 825.

³³⁶ *Id.*

tion of section 6(c)) the court initially agreed with the plaintiffs' contention that it was the intention of the constitutional convention to establish a preference for municipal authority over home rule county authority in certain situations.³³⁷ However, the court refused to uniformly apply this principle to every case where a municipality decides to legislate on the same subject as a home rule county. Citing the Local Government Committee Report, the court noted that section 6(c) was enacted to resolve conflicts in ordinances and not to establish a system of preemption of authority.³³⁸ The court further observed that if the provisions of section 6(c) were viewed as establishing the principle of preemption in favor of municipalities, instead of only a means of resolving conflicts and inconsistencies, then a municipality could defeat the effect of a home rule county tax within its borders by imposing only a nominal tax on the same object or transaction.³³⁹ In view of the indispensable role which adequate finances play in the operation of home rule government, the court refused to accept the construction of section 6(c) as proposed by the plaintiffs which would greatly weaken home rule counties by limiting their power to tax.³⁴⁰

In short, the case presented no conflict or inconsistency within the meaning of section 6(c). Rather, the case simply presented a situation wherein two home rule units were exercising the power which they each possessed pursuant to section 6(a) and were taxing the same transaction.³⁴¹ Finally, the majority rejected plaintiffs' contention that a decision in favor of Cook County would lead to a depletion of the sources of municipal revenue since the county could then impose taxes on a host of transactions and since, as a practical matter, the municipalities would thereby be precluded from burdening their residents with the same tax. Though recognizing the possibility of abuse, the court reasonably noted that such a possibility did not require denying the power to Cook County under these circumstances. Rather, the proper avenue to follow in rectifying or eliminating these abuses is through legislation enacted by the

³³⁷ *Id.* at 317-18, 291 N.E.2d at 825-26.

³³⁸ *Id.* at 318, 291 N.E.2d at 826.

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.* at 318-19, 291 N.E.2d at 826.

The basic reason why the power to tax is to be considered in a different light from other home rule powers in the context of section 6(c) is because the purpose of taxation is revenue and not regulation and consequently no conflict results with two revenue enactments. See *LOYOLA U. L.J. supra* note 71, at 493.

The court had earlier ruled in the *City of Evanston* opinion that two such taxes, imposed upon the same transaction, was not double taxation within the definition established by earlier opinions prohibiting such taxing schemes, since the instant taxes were imposed by different taxing districts. 53 Ill. 2d at 315, 291 N.E.2d at 825-26.

General Assembly by a three-fifths vote of both houses pursuant to section 6(g).³⁴²

A strongly worded dissent by Mr. Justice Schaefer, with Justices Davis and Underwood joining,³⁴³ argued that the power to tax should be treated no differently than any other home rule power when considering the extent of a "conflict" within the context of section 6(c).³⁴⁴ Furthermore, the dissent objected to the majority's holding that section 6(c) was to be limited to contradictions and inconsistencies between home rule county and municipal ordinances. Rather, the dissenters thought that section 6(c) should also apply in cases where county activity within municipal areas is unacceptable to city officials.³⁴⁵

The dissenters were also of the opinion that the majority ruling would create a meaningless burden on both municipalities and Cook County by requiring the dual regulation of such activities as new construction and alteration of existing buildings.³⁴⁶ However, the dissenters failed to take into consideration the fact that the question presented to the court and the treatment afforded that question by the majority was limited solely to the power to tax and did not concern the power to license or any other home rule power. As the majority opinion specifically noted in response to citations from the constitutional debates where section 6(c) was said to apply:

We do not find these statements in the debates helpful because they concerned zoning and certain regulatory and licensing ordinances of home rule units. In such ordinances there are clear opportunities for contradictions and conflicts between the ordinances of the municipalities and ordinances of the county. The discussion did not deal with ordinances involving taxation.³⁴⁷

Finally, the dissenting justices seem to have erroneously viewed the extent of the authority of home rule counties. The dissenters compared the home rule power to tax with the statutory power granted to counties to levy a retailer's occupation tax only in their unincorporated areas,³⁴⁸ and then observed that

³⁴² *Id.* at 319, 291 N.E.2d 826.

³⁴³ Professor Cohn has noted that a dissent such as this by three justices is an extraordinary occurrence in Illinois Supreme Court experience. COHN, *Judicial Decisions*, *supra* note 67, at 9.

³⁴⁴ 53 Ill. 2d at 320, 291 N.E.2d at 827.

The dissent, however, failed to note the differing treatment afforded the power to tax in the "preemption sections," with section 6(g) specifically requiring a three-fifths vote of both houses to deny or limit a taxing power, whereas the state can limit any other home rule power by a mere majority vote by preempting and entering the field.

