

THE INCONSISTENT STATE OF MUNICIPAL HOME RULE IN IOWA

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I. INTRODUCTION

The Iowa constitution grants home rule authority to cities and counties.¹ That means cities and counties may, with one exception,² enact any law governing their local affairs unless such law is inconsistent with a state law.³ This constitutional grant of authority has been supplemented by a statutory recognition of local home rule authority.⁴ Both the Iowa constitution and the Iowa Code contemplate a broad notion of home rule authority. Indeed, one Iowa Supreme Court justice has called the adoption of home rule in Iowa “revolution[ary].”⁵ In spite of the broad language in the statutes and constitution, the Iowa Supreme Court has, over the past

1. IOWA CONST. art. III, §§ 38A, 39A. This Note will refer to cities and counties collectively as “municipalities.”

2. Both sections of the Iowa constitution relating to municipal home rule specifically state that cities and counties “shall not have power to levy any tax unless expressly authorized by the general assembly.” *Id.*

3. Municipal home rule only extends to local laws “not inconsistent with the laws of the general assembly.” *Id.*

4. See IOWA CODE §§ 331.301(1)–(7), 364.1–364.3, 364.6 (2007) (further defining the constitutional grant of home rule power for counties and cities).

5. *Goodell v. Humboldt County*, 575 N.W.2d 486, 509 (Iowa 1998) (Harris, J., dissenting).

decade, limited the ability of cities and counties to enact laws under their home rule authority.⁶

This Note will briefly review the history of home rule. It will discuss the rise of “Dillon’s Rule” in the nineteenth century, including its Iowa origins. Dillon’s Rule is essentially the anti-home rule, as Part II.A of the Note describes. The Note will examine the rationale for Dillon’s Rule and also some of the practical problems the rule generated. It will then discuss the origins of home rule as an alternative to Dillon’s Rule.

This Note will then review the history of home rule implementation in Iowa, which includes the adoption of constitutional amendments implementing city home rule in 1968 and county home rule in 1978, as well as their statutory supplements. The constitutional home rule provisions are nearly identical for cities and counties, and the Iowa Supreme Court has treated its home rule analysis the same whether a city or county was involved. Thus, cases discussing a city ordinance under home rule are authoritative for considerations of county home rule and vice versa.⁷

Additionally, this Note will examine the Iowa Supreme Court’s decisions regarding city and county home rule. This analysis is divided into three time periods: pre-1998, 1998, and post-1998. The reason for the division is the seminal municipal home rule case, *Goodell v. Humboldt County*, decided in 1998.⁸ The first section—pre-*Goodell*—will examine a number of cases the Iowa Supreme Court decided before the implementation of local home rule in Iowa and in the three decades thereafter. It will highlight the relatively expansive interpretation of home rule in the early post-adoption years, contrasted with the harshness of Dillon’s Rule in the pre-adoption years. The second section will focus exclusively on the *Goodell* case. It will examine the court’s holding and rationale to determine whether they signal a significant change in the court’s interpretation of home rule authority. The third section will review the court’s home rule jurisprudence since *Goodell*. It will try to discern whether the court has remained faithful to its new, narrower interpretation of home rule authority or, alternatively, has displayed a willingness to

6. See *James Enters., Inc. v. City of Ames*, 661 N.W.2d 150, 153–54 (Iowa 2003) (striking down a city ordinance that banned smoking); *Goodell*, 575 N.W.2d at 507–08 (striking down county regulations relating to animal feeding operations). But see *City of Davenport v. Seymour*, 755 N.W.2d 533, 545 (Iowa 2008) (upholding a city ordinance imposing civil traffic fines for violations identified by automatic cameras).

7. *Goodell*, 575 N.W. 2d at 492 n.7.

8. *Goodell v. Humboldt County*, 575 N.W.2d 486 (Iowa 1998).

return to its earlier, broader interpretation.

The last part of the Note will examine some contemporary issues that have spurred municipalities to enact ordinances and consider whether those ordinances are subject to challenge under the Iowa Supreme Court's interpretation of home rule authority.⁹ Finally, the Note will recommend that the Iowa Supreme Court reverse its recent course, remain true to the constitutional will of Iowa's citizens, and protect municipal home rule authority. This would best be accomplished by requiring the Iowa legislature to expressly preempt municipalities from legislating in any area that the legislature wishes to reserve to itself. In the absence of express preemption or a local law attempting to permit conduct that state law expressly prohibits, municipal regulations should be upheld.

II. DILLON'S RULE VERSUS HOME RULE

Generally, municipal governments throughout America are classified into two types: home rule municipalities and Dillon's Rule municipalities. Although most states have granted some form of home rule to their municipalities,¹⁰ it is important to understand the effect and purpose of Dillon's Rule, largely because its principles still linger in Iowa.

A. *Dillon's Rule*

Dillon's Rule is named after famed Iowa Supreme Court Chief Justice John F. Dillon, who served on the court from 1864 through 1869.¹¹

9. One type of ordinance that seems particularly vulnerable to a home rule attack is a city ordinance imposing residency restrictions on convicted sex offenders whose victims were minors. Iowa law prohibits convicted sex offenders from living within 2,000 feet of a school or child care facility. IOWA CODE § 692A.2A. A number of municipalities have enacted ordinances adding to the list of restricted facilities and expanding the restricted zone. For example, the City of Oelwein recently enacted an ordinance prohibiting child sex offenders from living or even entering within 250 feet of a school, child care facility, public swimming pool, park, recreation center, library, or bike trail. Oelwein, Iowa, Ordinance 1057 (Apr. 24, 2006). See *infra* Part IV for further discussion of this issue.

10. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 10–11 (1990) (noting that forty-one states have granted some form of home rule authority to their local governments).

11. Christopher A. Novak, *Agriculture's New Environmental Battleground: The Preemption of County Livestock Regulations*, 5 DRAKE J. AGRIC. L. 429, 444 (2000). Dillon served as Chief Justice for two of his six years on the Iowa Supreme Court. Following his tenure on that court, he was appointed to the United States Court of Appeals for the Eighth Circuit, serving there until 1879. He then became a

The rule first appeared in a pair of opinions Dillon authored in 1868. In *City of Clinton v. Cedar Rapids & Missouri River Railroad Co.*, Dillon proclaimed:

The true view is this: Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, and the *corporation* could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere *tenants at will* of the legislature.¹²

Dillon considered this doctrine “so well settled” that he thought it “unnecessary to refer to more than a few cases asserting it.”¹³ Later in his opinion—in case it was not clear already—Dillon reiterated his position: municipal corporations hold their rights “at the absolute will and pleasure of the legislature.”¹⁴ In this case, Dillon’s Rule operated to strike down the City of Clinton’s ordinance prohibiting railroad companies from building tracks upon or across city streets or alleys without permission from the city council.¹⁵ The state legislature had passed a law specifically authorizing a railroad to be constructed to a certain point within the City of Clinton, so the city’s ordinance prohibited what state law permitted.¹⁶ Even under the home rule authority Iowa municipalities enjoy today, Clinton’s ordinance would almost surely have been struck down.¹⁷

Just a month after his decision in *City of Clinton*, Chief Justice Dillon refined his rule by identifying the specific powers municipalities can

professor of law at Columbia University, a lecturer at Yale University, and a prolific author. Iowa Judicial Branch, <http://www.judicial.state.ia.us/wfdata/frame1773-1463/pressrel14.asp> (last visited Oct. 13, 2008).

12. *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455, 475 (1868).

13. *Id.*

14. *Id.* at 476.

15. *Id.* at 455–56.

16. *Id.* at 466 (quoting 1860 Iowa Acts 43).

17. See IOWA CONST. art. III, § 38A (“Municipal corporations are granted home rule power and authority, *not inconsistent with the laws of the general assembly*, to determine their local affairs and government” (emphasis added)).

exercise:

[A] municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the power.¹⁸

Dillon further clarified his last point: “If [the legislature] clearly intended to confer the power, the courts should hold it to exist, otherwise not.”¹⁹ This rule of strict construction against municipal power, he said, is “founded in the highest wisdom and sanctioned by universal experience.”²⁰

In *Merriam v. Moody’s Executors*, the City of Keokuk executed a tax deed to the plaintiff after the plaintiff paid the delinquent taxes owed on a property that would, but for the tax deed, be owned by the defendants.²¹ The defendants acknowledged the delinquent taxes, but claimed the city lacked authority to sell the property to collect the taxes.²² The delinquent taxes were “special taxes” (what we might think of today as special assessments) rather than “general taxes” (today’s ad valorem property taxes).²³ That distinction is important, Dillon said, because in the act that incorporated the City of Keokuk and created its charter, the legislature specifically gave the city the power to levy general taxes and to collect general taxes through various means, including the sale of the property.²⁴ However, a later amendment to the charter that authorized the imposition of special taxes only authorized the city to “levy and collect” special taxes.²⁵ It did not specify a form of collection, but it did authorize the city council to provide for a means of collection by ordinance.²⁶ Dillon held the power to sell property to collect delinquent special taxes was not necessarily implied by the express grant of power to “levy and collect”

18. *Merriam v. Moody’s Ex’rs*, 25 Iowa 163, 170 (1868).