Furthermore, the dissent failed to cite, and indeed cannot cite, any statement from the Local Government Committee Report or the debates, where section 6(c) was declared to be applicable to the home rule taxing power.

³⁴⁵ 53 Ill. 2d at 323, 291 N.E.2d at 829.

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 317, 291 N.E.2d at 825.

³⁴⁸ ILL. REV. STAT. ch. 34, § 409.1 (1971).

“the recognition of authority of a home rule county to levy a tax of this kind upon transactions which take place in the unincorporated areas of the county will fully meet the needs of the county without adversely affecting the power of home rule municipalities to raise necessary funds.”³⁴⁹

Two interpretations are possible from a reading of this language. First, like the statutory power granted to impose a retailer occupation tax, Cook County has the authority to impose taxes only in the unincorporated areas of the county.³⁵⁰ If this is what was intended, then the three dissenting justices have misconstrued the very basic concept of the home rule authority given to counties. As the report of the Local Government Committee specifically noted:

County home rule powers granted by paragraph 3.1(a) [now article VII, section 6(a)] embrace the entire county, including areas within municipal boundaries.³⁵¹

The second possible interpretation is that the “conflict” provisions of section 6(c) empower both home rule and non-home rule municipalities to preclude home rule taxing authority within their borders. This interpretation arises in view of the dissenting language that the “authority in a home rule county to levy a tax . . . in the unincorporated areas of the county will fully meet the needs of the county”³⁵² This second construction is also without constitutional basis, for the authority of non-home rule municipalities does not include the self-executing power to tax. Lacking the authority to pass taxing ordinances, non-home rule municipalities obviously cannot create “conflicts” with the taxing ordinances enacted by home rule counties so as to permit the operation of section 6(c).

This author is disturbed with the dissenting opinion under either interpretation, for both constructions indicate an erroneous application of the pertinent home rule provisions. In my view, the majority ruling is the only reasonable position possible in light of the unequivocal constitutional desire to strengthen county government in order to permit effective

³⁴⁹ 53 Ill. 2d at 324, 291 N.E.2d at 829-30.

³⁵⁰ This severely restrictive view of the power possessed by home rule counties would be consistent with the question posed by Mr. Justice Schaefer during the oral arguments in this case to Jack Siegel, attorney for Evanston. Justice Schaefer asked him if it was not true that the authority of Cook County extended only to the unincorporated areas. Siegel replied that his study of the issue led him to conclude that Cook County had the authority to govern *throughout* the geographic area of the county, subject, of course, to the “conflict” provisions of section 6(c). Justice Schaefer seems to have discarded even Siegel’s opinion, if this first interpretation of his dissent is correct.

³⁵¹ *Committee Proposals*, vol. VII at 1646.

³⁵² 53 Ill. 2d at 324, 291 N.E.2d at 829-30.

treatment of matters of area-wide concern.³⁵³ Had the position of the dissenting justices prevailed, it would have been safe to predict that Cook County's taxing power would have been limited to the non-home rule municipalities and the unincorporated areas. Under the dissenters' theory, home rule municipalities would have been presented with an ideal method of raising revenues without any local criticism by explaining to their citizens that the passage of a municipal taxing ordinance was simply an effort at the localization and supersession of an otherwise valid county tax.

Fortunately, the dissent did not prevail and Cook County still possesses the power to tax on an equal level with home rule municipalities. The *City of Evanston* opinion is, therefore, of critical importance because it judicially insures the continued validity of home rule at both the county and municipal levels, through the protection of adequate revenue sources for all home-rule entities.

*Oak Park Federal Savings and Loan Association v.
Village of Oak Park*³⁵⁴

The *Oak Park* case presented the first opportunity for the Illinois Supreme Court to consider the meaning of article VII, section 6(1) (2), which provides:

The General Assembly may not deny or limit the power of home rule units . . . (2) to levy or impose additional taxes upon areas within their boundaries in the manner provided by law for the provision of special services to those areas and for the payment of debt incurred in order to provide those special services.

The *Oak Park* construction of this provision is, in the opinion of this author, unduly restrictive and inconsistent with the concept of home rule as envisioned by the members of the convention.

At issue was the constitutionality of five ordinances enacted by the Village of Oak Park pursuant to its home rule authority to tax for the provision of special services pursuant to section 6(1) (2). The problem faced by the court in deciding this issue was to construe this constitutional provision in a manner so as to give meaning to the prohibitory language: "*The General Assembly may not deny or limit the power of home rule units,*" as well as the seemingly qualifying phrase: "*in the manner as provided by law.*"³⁵⁵ The Village of Oak Park contended that

³⁵³ The majority ruling is also supported on this same basis by the author of a case comment considering the instant opinion. LOYOLA U. L.J., *supra* note 71, at 495-96.

³⁵⁴ 54 Ill. 2d 200, 296 N.E.2d 344 (1973).

³⁵⁵ *Id.* at 203, 296 N.E.2d at 346-47 (emphasis in original).

the latter phrase meant that the provisions previously established by the Revenue Act of 1939³⁵⁶ were intended to apply, thereby permitting the application of section 6(l) (2) without further enabling legislation.³⁵⁷ The court, however, rejected this proffered interpretation in a four to three opinion authored by Mr. Justice Ryan. The majority observed that since the concept "differential" taxation embodied in the "special services" provision was newly introduced to Illinois law with the 1970 Constitution, the necessary statutory framework could not be found in the Revenue Act of 1939 which pre-dated the new constitution.³⁵⁸ Consequently, although the first part of section 6(l) prohibits the General Assembly from interfering with the home rule powers enunciated in that subsection, this limitation upon the legislature takes effect only after enabling legislation is enacted subsequent to the effective date of the new constitution. In the opinion of the majority, any other construction would render the phrase "in the manner provided by law," meaningless.³⁵⁹ Therefore, in the absence of enabling legislation, the attempt by the Village of Oak Park to exercise the home rule powers of section 6(l) (2) through the passage of five ordinances, was ruled to be void.³⁶⁰

A forceful dissent was filed by Mr. Justice Ward who was joined by Chief Justice Underwood and Mr. Justice Goldenhersh. The dissenting opinion began by vigorously stating that "the opinion of the majority . . . seriously contradicts an authority conferred on home rule units by the constitution."³⁶¹ The dissent criticized the majority opinion for considering section 6(l) in isolation, while making no reference to sections 6(a), 6(g) or 6(h).³⁶² Section 6(a) was emphasized as the grant of "comprehensive" authority to provide for the government and affairs of a home rule unit, insuring in the words of the Local Government Committee, "the broadest possible range of powers."³⁶³ Again quoting the Local Government Report, the dissenting opinion stressed the danger of strictly construing local powers and emphasized that section 6(l) was not intended as a limitation upon home rule powers (unlike subsections (c) through (k)). Rather, section 6(l) was an explicit limitation upon the authority of the General Assembly to restrict the powers of home

³⁵⁶ ILL. REV. STAT. ch. 120, § 482, *et seq.* (1971).

³⁵⁷ 54 Ill. 2d at 204, 296 N.E.2d at 346-47.

³⁵⁸ *Id.* at 204-05, 296 N.E.2d at 347.

³⁵⁹ *Id.* at 203-04, 296 N.E.2d at 346-47.

³⁶⁰ *Id.* at 205, 296 N.E.2d at 347-48.

³⁶¹ *Id.*, 296 N.E.2d at 348.

³⁶² *Id.*

³⁶³ *Id.* at 206, 296 N.E.2d at 348.

rule units.³⁶⁴ The conclusion that the constitutional drafters intended to insulate the home rule powers in section 6(l) from legislative restriction was also seen by the dissenters to be evidenced by the fact that sections 6(g) and 6(h) both specifically exempt the powers or functions of section 6(l) from the effect of each subsection.³⁶⁵

Furthermore, the dissent observed that a paradoxical consequence of the majority's holding was possible if the General Assembly refused to enact the necessary enabling legislation. In this manner, the legislature would have "done what the constitution specifically prohibits, *viz.*, denying the power" through its inaction.³⁶⁶

The dissenting opinion criticized the majority for failing to refer to the constitutional proceedings in order to support their opinion. Specific reference, however, was made in the dissent to several pages of the verbatim transcripts of the convention as well as to the reports of the Committee on Style, Drafting and Submission in order to describe the constitutional history of section 6(l). In short, a provision as originally proposed by the Local Government Committee included an outright grant of authority to impose additional taxes for special services as provided by general law³⁶⁷ to all units of local general government. Due to some confusion, this provision was inadvertently deleted after first reading by the Committee on Style, Drafting and Submission.³⁶⁸ However, a provision was reinstated in revised form by the Style, Drafting and Submission Committee after second reading.³⁶⁹ The new "special service" provision would have clearly required enabling legislation as a condition precedent to the passage of such local tax legislation. That element of the provision was objected to on third reading, with the result that the present section 6(l) was drafted and approved.³⁷⁰ A colloquy which occurred between Delegates Durr and Carey, when the final version of section 6(l) was discussed, was cited by the dissenting justices in support of their position

³⁶⁴ *Id.* at 206-07, 296 N.E.2d at 348-49.

³⁶⁵ See text accompanying note 132 *supra* for a full recitation of article VII, sections 6(g) and 6(h).