19. *Id.* at 171.

20. *Id.* at 177.

21. *Merriam v. Moody’s Ex’rs*, 25 Iowa 163, 170 (1868).

22. *Id.*

23. *Id.*

24. *Id.* at 171.

25. *Id.* at 171–72.

26. *Id.*

taxes.²⁷ Collecting via a tax sale was not “absolutely necessary” because the city could collect the taxes through an ordinary lawsuit.²⁸ Dillon refused to allow the city to collect special taxes via a tax sale, even though the legislature had provided extensive regulations as to the effect of the tax deed and the process of issuing the deed.²⁹ He thought it was “easy to see that the legislature might regulate the effect of deeds on the mistaken supposition that they had authorized such deeds to be made, when in fact they had never given any such authority.”³⁰ In other words, although the city and the legislature both thought the city had power to collect special taxes via tax sale, Dillon disagreed.

Dillon seemingly had three options in *Merriam*: (1) aware that the legislature had expressly granted the city the power to levy and collect special taxes, and had prescribed a process for issuing tax deeds, he could have held the city’s ability to sell property to collect delinquent special taxes was necessarily implied; (2) he could have held that the legislature’s express grant of the power to pass an ordinance providing for the means of collecting special taxes included the ability to sell the property as one possible means of collection; or (3) he could have assumed that the express provision of a regulatory process for issuing tax deeds was enacted inadvertently, and narrowly read both the express grant of authority to levy and collect special taxes and the express grant of authority to provide for the means of collecting delinquent special taxes by ordinance.³¹ Either of the first two options would result in the city having a power that seemed to be clearly implied by the legislature’s acts. The third option would deny the city a power clearly beneficial, and perhaps indispensable, to its power to levy special taxes. He chose option three, and the strict reign of Dillon’s Rule began.³²

Merriam, unlike *City of Clinton*, did not involve a conflict between city and state law; no conflict existed between Keokuk’s ordinance, which provided for collecting delinquent special taxes via a tax sale, and any independent state law. But under Chief Justice Dillon’s Rule, the absence of conflict did not matter. The city did not have any power unless the legislature granted it, and the grant had to be extremely clear.³³

27. *Id.* at 174.

28. *Id.*

29. *Id.* at 176–77.

30. *Id.* at 176.

31. *Id.* at 177.

32. *Id.*

33. *Id.* at 170 (“[A]ny fair doubt as to the existence of a power is resolved by

To the City of Keokuk, it may have seemed that the power to collect taxes and the power to pass an ordinance providing the means of collection necessarily implied a power to collect taxes via a tax sale. (It may have also seemed so to former Chief Justice of the United States John Marshall, whose definition of “necessary” is substantially more lenient than Dillon’s.)³⁴ But not to Dillon. Because the power to sell property was not absolutely indispensable to the power to collect taxes, it was not necessarily implied.³⁵

Merriam and *City of Clinton* combine to provide both the substance and the rationale of Dillon’s Rule. Because municipalities “derive their powers and rights wholly from[] the legislature,”³⁶ they may only exercise powers expressly granted by the legislature, necessarily implied from those expressly granted, or absolutely essential to the operation of the municipality.³⁷ Such is Dillon’s Rule as it operated for nearly 100 years in Iowa.

If it seems like Chief Justice Dillon fashioned his rule at least in part out of hostility to municipalities, he did.³⁸ In Dillon’s era there was widespread corruption in local government—not just in Iowa but across the country.³⁹ Part of the goal of Dillon’s Rule was to protect citizens and their private property from the mischief in which municipal officers of that period so often engaged.⁴⁰

While Dillon’s Rule may have had noble goals, it caused significant practical problems.⁴¹ The most obvious problem was that municipal

the courts against the corporation—against the existence of the power.”).

34. See *McCulloch v. Maryland*, 17 U.S. 316, 413 (1819) (holding the word “necessary,” as part of the Necessary and Proper Clause, does not mean “indispensable,” but merely “convenient, or useful, or essential”).

35. *Merriam*, 25 Iowa at 173.

36. *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455, 475 (1868).

37. *Merriam*, 25 Iowa at 170.

38. See Novak, *supra* note 11, at 445.

39. *Id.* County governments, in particular, were accused of “inefficiency, corruption, and lack of citizen respect and involvement.” *Id.* (quoting David R. Berman & Kathryn A. Lehman, *Counties, Change and Reform: An Overview*, in *COUNTY GOVERNMENTS IN AN ERA OF CHANGE*, at xi (David R. Berman ed., 1993)).

40. See *id.*; Jill Welch, *Home Rule Doctrine and State Preemption—The Iowa Supreme Court Resurrects Dillon’s Rule and Blurs the Line Between Implied Preemption and Inconsistency*, 30 RUTGERS L.J. 1548, 1551 (1998).

41. Sam F. Scheidler, *Implementation of Constitutional Home Rule in Iowa*, 22 DRAKE L. REV. 294, 296–97 (1973).

officials in many states were forced to appeal to the legislature to grant them power to address even the most miniscule of local affairs.⁴² Legislators spent an inordinate amount of time addressing purely local issues that in many cases affected just one municipality.⁴³ As one commentator put it:

[A] large amount of time and effort both on the part of municipal lobbyists and state legislators was spent in getting laws of interest to municipalities passed. Even when passed, the laws were often poorly drafted and not well-considered by the legislature in view of the fact that they were of primarily local and not statewide concern. Finally, and perhaps most importantly, a “lag” system of legislating developed where municipalities had to wait until the legislature acted before they were given authority to meet problems where more immediate action was required.⁴⁴

The legislatures’ focus on local problems resulted in state codes being “filled with minute detail regarding the constant needs of local government.”⁴⁵ And perhaps of most concern, it “distracted [legislatures] from matters of general state importance.”⁴⁶

These problems, along with the abatement of local corruption, led many state legislatures to reexamine their state-local relationships.⁴⁷ In many cases, that reexamination resulted in municipal home rule.

B. Home Rule

It may be easiest to think of home rule as the exact opposite of Dillon’s Rule. Under Dillon’s Rule, municipalities may not act unless the legislature says they may; under home rule, municipalities may act unless the legislature says they may not.⁴⁸

While that understanding of home rule may be easy, it is also overly simplistic. There are many forms of home rule, and their effect can vary

42. *Id.*

43. *Id.*

44. *Id.*

45. Novak, *supra* note 11, at 447; *see also* Welch, *supra* note 40, at 1551 (“[L]imitations on local authority produced voluminous state codes and countless hours of time wasted by local lobbyists in getting laws passed.”).

46. Novak, *supra* note 11, at 447.

47. *Id.*; Welch, *supra* note 40, at 1551–52.

48. *See* Scheidler, *supra* note 41, at 304 (describing the Iowa home rule amendment for cities as “an apparent constitutional overruling” of Dillon’s Rule).

considerably. For example, sometimes home rule will provide local governments with exclusive “spheres of immunity,” within which the municipality is actually supreme to the state government.⁴⁹ More often, and certainly in Iowa, home rule provides local governments with the power to regulate their local affairs but specifically allows the legislature to overrule the local government.⁵⁰ Regardless of form, all home rule provisions are designed to provide local governments with the power to regulate their local affairs.⁵¹

Iowa’s version of municipal home rule is a combination of constitutional and legislative home rule.⁵² The constitutional provisions establish the framework and the legislative provisions enhance that framework and fill in the gaps. An accurate picture of Iowa’s home rule situation necessarily requires a recitation of the constitutional and statutory provisions currently in force. Two constitutional provisions are relevant to this discussion. The first, which established city home rule, was added in 1968. It reads:

Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have the power to levy any tax unless expressly authorized by the general assembly.

The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state.⁵³

The second, which established county home rule, was added ten years later in 1978. Its relevant portions are substantially identical to the city amendment quoted above.⁵⁴

49. See Welch, *supra* note 40, at 1560–61 & n.70 (noting the Colorado constitution allows municipal ordinances to “supersede” state law in certain instances and the California constitution grants “municipal authority superior to that of the state” when dealing with “municipal affairs”).

50. See, e.g., IOWA CONST. art. III, §§ 38A, 39A (granting home rule authority to cities and counties to the extent that acts under such authority are “not inconsistent with” state laws).

51. 56 AM. JUR. 2D *Municipal Corporations* § 108 (2000).

52. Welch, *supra* note 40, at 1552.

53. IOWA CONST. art. III, § 38A.

54. *Id.* § 39A.

The Iowa legislature has enacted statutes further defining the constitutional grant of home rule. They read, in relevant part:

1. A county may, except as expressly limited by the Constitution of the State of Iowa, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the county or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents. . . .

. . . .

3. The enumeration of a specific power of a county, the repeal of a grant of power, or the failure to state a specific power does not limit or restrict the general grant of home rule power conferred by the Constitution and this section. A county may exercise its general powers subject only to limitations expressly imposed by a state law.