³⁶⁶ 54 Ill. 2d at 208, 296 N.E.2d at 349.

³⁶⁷ Paragraph 4.2 of the Local Government Article as proposed by the Local Government Committee. See *Committee Proposals*, vol. VII at 1662.

³⁶⁸ *Committee Proposals*, vol. VII at 1976.

³⁶⁹ Article VII, section 6(e) (3), as found in Style, Drafting and Submission Committee Proposal No. 15, provided:

A home rule unit shall have only the power that the General Assembly may provide by law . . . (3) to levy or impose additional taxes upon areas within its boundaries for the provision of special services to those areas and for the payment of debt incurred in order to provide those special services.

Committee Proposals, vol. VII at 2474-75.

³⁷⁰ *Verbatim Transcripts*, vol. V at 4248-49, 4450.

that the power to levy special service taxes was not intended to be dependent upon enabling legislation and indeed, was referred to as a constitutional right.³⁷¹

For these several reasons, the three dissenting jurists opined that the legislation enacted prior to the new constitution with regard to the collection of other types of taxes could constitute the type of legislation envisioned in section 6(l) by the phrase "in the manner provided by law."³⁷² Thus, in the opinion of the dissenters, the Oak Park ordinances should have been held valid.

This author fully concurs with the opinion rendered by the dissenting justices, not only on the basis of my analysis of the home rule issues, but also because of statutory construction problems created with the majority ruling.³⁷³ The basic question contained in the *Oak Park* litigation again has been presented to the court in *Gilligan v. Korzen*,³⁷⁴ where a challenge was made to special service legislation enacted by Cook County through the levy of a wheel tax upon vehicles owned by residents of the unincorporated areas of the county. It is hoped that upon reconsideration, the court will reverse its position and declare that enabling legislation is not needed to permit Cook County to exercise its authority to levy special service taxes pursuant to section 6(l).

Although the issue has now become moot regarding future local special service legislation because of the enactment into law of two bills which constitute the necessary enabling legislation as required by the majority of the court in *Oak Park*,³⁷⁵ an analysis

³⁷¹ 54 Ill. 2d at 209, 296 N.E.2d at 348.

The following colloquy occurred in this context:

MR. DURR: Do I understand the effect of this would be to remove from the power of the state any control over home rule units — power to make special assessments for local improvements? Or their power to exercise that power of special assessments with other counties and municipalities and other units of local government? Or to levy the special service taxes or levies within their boundaries? That would remove it forever and ever from the General Assembly's domain?

MR. CAREY: It makes it a constitutional right which the non-home rule units now have and which the cities now have under the 1870 Constitution, with respect to special assessment.

³⁷² 54 Ill. 2d at 209, 296 N.E.2d at 350.

³⁷³ The latter consideration is treated at length in a student comment discussing the *Oak Park* case. See Comment, *Oak Park Federal Savings and Loan Association v. Village of Oak Park: The Foundation Begins To Crumble on Home Rule in Illinois*, 6 JOHN MAR. J. PRAC. & PROC. 395. (1973).

I don't entirely agree with its thesis (i.e., that the decision indicates that home rule is beginning to crumble in Illinois) because there are several other decisions which have been rendered both before and after the *Oak Park* opinion wherein the court has indicated a sympathetic and approving approach toward home rule. But I am disturbed by the seemingly restrictive attitude evidenced by some members of the court when certain issues involving home rule have been considered.

³⁷⁴ Ill. S. Ct. No. 45488.

³⁷⁵ See note 186 *supra*.

of this decision has herein been made because of the assistance it provides in the effort to ascertain the attitude of the Illinois Supreme Court toward various aspects of the home rule question.

*People ex rel. City of Salem v. McMackin*³⁷⁶

An interesting opinion having important effects upon home rule was rendered in the *Salem* case which concerned the constitutionality of an enactment specifically excluding application to home rule units!

The Industrial Project Revenue Bond Act³⁷⁷ was passed in order to attract industrial developments to Illinois communities. The Act, which specifically applies only to non-home rule municipalities,³⁷⁸ empowered such municipalities to construct, purchase or improve any industrial project either within the municipality or without the municipality up to a distance of ten miles from its borders and to issue bonds to finance this activity.³⁷⁹

In an original *mandamus* action brought to compel the mayor of the City of Salem, a non-home rule municipality, to sign both \$1,000,000 in bonds and a lease which were authorized under the terms of this Act, the court declared that the Act was constitutional. In so ruling, the court rejected the respondent's contention that the limitation of the Act to non-home rule municipalities violated the equal protection clause³⁸⁰ of the 1970 Constitution and therefore constituted special legislation.³⁸¹

Furthermore, the court declared that the language indicating that the Act only applied to non-home rule municipalities did not necessarily mean that the same powers are unavailable to home rule municipalities. Citing the language of sections 6(a) and 6(m), the majority stated that "the constitutional grant of power to home-rule municipalities appears to be of sufficient breadth and scope to authorize such entities to adopt this vehicle for economic development."³⁸² The court further based this determination upon the fact that the acquisition of land by purchase or gift is not an exercise of a governmental power, but rather is an act of a proprietary nature (*i.e.*, no rights of sovereignty are to be exercised by municipalities pursuant to this Act). As such, home rule municipalities possess the authority to so act by virtue of the general statutory and

³⁷⁶ 53 Ill. 2d 347, 291 N.E.2d 807 (1972).

³⁷⁷ ILL. REV. STAT. ch. 24, §§ 11-74-1 thru 11-74-13 (1971).

³⁷⁸ 53 Ill. 2d at 353, 291 N.E.2d at 812.

³⁷⁹ *Id.* at 351, 291 N.E.2d at 810.

³⁸⁰ ILL. CONST. art. I, § 2 (1970).

³⁸¹ ILL. CONST. art. IV, § 13 (1970).

³⁸² 53 Ill. 2d at 365, 291 N.E.2d at 818.

decisional law regarding municipal corporations.³⁸³ But the majority went even further and reiterated that although there is some question of the home rule exercise of sovereign authority beyond municipal borders, there is no constitutional provision warranting the inference that a home rule municipality is unable to act in a proprietary capacity beyond its corporate limits. Indeed, according to the majority, the language of section 6(a) that "a home rule unit may exercise any power and perform any function pertaining to its government and affairs," affirmatively dictates that home rule municipalities may act in a proprietary capacity.³⁸⁴

A strong dissent was submitted by Mr. Justice Schaefer in which he reasoned that the entire Act was invalid for failure to apply to any home rule municipalities. In Schaefer's opinion, the quoted sentence precludes home rule municipalities from exercising a power that the General Assembly has granted to all other municipalities. Justice Schaefer reasoned that the activity was forbidden because home rule authority does not permit the purchase of land outside the borders of the home rule municipality, since this is not the exercise of a government power or function.³⁸⁵

Justice Schaefer made specific reference to both the pertinent majority and minority proposals of the Local Government Committee where, in each instance, the home rule authority was intended to apply "*within its corporate limits.*"³⁸⁶ When an objection was raised during the debates that such language might result in the conclusion that the General Assembly would have no authority to grant home rule municipalities any extra-territorial power, the response was made by both Chairman Parkhurst and Vice-Chairman Carey that such a conclusion was clearly not intended.³⁸⁷ Justice Schaefer viewed this, as well as other constitutional activity, as evidencing the fact that both the proponents and opponents were in complete agreement that the extraterritorial powers of home rule municipalities were to be derived from the legislature and not from the constitution.³⁸⁸

Justice Schaefer was also of the opinion that the purposes of the Act (*i.e.*, "to relieve conditions of unemployment, to aid in the rehabilitation of returning veterans, and to encourage the increase of industry within the state") were not subject to home

³⁸³ *Id.* at 365-66, 291 N.E.2d at 818.

³⁸⁴ *Id.* at 366, 291 N.E.2d at 818.

³⁸⁵ *Id.* at 369, 371, 291 N.E.2d at 820, 821.

³⁸⁶ *Id.* at 372, 291 N.E.2d at 822 (emphasis in original).

³⁸⁷ *Id.* at 373, 291 N.E.2d at 822.

³⁸⁸ *Id.* at 374, 291 N.E.2d at 823.

rule authority, since they are matters which pertain to "the government and affairs" of the state. Justice Schaefer opined that these purposes could become matters which pertain to the government and affairs of a municipality only pursuant to a legislative delegation of authority.³⁸⁹

Although this last portion of the dissent has been criticized as imposing a narrow and restrictive view toward what constitutes a local affair³⁹⁰ (which in my opinion is the basic problem which will plague Illinois home rule), the remainder of the dissent has been described as consistent with the intent of the convention.³⁹¹

Whether or not the *Salem* decision is correct, the important point to observe for the purposes of this article is the extremely liberal approach toward home rule within the context of the *Salem* issues. The determination that home rule municipalities possess an inherent authority to operate extraterritorially in a proprietary capacity, supports the view that the supreme court is basically receptive to the concept of home rule.

*People ex rel. Hanrahan v. Beck*³⁹²

The office of State's Attorney of Cook County found itself in a totally different position when it brought the *Beck* suit challenging the action of one of its clients, the Cook County Board of Commissioners.