4. An exercise of a county power is not inconsistent with a state law unless it is irreconcilable with the state law.

5. A county shall substantially comply with a procedure established by a state law for exercising a county power unless a state law provides otherwise. If a procedure is not established by state law, a county may determine its own procedure for exercising the power.

6. A county shall not set standards and requirements which are lower or less stringent than those imposed by state law, but may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise.⁵⁵

Both the constitutional and statutory provisions are intended to provide broad authority to municipalities. The constitution itself imposes only three limitations. The municipal exercise of power (1) “cannot be inconsistent with the laws of the General Assembly,” (2) “must be exercised only with regard to local affairs and government,” and (3) cannot include the levying of taxes unless expressly authorized by the legislature.⁵⁶ Subject only to those limitations, municipalities can exercise virtually

55. IOWA CODE § 331.301(1)–(6) (2007). For substantially identical statutory provisions relating to cities, see IOWA CODE §§ 364.1–364.3, 364.6 (2007).

56. Scheidler, *supra* note 41, at 304.

unlimited home rule power.⁵⁷

The statutes seem to confer even greater home rule authority than the constitution. They begin by imposing two general limits on municipal home rule. Municipalities may act under their home rule authority unless (1) expressly preempted by the state or (2) inconsistent with a state law.⁵⁸ But the statutes also qualify those general limitations. For example, the Iowa Code grants municipalities the ability to exercise their general powers “subject *only* to limitations *expressly* imposed by a state law.”⁵⁹ The Iowa Code also strictly defines “inconsistent” as “irreconcilable.”⁶⁰ The effect of that definition is to allow dual regulation—a municipality may regulate in an area in which the state also regulates, as long as the local ordinance is not irreconcilable with the state statute.⁶¹ The Iowa Code also expressly allows municipalities to impose standards more stringent than state law, while prohibiting local ordinances that impose less stringent standards.⁶²

Even with this broad language, municipal home rule power is not unlimited. There are three general areas in which a municipality can be precluded from exercising its home rule power: (1) a municipality cannot regulate something that is not a local affair—in other words, municipalities cannot regulate matters of statewide concern; (2) a municipality’s ability to regulate may be expressly preempted by the state; and (3) a municipality cannot regulate in a way that is “inconsistent” with state law.⁶³ Inconsistency exists when either (a) the state has reserved the regulatory field in a particular area to itself (also called “occupying the field”) or (b) the municipality permits something that state law prohibits or prohibits something that state law permits.⁶⁴ The next Part of this Note will review examples of all of these limits on home rule authority.

57. Each of those limitations, however, can be interpreted rather broadly to reduce home rule authority. *See infra* Part III.

58. IOWA CODE § 331.301(1).

59. *Id.* § 331.301(3) (emphasis added).

60. *Id.* § 331.301(4).

61. *See Goodell v. Humboldt County*, 575 N.W.2d 486, 492 (Iowa 1998) (“The concept of home rule envisions the possibility that state and local governments will regulate in the same area . . .”).

62. IOWA CODE § 331.301(6).

63. *See Goodell*, 575 N.W.2d at 492–93.

64. *See id.* at 493. The Iowa Supreme Court has recently referred to these two strands of inconsistency as “field preemption” and “conflict preemption.” *City of Davenport v. Seymour*, 755 N.W.2d 533, 539 (Iowa 2008).

III. THE IOWA SUPREME COURT'S HOME RULE JURISPRUDENCE

A. *Pre-Goodell: 1868–1998*

1. *The Reign of Dillon's Rule: 1868–1968*

In the late nineteenth century and early twentieth century, Iowa municipalities had no power unless it was expressly granted to them by the legislature. One power that was expressly granted to municipalities was the police power. For example, a pair of late nineteenth century statutes gave cities the power “to preserve peace and order” within their borders and “to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience” of the city and its residents.⁶⁵ Similar statutes were in effect well into the twentieth century.⁶⁶

Even under Dillon's Rule, the Iowa Supreme Court generally gave municipalities wide discretion to enact ordinances under their police power. The court upheld local ordinances enacted under the general police power that punished drunks,⁶⁷ imposed Sunday closing requirements for businesses,⁶⁸ criminalized assault and battery,⁶⁹ prohibited gambling,⁷⁰ and prohibited the operation of disorderly businesses.⁷¹ In all those cases, the court relied on the express grant of police power to cities and held that the ordinances fell within that power. Thus, Dillon's Rule was satisfied.

In fact, the court was only likely to strike down a local police power ordinance when the local ordinance tried to subvert a state law by criminalizing the same conduct as state law but imposing a lesser punishment. In *City of Iowa City v. McInnery*, the Iowa Supreme Court invalidated a local ordinance that prohibited keeping saloons open on

65. See *Town of Bloomfield v. Trimble*, 6 N.W. 586, 587 (Iowa 1880) (quoting the Iowa statutes in effect at that time).

66. See, e.g., *City of Des Moines v. Rosenberg*, 51 N.W.2d 450, 453 (Iowa 1952) (quoting IOWA CODE § 366.1 (1950), which is identical to the statute cited in *Trimble*); *Town of Neola v. Reichart*, 109 N.W. 5, 8 (Iowa 1906) (noting that the state law in effect at that time granted cities the power to provide for the safety, health, morals, order, and comfort of the city and its residents).

67. *Trimble*, 6 N.W. at 587.

68. *Town of Lovilia v. Cobb*, 102 N.W. 496, 496 (Iowa 1905).

69. *Reichart*, 109 N.W. at 6; *Inc. Town of Avoca v. Heller*, 105 N.W. 444, 445 (Iowa 1905).

70. *Blodgett v. McVey*, 108 N.W. 239, 240 (Iowa 1906).

71. *Rosenberg*, 51 N.W.2d at 451.

election day.⁷² An identical state law existed, but the punishment for violating the state law was more severe than the punishment for violating the city law.⁷³ Because the city could charge the offender under the city law and impose the lower punishment, the court found that the city ordinance frustrated the purpose of the state law and, thus, struck it down.⁷⁴

In the Dillon's Rule era, the court was wary of striking down a local ordinance based on the notion that the state had reserved the area of regulation to itself. In fact, the court routinely upheld local police power regulations covering subjects that were already covered by extensive state regulation.⁷⁵ For example, in *Pugh v. City of Des Moines*, the court upheld a city ordinance that prohibited parking on certain streets during the daytime.⁷⁶ An existing state law regulated the standing and operation of automobiles on public streets, and also prohibited cities from requiring a license to use public streets or excluding automobiles from streets altogether.⁷⁷ But the court did not find any state law expressly prohibiting cities from implementing reasonable parking restrictions.⁷⁸ Further, and more importantly, the court noted the existence of a state law expressly granting cities the power to "supervis[e] and control" their streets.⁷⁹ The court upheld the ordinance because it was not inconsistent with any state law and because the express grant of supervisory power outweighed any implied restriction on local regulation.⁸⁰

In another case, *Towns v. Sioux City*, the court upheld a city ordinance requiring taxicabs to be licensed and pay an annual fee to the city.⁸¹ The city enacted its ordinance under the authority to regulate and

72. *City of Iowa City v. McInnery*, 87 N.W. 498, 500 (Iowa 1901).

73. *Id.*

74. *Id.*

75. *See, e.g., Blodgett*, 108 N.W. at 241 ("The ordinance in question clearly covers a subject [gambling] which is fully covered by a general statute . . ."); *Inc. Town of Avoca v. Heller*, 105 N.W. 444, 445 (Iowa 1905) (state law and city law both punished assault and battery); *Town of Lovilia v. Cobb*, 102 N.W. 496, 496–97 (Iowa 1905) (state law and city law both mandated Sunday business closings); *Town of Bloomfield v. Trimble*, 6 N.W. 586, 587 (Iowa 1880) (state law and city law both punished intoxication).

76. *Pugh v. City of Des Moines*, 156 N.W. 892, 898 (Iowa 1916).

77. *Id.* at 897 (citations omitted).

78. *Id.*

79. *Id.* at 894 (quoting IOWA CODE § 753 (1897)).

80. *Id.* at 897–98.

81. *Towns v. Sioux City*, 241 N.W. 658, 663 (Iowa 1932).

license all vehicles “of conveyance kept for hire,” which had been expressly granted by a state law.⁸² A subsequent state law specifically gave a state agency the right to license and tax taxicabs and other similar vehicles.⁸³ The plaintiff claimed that the city law conflicted with the state law and that the newer state law implicitly repealed the older law.⁸⁴ The court disagreed on both counts.⁸⁵ It found the primary purpose of the state law was to impose a “privilege tax” on the taxicabs for doing business on the state’s public highways.⁸⁶ The court found there was no legislative intent to withdraw the power previously granted to cities to license taxicabs and exact a reasonable fee in so doing.⁸⁷ Because there was no conflict with state law and the ordinance was reasonable, it was upheld.⁸⁸

Another good example of judicial deference to municipalities—even while operating under Dillon’s Rule—is *Gannett v. Cook*, a county zoning case.⁸⁹ The state law at issue in this case specifically gave counties the power to engage in zoning but also prescribed a procedure for doing so.⁹⁰ The state law stated that zoning changes would be effective after a majority of property owners in the affected district provided written consent.⁹¹ The county passed an ordinance delaying the effective date of any zoning regulation until a majority of property owners gave written consent and the document evidencing such consent was filed with the county recorder.⁹² Instead of construing the ordinance as inconsistent with the state law, the court found it to merely impose an additional regulation and specifically held that a local ordinance “can make additional, reasonable, and nondiscriminatory requirements so long as the statute does not” expressly

82. *Id.* at 659 (quoting IOWA CODE § 5970 (1931)).