At issue in *Beck* was the constitutionality of a Cook County ordinance³⁹³ which was "specifically intended to supersede" sections 1142 through 1142.14 of chapter 34 of the Illinois Revised Statutes,³⁹⁴ thereby effecting the removal of the statutory func-

³⁸⁹ *Id.*

³⁹⁰ Professor Cohn has observed in this regard:

In this last statement Justice Schaefer contradicts the majority conclusion that a home rule unit has the inherent power to engage in the functions authorized for non-home rule municipalities by the Industrial Project Act. The opinion of so prestigious a member of the Court may augur ill for the exercise by home rule municipalities of powers or functions pertaining to any matters in which the state may be said to have a substantial interest or concern, and may foreshadow a narrow approach to the resolution of conflicts between state and municipal government reminiscent of the customary tendency of courts to favor state supremacy by denying that the function is a matter of local concern or one which pertains to municipal affairs.

COHN, *Judicial Decisions*, *supra* note 67, at 7.

³⁹¹ Chairman Parkhurst has observed that even the staunchest advocates of home rule at the convention did not realize that they had gone as far as they had upon a reading of the majority opinion in the *Salem* case. In short, the liberal interpretation rendered in *Salem* resulted in the grant of "an unintended home rule power," according to Parkhurst. PARKHURST, *Status of Home Rule*, *supra* note 303, at 6, 7.

³⁹² 54 Ill. 2d 561, 301 N.E.2d 281 (1973).

³⁹³ See Cook County, Illinois, Ordinance 72-0-54, October 2, 1972 entitled "An Ordinance in Relation to the Powers and Duties of the Comptroller."

³⁹⁴ *Id.* at § 18.

tion of *ex-officio* comptroller from the county clerk of Cook County and the placing of these functions in the hands of a comptroller appointed by the county board.

After the circuit court found the ordinance to be unconstitutional in the *quo warranto* action brought by the state's attorney, the supreme court reversed this ruling with expansive language regarding home rule authority to supersede statutes existing prior to the effective date of the new constitution.

Article VII, section 6(f) provides in pertinent part that a home rule county has the power to provide for its officers, their manner of selection and their terms of office in the manner set forth in section 4 of article VII.³⁹⁵

The majority opinion, authored by Mr. Justice Kluczynski, noted initially that the creation of the office of comptroller was a proper exercise of county authority under section 4(c), but stated that the essential question involved was not the possession of this power, but rather "whether the duties given to said office may supersede those granted by the legislature to another county officer."³⁹⁶ Specific reference in this regard was made to language of the *Kanellos* opinion,³⁹⁷ where, in the words of the court, "we held that a home-rule county may adopt an ordinance pursuant to its home rule power and thereby supersede a statute antedating the present constitution."³⁹⁸ Consequently, pursuant to its home rule power granted in section 6(a), Cook County was deemed to possess the authority necessary to transfer the powers, duties and functions among county officers, even to the extent that such exercise conflicts with a statute enacted prior

³⁹⁵ The relevant provisions of article VII, section 4 state:

(c) Each county shall elect a sheriff, county clerk and treasurer and may elect or appoint a coroner, recorder, assessor, auditor and such other officers as provided by law or by county ordinance. Except as changed pursuant to this Section, elected county officers shall be elected for terms of four years at general elections as provided by law. Any office may be created or eliminated and the terms of office and manner of selection changed by county-wide referendum. Offices other than sheriff, county clerk and treasurer may be eliminated and the terms of office and manner of selection changed by law. Offices other than sheriff, county clerk, treasurer, coroner, recorder, assessor and auditor may be eliminated and the terms of office and manner of selection changed by county ordinance.

(d) County officers shall have those duties, powers and functions provided by law and those provided by county ordinance. County officers shall have the duties, powers or functions derived from common law or historical precedent unless altered by law or county ordinance.

³⁹⁶ 54 Ill. 2d at 565, 301 N.E.2d at 283.

³⁹⁷ See the first paragraph of the text referred to by note 302 *supra*.

³⁹⁸ 54 Ill. 2d at 565, 301 N.E.2d at 283.

The court specifically noted in this regard that no legislative enactment had been made which would limit the power of the County Board exercised in this case. *Id.*

to the adoption of the 1970 Constitution unless otherwise limited by action of the General Assembly.³⁹⁹

The court further noted that a consideration of sections 4(c) and 4(d) in no manner alters this conclusion. Although section 4(d) authorizes the General Assembly *and* the county to determine the duties, powers and functions of county officers, the court rejected the contention of the state's attorney that this provision empowered counties merely to supplement the statutory powers given to county officers. This determination was made in the face of extensive constitutional convention opinion to the contrary.⁴⁰⁰ Furthermore, there was a seemingly contradictory statement by a member of the Local Government Committee to the effect that it was not possible for a county to alter the statutory functions granted to constitutional county officials (of whom the county clerk is one).⁴⁰¹ The court's holding was based upon an interpretation of the intent underlying section 4(c) — to give wide flexibility in the assignment of duties and functions to county officials:

We further believe that to accept plaintiff's position might frustrate the implicit intent of section 4(c) of article VII, which permits the creation of other offices to deal with the myriad complex problems of local government because of the possibility that certain functions of such offices might duplicate duties previously delegated to others.⁴⁰²

After so stating, the court took pains to emphasize that it was fully aware of the provision in section 4(c) which permits the elimination of offices such as the county clerk only by county-

³⁹⁹ *Id.* at 566, 301 N.E.2d at 283.

⁴⁰⁰ Support for this contention of the plaintiff was found in several of the comments made during the debates on this subject. Delegate Dunn, for example, was quoted as stating:

The words 'and by county ordinance' are included in the first sentence to give an extra dimension of power to counties similar to that given in the Municipal Code to municipalities so that the assigned duties of municipal officers — or in this case, county officers — can be 'and by county ordinance' in addition to those powers given to them in 'provided by law.'

Verbatim Transcripts, vol. IV at 3286. This remark was quoted in the brief of Plaintiff-Appellee Hanrahan at 21.

⁴⁰¹ The sheriff, county clerk and county treasurer were considered to be constitutional county officials because theirs were the three chief policy-making offices in the county. *Verbatim Transcripts*, vol. V at 4163. As such, they are provided with the highest protection afforded any of the county offices by section 4(c) which prohibits their elimination by any method other than county-wide referendum.

Within the context of this information, the following colloquy is informative:

MR. FOSTER: I would ask Mr. Dunn a couple of preliminary questions. First of all, if the Legislature provided by general law that certain offices such as the treasurer or sheriff had certain basic functions, would it be possible for a county ordinance to deviate from that?

MR. DUNN: I don't think it would.

Verbatim Transcripts, vol. IV at 3289.

⁴⁰² 54 Ill. 2d at 566, 301 N.E.2d at 283.

wide referendum. The actions of the Cook County Board of Commissioners were considered consonant with the provision, since there was no "elimination" of the office nor any major step in that direction.⁴⁰³ In view of this fact, the court refrained from ruling on the validity of transfers of duties which result in the substantial emasculation of county offices which can be eliminated only by referendum.⁴⁰⁴ Support for the statement that the office of county clerk was not essentially affected was found in the observation of the majority that the statutes entrust the function of comptroller only to the county clerk of Cook County, and the actions of the Cook County Board merely reduced that office to one having substantially identical functions to all other county clerks in Illinois.⁴⁰⁵

A dissenting opinion was filed by Mr. Justice Ryan. Citing section 4(d), which provides that county officers shall have those duties, powers and functions provided by law *and* those provided by county ordinance, Justice Ryan interpreted this section to mean that the county cannot remove or alter statutory duties, powers and functions, but can only add to this statutory authority by ordinance.⁴⁰⁶

The dissenting jurist also noted that the majority's reliance upon *Kanellos* to support the position that the instant statute could be superseded was misplaced. For in Ryan's view, the present case was unlike *Kanellos* in that in *Kanellos* it was specifically found that the statutory provisions involved conflicted with provisions of the new constitution and, as such, were not preserved by section 9 of the Transition Schedule.⁴⁰⁷ Since there was no finding in *Beck* that the statutory duties of the county clerk were contrary to or inconsistent with the new constitution, Mr. Justice Ryan opined that the powers, duties and functions must remain in effect until repealed by the General Assembly.⁴⁰⁸

The *Beck* opinion greatly expanded the liberal approach to the question of applying pre-existing statutory provisions to the home rule power initiated with the *Kanellos* decision. As Mr. Justice Ryan aptly observed in his dissent, the *Kanellos* case presented a limited factual situation where there was an obvious conflict between statutory and constitutional provisions. The *Beck* case, however, included no statutory inconsistency with

⁴⁰³ *Id.* at 566, 301 N.E.2d at 283-84.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* at 567, 301 N.E.2d at 284.

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.* at 568, 301 N.E.2d at 284.

See note 166 *supra* for a reading of the pertinent portion of section 9 of the Transition Schedule.

⁴⁰⁸ 54 Ill. 2d at 568, 301 N.E.2d at 285.

the constitution. Indeed, *Beck* was decided in the face of strong evidence of convention opinion against action such as that taken by Cook County in removing a statutory function from a constitutional county official and entrusting the function to an appointive official.