83. *Id.* at 660.

84. *Id.* at 661.

85. *Id.*

86. *Id.* at 662.

87. *Id.*

88. *Id.* at 663. The *Towns* case is notable for one other reason: it was the Iowa origin of the “permit-prohibit test” for determining whether a local ordinance is inconsistent with a state law. *See id.* at 662 (“The general test [in determining whether a conflict exists] is whether the ordinance prohibits an act which the statute permits, or permits an act which the statute prohibits.”). This test, as will be noted later in this Part, has proven to be a significant restraint on municipal home rule authority.

89. *Gannett v. Cook*, 61 N.W.2d 703 (Iowa 1953).

90. *Id.* at 705.

91. *Id.*

92. *Id.*

prohibit additional requirements.⁹³ The court did not find that the specific state law reserved the field of zoning regulation to the state.⁹⁴ Further, the court did not find that the ordinance prohibited something that the state law permitted.⁹⁵ Either of those findings would have invalidated the ordinance.⁹⁶

One final example of the court allowing broad municipal power even under Dillon's Rule is *City of Des Moines v. Reiter*.⁹⁷ This case involved a city ordinance punishing people who interfered with the work of city employees.⁹⁸ The city had installed parking meters under a state law expressly granting that power.⁹⁹ Reiter was charged with interfering with a city meter maid.¹⁰⁰ Reiter complained that the city lacked authority both to employ meter maids and to make it a crime to interfere with meter maids because neither power was expressly granted by statute.¹⁰¹

The court first held that the city had the authority to enact an ordinance prohibiting interference with city employees engaged in official city duties.¹⁰² The city's ordinance was valid under its police powers, which had been expressly granted.¹⁰³ Further, the city's ordinance was merely an additional regulation because a state law already prohibited persons from interfering with the duties of law enforcement officers.¹⁰⁴ The court noted it had previously upheld mere additional regulations, and stated it would continue to do so as long as those regulations further "the purpose of the

93. *Id.* at 706. The court quoted the general rule that "a municipal regulation which is merely additional to that of the state law does not create a conflict therewith." *Id.* (quoting 62 C.J.S. *Municipal Corporations* § 143).

94. *Id.* at 710.

95. *Id.*

96. Using a strict interpretation of the permit-prohibit test, the court could have found that while state law permitted a zoning ordinance to be effective even without recording the written consent with the recorder, local law prohibited the ordinance from being effective until the consent document was filed. Thus, the ordinance prohibited what a state law permitted. *See supra* note 88 and accompanying text. This type of reasoning was at the heart of the Iowa Supreme Court's decision in *Goodell*. *See infra* Part III.B.

97. *City of Des Moines v. Reiter*, 102 N.W.2d 363 (Iowa 1960).

98. *Id.* at 365.

99. *Id.* at 367.

100. *Id.* at 365.

101. *Id.* at 365–66.

102. *Id.* at 365.

103. *Id.* at 366.

104. *Id.* at 365 (citing IOWA CODE § 742.1 (1958)).

general law.”¹⁰⁵ The court said the city’s ordinance did indeed further the purpose of the state law in this situation.

The court then held that a city’s ability to employ meter maids to enforce parking restrictions was necessarily implied from the expressly granted power to install parking meters.¹⁰⁶ There was no argument over the existence of a power to install parking meters, and the court noted that power would be useless without also having the power to enforce parking meter regulations.¹⁰⁷ Then the court characterized the city’s decision to employ meter maids as one of manner—employing meter maids was simply the manner the city chose to carry out its implied power to enforce parking meter restrictions.¹⁰⁸ The court had previously noted the broad discretion municipalities have in determining the proper manner of implementing a power expressly granted.¹⁰⁹

As the above examples show, local ordinances enacted under expressly granted powers often survived legal challenge during the era of Dillon’s Rule. But make no mistake—under Dillon’s Rule, there must have been some power expressly granted to the municipality (or

105. *Id.* at 366.

106. *Id.* at 367.

107. *Id.*

108. *Id.* Contrast this lenient treatment of a city’s choice of the method it uses to implement an expressly granted power with *Merriam*, in which Chief Justice Dillon struck down the method a city used to implement the express power to collect special taxes. Recall that in *Merriam*, state law also expressly granted the city the power to provide by ordinance the means of collection. *See supra* notes 18–35 and accompanying text; *see also infra* note 109.

109. *See Keokuk Water Works Co. v. City of Keokuk*, 277 N.W. 291, 299 (Iowa 1938) (“Neither does the rule of strict construction . . . apply in construing statutes relating to the manner of exercising expressly granted power.”). The *Keokuk Water Works* court then quoted none other than Chief Justice Dillon himself:

The rule of strict construction does not apply to the mode adopted by the municipality to carry into effect powers expressly or plainly granted, where the mode is not limited or prescribed by the legislature, and is left to the discretion of the municipal authorities. In such a case the usual test . . . is, Whether it is reasonable? and there is no presumption against the municipal action in such cases.

Id. (quoting 1 JOHN F. DILLON, DILLON ON MUNICIPAL CORPORATIONS 453 (5th ed. 1911)); *see also* *Lyon v. Civil Serv. Comm’n of Des Moines*, 212 N.W. 579, 581 (Iowa 1927) (“It is elementary that, unless expressly or impliedly restrained by statute, a municipal corporation may, in its discretion, determine for itself the means and method of exercising the powers conferred thereon.”).

necessarily implied, or absolutely essential to the municipality's operation) before a court would uphold the municipal ordinance.¹¹⁰ Consequently, many local ordinances were struck down during the era of Dillon's Rule.¹¹¹ Chief Justice Dillon himself struck down municipal ordinances in *City of Clinton* and *Merriam*.¹¹² A couple of other examples follow.

In *Dotson v. City of Ames*, the Iowa Supreme Court emphasized the strictness of Dillon's Rule and struck down an Ames ordinance that regulated how close farm animal enclosures could be to wells or dwellings.¹¹³ The legislature had specifically given cities the power to regulate farm animals running at large, but not those animals that were confined.¹¹⁴ Relying on the statutory construction principle that "the express mention of one thing implies the exclusion of others" (*expressio unius est exclusio alterius*), the court held that the legislature implicitly withheld from cities the power to regulate confined farm animals.¹¹⁵

A few years later, in *Pape v. Westerdale*, the court provided some insight into how it would determine whether a local ordinance was inconsistent with state law.¹¹⁶ This was five years prior to the adoption of the City Home Rule Amendment to Iowa's constitution, but the legislature had already given cities the power to enact ordinances to implement powers expressly granted to them as long as the ordinances were not inconsistent with state law.¹¹⁷

Pape resolved a dispute over whether the City of Davenport could require a real estate broker to obtain a local license in addition to the state real estate license he already held. Davenport's ordinance, presumably

110. See *supra* note 18 and accompanying text.

111. See, e.g., *Pape v. Westerdale*, 121 N.W.2d 159, 160 (Iowa 1963) (striking down a city real estate license requirement); *Dotson v. City of Ames*, 101 N.W.2d 711, 714 (Iowa 1960) (striking down a city ordinance regulating confined animals); *Merriam v. Moody's Ex'rs*, 25 Iowa 163, 170 (1868) (striking down a city ordinance allowing tax sales as a method of collecting delinquent special taxes); *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455, 464–75 (1868) (striking down a city ordinance restricting railroad construction).

112. See *supra* Part II.A.

113. *Dotson v. City of Ames*, 101 N.W.2d 711, 714 (Iowa 1960).

114. *Id.* at 713–14.

115. *Id.* at 714. This principle of statutory construction no longer applies in the home rule context. See *City of Davenport v. Seymour*, 755 N.W.2d 533, 543–44 (Iowa 2008).

116. *Pape v. Westerdale*, 121 N.W.2d 159 (Iowa 1963).

117. *Id.* at 160 (citing IOWA CODE §§ 366.1, 420.31 (1958)).

enacted under police powers expressly granted to the city, prohibited Pape from acting as a real estate broker in the city without obtaining a city license, even though he was already licensed by the state.¹¹⁸ Pape acted as a broker for Westerdale in Davenport, and when his client refused to pay the commission due, Pape sued.¹¹⁹ Westerdale's defense was based on the city ordinance, which prohibited an unlicensed broker from collecting a commission.¹²⁰ The Iowa Supreme Court held the local ordinance invalid, using the permit-prohibit test laid down more than thirty years earlier in *Towns*.¹²¹ State law permitted Pape to act as a real estate broker anywhere in Iowa upon receiving a state license; Davenport's ordinance, in contrast, prohibited Pape from acting as a broker in Davenport without getting a local license. In other words, the city's ordinance prohibited what the state law permitted.¹²² Even though the ordinance was valid under the city's police power, it was also "inconsistent" with state law and, thus, struck down.¹²³

By the first half of the 1960s, the Iowa legislature had had enough of Dillon's Rule. In fact, the 60th Iowa General Assembly statutorily renounced Dillon's Rule, amending the 1962 Iowa Code to give cities broad and implied powers over matters of local concern.¹²⁴ In *Richardson v. City of Jefferson*, the Iowa Supreme Court had its first chance to interpret the new statute and the results were somewhat mixed.¹²⁵ First, the court upheld the statute as a valid exercise of legislative power.¹²⁶ This was important because it confirmed that Dillon's Rule was born of judicial interpretation—it was not a constitutional mandate.¹²⁷ However, the opinion also clarified that the statute merely instructed the court to liberally construe statutes granting power to cities; the newly amended statute did not itself grant additional power to cities.¹²⁸ The latter part of the decision was the deciding factor in the case, and the court struck down

118. *Id.* at 159.

119. *Id.*

120. *Id.*

121. *Id.* at 160 (citing *Towns v. Sioux City*, 241 N.W. 658 (Iowa 1932)).

122. *Id.*

123. *Id.*

124. *See Richardson v. City of Jefferson*, 134 N.W.2d 528, 530 (Iowa 1965) (noting the statutory changes).

125. *Richardson v. City of Jefferson*, 134 N.W.2d 528, 530 (Iowa 1965).

126. *Id.* at 534.

127. *Id.* at 530.

128. *Id.* at 534.

the city's efforts to issue bonds to construct a public swimming pool.¹²⁹ Because there was no specific grant of power to the city to build a swimming pool, there was no statute that the court could liberally construe, even if it was inclined to do so.¹³⁰

Just one year later, in 1966, the division that still lingers in the Iowa Supreme Court's municipal home rule decisions emerged. The case, *City of Vinton v. Engledow*, was decided before the City Home Rule Amendment was adopted, but after the legislature had statutorily repudiated Dillon's Rule.¹³¹ Engledow was convicted of violating Vinton's ordinance requiring "careful and prudent" driving because he had intentionally and repeatedly revved his car's engine to spook a horse that was on the side of the road.¹³² The state law on reckless driving provided conflicting guidance to the court. One section required the state's traffic laws to be applied uniformly throughout the state and specifically prohibited local ordinances conflicting with state law.¹³³ Because the state law criminalized only reckless driving and Vinton's ordinance criminalized even negligent driving, the local ordinance could be construed as conflicting with state law and violating the uniformity requirement.¹³⁴ In fact, that is exactly what the majority of the court held.¹³⁵

But the state's traffic laws also specifically granted cities the power to enact supplemental traffic regulations as long as the regulations did not conflict with state law.¹³⁶ Another section of the Code granted cities the power to regulate driving on city roads and to "punish fast or immoderate riding or driving within" the city.¹³⁷ As the four-justice dissent pointed out, the legislature's recent repudiation of Dillon's Rule directed the court to liberally construe these grants of power and the court had upheld that rule of construction just one year earlier in *Richardson*.¹³⁸ Indeed, the majority's conclusion that the local ordinance conflicted with state law seems counter to the general rule that a mere additional local regulation does not conflict with a state law—particularly when the state law is not

129. *Id.*

130. *Id.*

131. *City of Vinton v. Engledow*, 140 N.W.2d 857 (Iowa 1966).

132. *Id.* at 859–60.

133. *Id.* at 860.

134. *Id.* at 861.

135. *Id.* at 862.

136. *Id.* at 863 (Snell, J., dissenting).

137. *Id.*

138. *Id.* at 864.

intended to be the exclusive voice on the subject, as was the case with the traffic law at issue here.¹³⁹ As to the uniformity requirement in state law, the same state law specifically allowed additional, non-conflicting local regulations and imposed no such uniformity requirement on local regulations.¹⁴⁰

Engledow seemed to reflect the court's unwillingness to abandon Dillon's Rule at the mere direction of the legislature. In fact, the court said as much in *Richardson* when it upheld the legislative repudiation of Dillon's Rule (via a direction to the courts to liberally construe powers granted to cities), but also emphasized that while the "legislative construction of an act is entitled to due consideration of the courts, it is in no sense binding on the courts."¹⁴¹ But soon after *Engledow*, the direction to abandon Dillon's Rule came not just from the legislature, but from Iowa's citizens and its constitution.

2. *The Early Years of Municipal Home Rule: 1968–1998*

The City Home Rule Amendment was adopted in 1968.¹⁴² The Iowa Supreme Court's first opportunity to interpret the Amendment and accompanying statutory changes came in 1974 with *Cedar Rapids Human Rights Commission v. Cedar Rapids Community School District*.¹⁴³ The City of Cedar Rapids, pursuant to its new home rule powers, established a human rights commission charged with monitoring and remedying unfair

139. *Id.* (quoting 62 C.J.S. *Municipal Corporations* § 143).

140. *Id.* at 855. For a recent case addressing a legal issue similar to that in *Engledow* but upholding the local ordinance, see *City of Davenport v. Seymour*, 755 N.W.2d 533 (Iowa 2008).

141. *Richardson v. City of Jefferson*, 134 N.W.2d 528, 533 (Iowa 1965) (quoting *State v. Parsons*, 220 N.W. 328, 331 (Iowa 1928)).

142. IOWA CONST. art. III, § 38A. The full text reads:

Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have the power to levy any tax unless expressly authorized by the general assembly.

The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state.

Id.

143. *Cedar Rapids Human Rights Comm'n v. Cedar Rapids Cmty. Sch. Dist.*, 222 N.W.2d 391 (Iowa 1974).

or discriminatory actions in housing, employment, and other areas.¹⁴⁴ Two teachers complained to the commission that the Cedar Rapids School District had engaged in discrimination by forcing pregnant teachers to take maternity leave.¹⁴⁵ The commission agreed with the teachers and ordered back pay and other remedies, including an order that the district pay the costs of the commission's hearing.¹⁴⁶ The school district refused to comply with the order, and when the commission filed suit, the school district defended in part by claiming that the city lacked the authority to create the commission; thus, from the school district's perspective, all of the commission's orders were null and void.¹⁴⁷

In its first decision since the City Home Rule Amendment was adopted, the court made clear that Dillon's Rule was no longer the law in Iowa: "The fact there is no express authority allowing municipalities to establish commissions with quasi-judicial powers should not be of importance, as '[t]he rule that cities and towns have only those powers expressly conferred by statute has no application . . .' in the Iowa Code."¹⁴⁸ The court determined that the creation of the commission was within the city's home rule authority unless it was inconsistent with state law.¹⁴⁹

The potential inconsistency was that the city's human rights commission did not provide for judicial review of its decisions, whereas the state civil rights commission—which had a duty and scope comparable to that of the city commission—did provide for judicial review.¹⁵⁰ The statute creating the state civil rights commission expressly allowed local governments to implement similar commissions, but—as is usually the case—required local laws to be consistent with the state law.¹⁵¹ Without much discussion, the court found the lack of judicial review at the city commission level sufficiently inconsistent with state law to invalidate the commission's ruling against the school district.¹⁵² It is noteworthy that the court specifically held that the lack of judicial review did not violate due process.¹⁵³ The only reason for striking down the commission's order was

144. *Id.* at 392.

145. *Id.* at 393.

146. *Id.*

147. *Id.* at 393–94.

148. *Id.* at 399 (quoting IOWA CODE § 368.2 (1973)).

149. *Id.*

150. *Id.* at 401.

151. *Id.* at 402.

152. *Id.* at 402–403.

153. *Id.* at 402.

that the lack of judicial review was inconsistent with state law. Because of that inconsistency, creating the commission was not a valid exercise of the city's home rule power.¹⁵⁴

In subsequent cases decided shortly after the City Home Rule Amendment was adopted, the court struggled to determine the impact of the new Amendment and the accompanying statutes, and to define important terms like "local affairs," "inconsistent," and "irreconcilable."

First, the court discarded the rather specious argument that the City Home Rule Amendment acted to freeze in place all state laws relating to cities as of 1968.¹⁵⁵ The court described a primary purpose of home rule as granting cities flexibility to deal with their local problems, subject to being overruled by the legislature.¹⁵⁶ Freezing laws in place would essentially give them constitutional status and run counter to the goal of enhanced flexibility for local officials.¹⁵⁷

Later, the court made clear that both the City Home Rule Amendment and its implementing statutes were designed to confer broad powers on cities. The fact that neither the Amendment nor the statutes conferred any specific power to cities was irrelevant; the whole point of the Home Rule Amendment was to make it unnecessary for the legislature to grant specific powers to cities.¹⁵⁸ After the Home Rule Amendment's adoption, cities have broad power unless the legislature affirmatively acts to remove it.