In light of the *Beck* opinion, home rule counties now have wide authority to determine who among their elected and appointed officials shall exercise the many functions required of county government. So long as an official is not substantially stripped of his statutory functions, it appears that his authority can be removed and given to another official at the discretion of the county board. This declaration of home rule county power gives rise to the opportunity for abuse, as indeed does the judicial recognition of any and all home rule powers. By announcing this recognition, the Illinois Supreme Court has impliedly declared that the exigencies of government require the possession of this authority at the local level, with the General Assembly able to act in only a residual capacity.

Home rule in Illinois, therefore, has been greatly enhanced with the *Beck* decision.

THE FUTURE FOR ILLINOIS HOME RULE

This author concurs with those informed commentators who are cautiously hopeful about the future of home rule in Illinois.⁴⁰⁹ With the exception of the *Bridgman*⁴¹⁰ and the *Oak Park*⁴¹¹ decisions, the Illinois Supreme Court has indicated a favorable approach toward the issue of home rule. Similarly, the General Assembly has thus far imposed few restrictions upon the exercise of home rule authority.⁴¹²

Despite this strong beginning, there is still some basis for reserving judgment about the ultimate treatment of home rule by both the judiciary and the legislature. As Arthur C. Thorpe has noted:

The [home rule] provisions are fragile and can easily be emasculated by an aroused legislature or by courts faced with harsh factual situations.⁴¹³

⁴⁰⁹ See COHN, *Judicial Decisions*, *supra* note 67, at 11; and COLE, *supra* note 39, at 10.

⁴¹⁰ See notes 314-29 *supra*.

⁴¹¹ See notes 355-75 *supra*.

⁴¹² See note 106 *supra* for a discussion of a statute, which has been enacted limiting home rule authority, precluding local authority over the licensing of thirty occupations. Additionally, H.B. 1050 and 1313 have been passed during the 78th Session of the General Assembly which are intended to cover home rule units. H.B. 1050 (P.A. 78-448) adds to the Open Meetings Act (ILL. REV. STAT. ch. 102, §§ 41-44 (1973)) the statement that the provision of the Act constitute minimum requirements for home rule units. Said units may enact more stringent requirements if they desire. Similarly, H.B. 1313 (P.A. 78-458) provides that state laws concerning public notice

And as this author has observed throughout this article, the problem of defining the general term "pertaining to its government and affairs" as found in article VII, section 6 (a), presents an opportunity for the Illinois courts to strictly and narrowly construe what constitutes a "local affair" so as to permit the exercise of home rule authority. Indeed, such a restrictive approach has already been utilized in the *Bridgman* case.⁴¹⁴ Additionally, although little legislation to limit home rule authority has been enacted by the Illinois General Assembly, many such restrictive bills have been proposed.⁴¹⁵

Consequently, in order to insure that neither the courts nor the legislature reduce home rule in Illinois to "a paradoxical enigma . . . unattainable to any significant degree,"⁴¹⁶ the initiative has been thrust upon local governmental officials to enact responsible home rule legislation and to reasonably restrain the use of their wide grant of home rule authority for only demonstrably evidenced needs. In view of the obvious need of urban areas for meaningful home rule authority, it is sincerely hoped that home rule entities rise to meet this important challenge.

requirements shall apply to home rule as well as non home rule units. Once again, more stringent requirements may be imposed by home rule units.

⁴¹³ THORPE, *supra* note 58 at 10.

⁴¹⁴ See notes 314-29 *supra*.

⁴¹⁵ Sixty-seven bills were introduced during the 77th Session of the General Assembly which were intended to preempt home rule powers. Of those, approximately one-half received favorable votes in the House of Representatives, but as noted in note 106 *supra*, only one bill was ultimately enacted.

One legislator has been particularly active in his effort to curb home rule authority. In April of 1971, for example, Representative John H. Conolly introduced thirty-eight preemptive bills (H.B. 2780-2817). Twenty-four of these bills passed the House only to die on third reading in the Senate. It should be noted that Conolly, as well as the other legislators who proposed preemptive legislation, were all Republicans. The voting patterns regarding limiting or preemptive legislation appear to indicate that the opposing forces have become the Chicago Democrats, who have protected home rule, against the Republicans and many downstate Democrats, (including Democratic House Majority Leader Choate who consistently voted *present*) who have attacked home rule. As Eugene Green has noted, this voting pattern is not favorable to those in Illinois who wish to see state legislative preemption kept to a minimum. See GREEN, *supra*, note 5 at 5-7 and Madigan, *A Legislator Views Home Rule*, Local Government Law Newsletter at 5 (Feb. 1973). (Published by the Illinois State Bar Association.)

⁴¹⁶ See note 2 *supra*.