The court also clarified that even though the Home Rule Amendment is limited to cities' "local affairs and government,"¹⁵⁹ the legislature may grant cities additional powers beyond those relating to local affairs. In other words, "the Home Rule Amendment is not a limitation on the power of the legislature," but a simultaneous grant of power to cities and a limitation on that power.¹⁶⁰

The legislature exercised its ability to expand cities' powers

154. *Id.* at 402–403.

155. *Bechtel v. City of Des Moines*, 225 N.W.2d 326, 332 (Iowa 1975).

156. *Id.*

157. *Id.*

158. *See Green v. City of Cascade*, 231 N.W.2d 882, 890 (Iowa 1975) (upholding the city's authority to issue bonds for street and sewer maintenance and construction, even though no law grants that specific authority to cities).

159. IOWA CONST. art. III, § 38A.

160. *Green*, 231 N.W.2d at 888.

immediately after the Home Rule Amendment was enacted. For example, while the Home Rule Amendment limits cities' home rule power in cases in which the city acts inconsistently with state law, the implementing statutes direct the courts to harmonize state and local laws whenever possible, stating that a city law "is not inconsistent with a state law unless it is irreconcilable with the state law."¹⁶¹ Throughout the years following the adoption of the City Home Rule Amendment, and even today, the court's home rule jurisprudence has focused largely on the inconsistency and irreconcilability of state and local laws. As we will see, that jurisprudence has itself been maddeningly inconsistent.

In addition to *Cedar Rapids Human Rights Commission*, another early home rule case involved a local human rights commission and produced a similar result. In *City of Iowa City v. Westinghouse Learning Corp.*, the Iowa Supreme Court invalidated the process used by the local commission to resolve complaints about discriminatory employment practices.¹⁶² Unlike the Cedar Rapids commission's process, which included no judicial review, Iowa City's process required courts to make the original determination as to whether a discriminatory practice existed.¹⁶³ The court found that state law required an administrative body to issue an order, which should then be subject to judicial review.¹⁶⁴ In its opinion, the court specifically laid out a definition of inconsistent: a local law "must be faithful to the legislative scheme" of the state law in order to be consistent with that law.¹⁶⁵ Deviating from the state's scheme of administrative determination followed by judicial review was apparently enough to make the local law unfaithful to, and thus inconsistent with, the state law. Iowa City's process got the courts involved too early; Cedar Rapids' process did not get them involved at all. Both processes were found irreconcilable with state law and struck down.

More than a decade later, in 1993, the court also relied on the inconsistency test in striking down a local prevailing wage law.¹⁶⁶ The City

161. *Id.* at 890. The court quotes language from section 11(3) of the Home Rule Act, chapter 1088 of the Acts of the 64th General Assembly. See 1972 Iowa Acts 219.

162. *City of Iowa City v. Westinghouse Learning Corp.*, 264 N.W.2d 771, 773 (Iowa 1978).

163. *Id.*

164. *Id.*

165. *Id.*

166. *City of Des Moines v. Master Builders of Iowa*, 498 N.W.2d 702, 704 (Iowa 1993).

of Des Moines passed an ordinance requiring contractors to pay “prevailing wages” on most public improvement projects.¹⁶⁷ In addition to striking down the ordinance because it was preempted by ERISA, the court found the ordinance inconsistent with the state’s competitive bidding law, which generally required cities to award contracts to the lowest responsible bidder.¹⁶⁸ But the inconsistency was not with any particular text in the state law. Rather, the court found that the local ordinance, which would have the effect of increasing the bid levels on many projects, frustrated the state law’s purpose of “provid[ing] a city with the best results at the lowest possible price.”¹⁶⁹

In spite of the existence of home rule authority—which the court itself had admitted was intended to confer broad power on cities¹⁷⁰—and legislative direction that a local law is not to be struck down unless irreconcilable with state law, the court struck down Des Moines’ prevailing wage ordinance.¹⁷¹ This was another significant chink in the armor of home rule. The ordinance easily could have been harmonized with state law, as one of the four justices who disagreed with the majority’s conclusion on that point described: “The purpose of [the state law] is to protect the lowest bidder, rather than dictate the contract terms that a city might place on its bids.”¹⁷² In other words, the court could have upheld the ordinance, which would have affected all prospective bidders. All bids would be forced to factor in the prevailing wage requirement and the state competitive bidding law would still ensure that the lowest responsible bidder was awarded the project. All the bids might be slightly higher than they otherwise would, but the lowest bidder would still be selected. It is perhaps possible to describe the local ordinance as inconsistent with one of the purposes of the competitive bidding law, but to say the local ordinance is irreconcilable with that law is simply inaccurate.

The early decisions mentioned above seemed to siphon much of the impact from home rule authority. But the court was not always so quick to find inconsistency between state and local laws. In fact, the court regularly upheld local ordinances that imposed additional regulations on existing state laws. In *Bryan v. City of Des Moines*, for example, the court upheld

167. *Id.* at 703.

168. *Id.* at 704.

169. *Id.*

170. *See* *Green v. City of Cascade*, 231 N.W.2d 882, 885 (Iowa 1975) (noting that cities have broad power to act even without specific legislative discretion).

171. *Master Builders of Iowa*, 498 N.W.2d at 704.

172. *Id.* at 706 (Schultz, J., specially concurring).

the city's requirement that police officers have one year of college education to be eligible for certain promotions.¹⁷³ The defendants claimed the city's requirement conflicted with a state law that gave civil service commissions sole responsibility for holding promotional examinations.¹⁷⁴ The court relied on a portion of the home rule statutes authorizing cities to set standards more stringent than state law and found that this additional educational requirement was simply a more stringent standard.¹⁷⁵ Fifteen years later, the court upheld, on similar reasoning, an anti-nepotism policy Sioux City imposed on its police department.¹⁷⁶

The court also showed deference to local home rule power when the local ordinance was related to, but not directly in conflict with, a state law. In *City of Des Moines v. Gruen*, for example, the court upheld a local ordinance that required lawfully unregistered vehicles to be parked in enclosed buildings and not on streets or driveways in residential neighborhoods.¹⁷⁷ The defendant, who was a vehicle dealer, complained that the ordinance was inconsistent with a state law that allowed vehicle dealers to possess unregistered vehicles under certain conditions, none of which required the vehicles to be stored in an enclosed building.¹⁷⁸ The court first reiterated the two tests it most often uses for determining inconsistency:

A municipal ordinance is "inconsistent" with a law of the general assembly and, therefore, preempted by it, when the ordinance "prohibits an act permitted by a statute, or permits an act prohibited by a statute." A municipal ordinance also is preempted by state law when the ordinance invades an area of law reserved by the legislature to itself.¹⁷⁹

Gruen argued that because the state law did not restrict the parking of unregistered vehicles, it implicitly permitted him to park his unregistered vehicles wherever he desired.¹⁸⁰ Thus, the Des Moines ordinance

173. *Bryan v. City of Des Moines*, 261 N.W.2d 685, 686 (Iowa 1978).

174. *Id.* at 686–87.

175. *Id.* at 687.

176. *Sioux City Police Officers' Ass'n v. City of Sioux City*, 495 N.W.2d 687, 697–98 (Iowa 1993).

177. *City of Des Moines v. Gruen*, 457 N.W.2d 340, 343 (Iowa 1990).

178. *Id.* at 342.

179. *Id.* (quoting *City of Council Bluffs v. Cain*, 342 N.W.2d 810, 812 (Iowa 1983)).

180. *Id.*

prohibiting Gruen from parking his unregistered cars in the open prohibited what the state law permitted and was inconsistent under the court's established test.¹⁸¹ In an opinion very respectful of the broad powers of local home rule, the court disagreed.

The court noted its duty to harmonize seemingly conflicting state and local laws and emphasized that legislative limits on a city's power must be expressly imposed—in the post-Dillon's Rule era, “[l]imitations on a municipality's power over local affairs are not implied.”¹⁸² The court distinguished the city law, which regulated parking unregistered vehicles, from the state law, which regulated possessing unregistered vehicles, and found no conflict.¹⁸³ Under both city and state law, Gruen was free to possess unregistered vehicles. There was no state law expressly permitting Gruen to park those vehicles in the open; therefore, the city's law requiring the vehicles to be parked indoors caused no conflict.¹⁸⁴

The court also tended to harmonize state and local laws in the context of government charters.¹⁸⁵ In *City of Clinton v. Sheridan*, the court did not find any inconsistency between the initiative and referendum provisions in a proposed city charter and state laws vesting all city powers in a council and requiring the council to exercise those powers by passing a resolution, motion, or ordinance.¹⁸⁶ The proposed charter allowed ordinances to be adopted by a vote of the citizens, rather than by the city council.¹⁸⁷ The court found that the state law merely limited how a city council was to exercise its power; the law did not prohibit some of the council's power from being delegated to another group, like the citizens.¹⁸⁸ The court relied in part on specific state laws reserving certain issues—such as franchise ordinances—to be decided by a city's citizens to show that “Iowa has a long tradition of” initiative and referendum.¹⁸⁹ That reliance seems somewhat misplaced because the question in *Sheridan* was whether a city

181. *Id.*

182. *Id.* at 342–43.

183. *Id.*

184. *Id.*

185. *See City of Clinton v. Sheridan*, 530 N.W.2d 690 (Iowa 1995); *see also* Polk County Bd. of Supervisors v. Polk Commonwealth Charter Comm'n, 522 N.W.2d 783, 795–96 (Iowa 1994) (upholding a proposed charter and not finding any inconsistency with statutory procedure under home rule).

186. *City of Clinton v. Sheridan*, 530 N.W.2d 690, 692–94 (Iowa 1995).

187. *Id.* at 690.

188. *Id.* at 694.

189. *Id.* at 693.

could enact laws via initiative and referendum even if not specifically allowed by the state. That question seemed especially relevant in light of the fact that state law vested all city power in the council unless an exception applied, and none did here.

Nonetheless, the *Sheridan* case is a prime example of the court harmonizing a state and local law in much the same manner as could have been done in *City of Des Moines v. Master Builders of Iowa*, the prevailing wage case.¹⁹⁰ One could argue that the policy of a state law vesting city power in a council is to further representative, rather than direct, democracy. That policy would clearly be undermined by a charter allowing initiative and referendum, but the court upheld the charter anyway. In *Master Builders of Iowa*, the state law implemented the policy of keeping construction costs down for local governments.¹⁹¹ That policy was not necessarily undermined by Des Moines' prevailing wage ordinance because a prime rationale for the ordinance was that paying workers more would attract more experienced workers and result in better quality construction, reducing costs in the long run.¹⁹² Even so, the Iowa Supreme Court struck down Des Moines' wage ordinance as irreconcilable with state policy and upheld Clinton's system of direct voting.¹⁹³

Perhaps the starkest example of the court's inconsistent home rule jurisprudence is in the area of animal confinements. In 1983, the court decided *City of Council Bluffs v. Cain*.¹⁹⁴ Cain, a horse breeder, owned a farm in the City of Council Bluffs.¹⁹⁵ The city passed an ordinance that imposed a number of regulations on housing farm animals and required farms within the city to be inspected and obtain a permit.¹⁹⁶ Cain violated the ordinance, was charged, and defended in part on the ground that "farm animal control cannot be the subject of a municipal ordinance . . . because the subject has been preempted by state law."¹⁹⁷ The court unanimously disagreed.¹⁹⁸

190. *City of Des Moines v. Master Builders of Iowa*, 498 N.W.2d 702 (Iowa 1993).

191. *Id.* at 704.

192. *Id.*

193. *Sheridan*, 530 N.W.2d at 695.

194. *City of Council Bluffs v. Cain*, 342 N.W.2d 810 (Iowa 1983).

195. *Id.* at 811–12.

196. *Id.* at 812.

197. *Id.*

198. *Id.* The court ultimately invalidated Cain's conviction on the ground that the ordinance was unconstitutionally vague, but the home rule discussion is relevant for

The court conceded that state law imposed significant regulations on the keeping and breeding of livestock.¹⁹⁹ But it also noted that dual regulation—a city ordinance covering the same subject as a state law—was permissible as long as the laws were not inconsistent.²⁰⁰ In applying the permit-prohibit test, the court found “no statute . . . *expressly* permitting what the challenged ordinance prohibits or *expressly* prohibiting the city from requiring a permit and fee for keeping farm animals within city limits.”²⁰¹ The court looked for an express (as opposed to implied) conflict between the state and local laws and found none. Thus, the local ordinance was upheld. *Cain* indicated a local law would be found inconsistent with a state law only if the statute expressly prohibited what the local law permitted or vice versa.²⁰² Fifteen years later, the court would change its tune considerably.

B. Goodell v. Humboldt County: 1998

Goodell v. Humboldt County is among the most influential of the Iowa Supreme Court’s municipal home rule cases.²⁰³ The case centered around four ordinances the Humboldt County Board of Supervisors enacted to regulate the construction and operation of “large livestock confinement feeding facilities” (hereinafter confinement facilities).²⁰⁴ The ordinances: (1) required confinement facilities to obtain a permit prior to construction and operation; (2) established financial security requirements designed to ensure funds would be available for any necessary cleanup or remediation of environmental contamination; (3) prohibited manure from being applied in a manner that resulted in groundwater contamination; and (4) established setback distances if confinement facilities generated toxic air emissions.²⁰⁵

The defendants, local livestock producers, challenged the ordinances on a number of grounds.²⁰⁶ The defendants first claimed that livestock confinement facilities were an important part of the statewide economy—not a “local affair” within the context of the County Home Rule

the purposes of this Note. *Id.* at 814.

199. *Id.* at 812.

200. *Id.*

201. *Id.* (emphasis added).

202. *Id.*

203. *Goodell v. Humboldt County*, 575 N.W.2d 486 (Iowa 1998).

204. *Id.* at 489 (quoting the ordinances).

205. *Id.* at 489–90.

206. *Id.* at 493.

Amendment.²⁰⁷ The court disagreed, noting that the regulations were designed primarily to protect the environment of Humboldt County and the quality of life of its citizens.²⁰⁸ Protecting the citizens and environment of a city or county clearly qualifies as a local affair and is a proper subject of local regulation. However, the court noted that local affairs often have statewide implications and that the determination of an issue as a local affair by no means prevents the legislature from imposing statewide regulations and, potentially, preempting local regulation.²⁰⁹

The defendants next claimed that the regulations constituted county zoning of agricultural property—action that had been expressly preempted by the legislature.²¹⁰ Again, the court disagreed.²¹¹ The court found that zoning refers to “regulat[ing] land use by district.”²¹² The court discarded the notion that any regulation that affects how land is used constitutes zoning, emphasizing the fact that the county regulation did not try to isolate confinement facilities or otherwise regulate their use to certain districts.²¹³ Because the regulation did not apply on a district-by-district basis, it was not an exercise of zoning.²¹⁴

The court then addressed what would become the most important issue in the case: Whether the state had preempted the county from regulating confinement facilities.²¹⁵ The court introduced its opinion by describing the various ways in which the legislature can preempt local laws. The state can expressly preempt local laws, as it has done vis-à-vis county zoning of agricultural property.²¹⁶ Express preemption involves the state clearly forbidding local regulation of a particular topic.²¹⁷ The state can also implicitly preempt local laws. Implied preemption can take two forms.

207. *Id.* at 494.

208. *Id.*

209. *Id.*

210. *Id.*; see IOWA CODE § 335.2 (2007) (expressly prohibiting county zoning of property used for agricultural purposes).

211. *Goodell*, 575 N.W.2d at 497.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. See IOWA CODE § 335.2 (2007).

217. *Goodell*, 575 N.W.2d at 492; see also *Chelsea Theater Corp. v. City of Burlington*, 258 N.W.2d 372, 373–74 (Iowa 1977) (striking down city ordinance restricting the availability of obscene materials to adults as expressly preempted by state law).

First, a state law implicitly preempts any local law that is inconsistent with state law. Second, when a state law is so extensive as to demonstrate a legislative intent to be the sole regulator in that area, it is said to occupy the field of regulation, and any local regulation is implicitly preempted.²¹⁸ As to the inconsistency strand of implied preemption, the court reiterated the permit-prohibit test for determining when a local law is inconsistent with state law.²¹⁹

With those definitions out of the way, the court proceeded to decide whether state law preempted Humboldt County's confinement facility ordinances. The only possible source of express preemption was the statutory prohibition against county zoning of agricultural property. When the court decided the ordinances did not constitute zoning, there was no further need to discuss express preemption, because it simply did not exist.²²⁰

As to implied preemption, the court first considered the "occupying the field" strand.²²¹ Determining just how extensive state regulations must be before they intend to occupy the field can be a challenge; most state regulations are extensive, but surely not all of them are intended to occupy the field. To get around this difficulty, courts often try to discern whether the legislature has displayed a desire for uniform regulation throughout the state.²²² In *Goodell*, the court examined a recently enacted law that limited nuisance suits against confinement facilities, as well as older laws regulating groundwater contamination and giving the state Environmental Protection Commission (EPC) the power to regulate the construction and operation of confinement facilities.²²³ While these regulations were indeed extensive, the court found no clear indication that the legislature desired uniform regulation of confinement facilities statewide.²²⁴ Thus, the court found no implied preemption based on the state occupying the regulatory field.

But the court did find implied preemption based on the ordinances' inconsistency with state law.²²⁵ The court engaged in a thorough analysis of the home rule statutes. It noted that a local law is only inconsistent with

218. *Goodell*, 575 N.W.2d at 493.

219. *Id.*

220. *Id.* at 497.

221. *Id.* at 497-98.

222. *Id.* at 499.

223. *Id.* at 500.

224. *Id.*

225. *Id.* at 502-06.

state law if irreconcilable with state law—defining irreconcilable as prohibiting something that the statute permits, and vice versa.²²⁶ The court also recognized its duty to harmonize state and local laws whenever possible.²²⁷ Then the court frankly admitted that a fair amount of tension existed between the permit-prohibit test and the statute that allows local governments to “set standards and requirements which are higher or more stringent than those imposed by state law.”²²⁸ If a local government sets a more stringent standard, then by definition, it must be prohibiting something that state law permits.

The court tried to reconcile this conflict by distinguishing between “higher” standards and “different” standards. The *Bryan* case, in which the City of Des Moines required police officers to have at least one year of college to be eligible for certain promotions, was cited as an example of a higher standard—a more stringent local standard that was not inconsistent with state law.²²⁹ The *Cedar Rapids Human Rights Commission* case, in which the local ordinance did not provide for judicial review of commission orders, was given as an example of a different standard—a local standard that was not merely more stringent than state law, but that was actually inconsistent with state law.²³⁰

At the same time the court seemed to recognize the express statutory ability of local governments to set standards more stringent than state law, it said this:

Another situation that could give rise to inconsistent local laws is one where the state has conditioned pursuit of an activity upon compliance with certain requirements. Any attempt by a local government to add to those requirements would conflict with the state law, because the local law would in effect prohibit what the state law permits. Stated another way, the local ordinance would prohibit an activity absent compliance with the additional requirements of local law, even though under state law the activity would be permitted because it complied with the requirements of state law. In this situation, the local

226. *Id.* at 500.

227. *Id.*

228. *Id.* at 500–01 (quoting IOWA CODE § 331.301(6)).

229. *Id.* at 501 (citing *Bryan v. City of Des Moines*, 261 N.W.2d 685, 687 (Iowa 1978)).

230. *Id.* (citing *Cedar Rapids Human Rights Comm’n v. Cedar Rapids Cmty. Sch. Dist.*, 222 N.W.2d 391, 402–03 (Iowa 1974)).

regulation would be inconsistent with state law and preempted.²³¹

This exceedingly strict version of the permit-prohibit test seems to siphon all meaning from the statutory grant of power to municipalities to impose standards more stringent than state law.

As to the Humboldt County ordinances at issue, the court held they “revise[d] the state regulatory scheme.”²³² In other words, the ordinances imposed different standards—not just higher standards—and were struck down. The analysis below looks closely at just how different the local standards really were.

Ordinance 22 required confinement facilities to obtain a county permit before beginning construction or operation.²³³ Issuance of the permit was conditioned upon the facility complying with all state and local regulations.²³⁴ If a facility began construction or operation without a county permit, the county could sue to enjoin construction or operation.²³⁵

Contrast that local regulatory scheme with the state law, which prevented the state Department of Natural Resources (DNR) from pursuing legal action against a confinement facility without first getting the approval of the EPC.²³⁶ Any entity other than the DNR could only pursue legal action if the entity was adversely affected and gave sixty days’ notice to both the DNR and the violator.²³⁷ State law also gave the EPC the authority (but not the exclusive authority) to promulgate rules regarding the construction and operation of confinement facilities.²³⁸ Finally, state law allowed counties the opportunity to provide input to the DNR on a proposed confinement facility’s compliance with state law, but left the ultimate decision-making ability to the DNR.²³⁹

The court found the county’s ability to seek enjoinder of a facility’s operation without notice to the violator or the DNR and without the EPC’s prior approval to be a different standard and inconsistent with state law.²⁴⁰

231. *Id.* (citations omitted).

232. *Id.* at 502.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 503.

240. *Id.* at 502.

The court also held that conditioning the local permit on a facility's compliance with "the county's additional requirements" would violate the permit-prohibit test.²⁴¹ Finally, the court determined that Ordinance 22 "conflicts with the limited role envisioned by the legislature for the county in the permitting process" for confinement facilities.²⁴² Thus, Ordinance 22 was inconsistent with multiple areas of state law and struck down.

However, the vast majority of the local ordinance's inconsistency—if it indeed existed—was born of necessity. The court noted time and again that the county's ordinance elevated the county to decision-maker status and violated the supposed statutory scheme of state enforcement.²⁴³ But that is the point of any local ordinance—to have decisions made locally. The only reason to enact a local ordinance is dissatisfaction with the effectiveness of state law. Further, even if the county had only desired to impose "more stringent" permitting requirements but not to have the decisions made locally, it could not have done so. The county had no power to compel the state EPC, DNR, or any other state regulatory body to enforce a local ordinance. If the county wanted to have more stringent confinement facility permitting regulations—as the county home rule act specifically said it could—it had to enforce those locally. It tried to do so, but the Iowa Supreme Court said no.

Ordinance 23 was likewise struck down under perhaps the most blatant example of the strict permit-prohibit test. The county ordinance required an operator to post financial assurance sufficient to clean up any contamination caused by the facility's construction or operation.²⁴⁴ State law had no such requirement; it simply established a manure storage indemnity fund that would supposedly reimburse counties for the costs of cleaning up after a confinement facility contamination.²⁴⁵ The additional local requirement of financial assurance triggered the permit-prohibit test because a facility could operate under state law without posting financial assurance, but it could not do so under local law. The local law prohibited what state law implicitly permitted. Thus, the local law was inconsistent and invalidated.²⁴⁶

Ordinance 24, which regulated the application of manure with the

241. *Id.* at 503.

242. *Id.*

243. *Id.* at 504.

244. *Id.*

245. *Id.*

246. *Id.*

goal of preventing groundwater contamination, was likewise invalidated.²⁴⁷ This ordinance was perhaps the easiest for the court to strike down because state law made the DNR “exclusively responsible for adopting the standards” regulating the disposal of livestock manure from confinement facilities.²⁴⁸ This is an example of what the Iowa Supreme Court has recently called “field preemption.”²⁴⁹

The court struck down Ordinance 25 as inconsistent with the state law limiting nuisance suits against confinement facilities.²⁵⁰ The ordinance regulated off-site emissions of certain toxins and authorized the county to seek an injunction against violators.²⁵¹ The relevant state law authorized nuisance suits against confinement facilities only if certain conditions, like negligent operation, were met.²⁵² The local law did not include those conditions; therefore, it permitted something—seeking an injunction without showing negligent operation—that the state law expressly prohibited.²⁵³ Consequently, it was deemed inconsistent with the state law and was struck down.

The court invalidated the entirety of Humboldt County’s attempt to regulate confinement facilities, but its holdings were not without dissent.²⁵⁴ Justice Harris agreed that Ordinance 24 was invalid and would have struck it down based on express preemption.²⁵⁵ However, he thought the other ordinances should have been upheld under the county’s home rule power.²⁵⁶ Justice Harris emphasized the policy underlying the County Home Rule Amendment, which, as he saw it, was that “local problems should be addressed by local government.”²⁵⁷ To effectuate that policy, he urged the court to “strive to uphold, rather than to thwart, efforts of counties to govern local affairs.”²⁵⁸ He emphasized the court’s duty to harmonize, whenever possible, state and local laws covering the same

247. *Id.*

248. *Id.* (quoting IOWA CODE § 455B.172(5)).

249. *City of Davenport v. Seymour*, 755 N.W.2d 533, 539 (Iowa 2008).

250. *Goodell*, 575 N.W.2d at 506–07.

251. *Id.* at 505.

252. *Id.* at 506.

253. *Id.*

254. The vote in *Goodell* was 5–2, with two justices abstaining. *Id.* at 508.

255. *Id.* at 510 (Harris, J., dissenting in part).

256. *Id.* at 509.

257. *Id.*

258. *Id.*

subject.²⁵⁹ With that premise established, Justice Harris characterized the remaining ordinances—Ordinances 22, 23, and 25—as simply more stringent standards for livestock facilities than those set forth by state law.²⁶⁰ Rather than finding a conflict between the state and local laws, he found “ample room for accommodation between the Iowa Code and the challenged ordinances.”²⁶¹

Justice Harris also emphasized the constitutional status of home rule, criticizing the majority for rejecting “a constitutional right granted to local government . . . on so frail a ground” as the local ordinances being “unfriendly to a state plan.”²⁶² Indeed, the majority allowed a judicially created test—the permit-prohibit test—to overrule a constitutional guarantee of home rule and clear legislative direction that local home rule powers should be broadly construed.

Perhaps the most telling aspect of Justice Harris’s dissent was its prognosis for local home rule in Iowa: “I have a sinking feeling that the concept of home rule for local governments, guaranteed in our constitution, will suffer under the majority holding.”²⁶³ Unfortunately, that sinking feeling has proven quite accurate, as will be demonstrated in Part III.C.

Justice Snell also dissented, but unlike Justice Harris, he would have upheld all four of the county’s ordinances.²⁶⁴ Justice Snell exhaustively reviewed the court’s home rule jurisprudence to date and concluded that the majority opinion “veered away from the course set” by that precedent.²⁶⁵ He, like Justice Harris, characterized the ordinances as merely additional local regulations, similar to those that had been upheld in prior cases.²⁶⁶ And also like Justice Harris, Justice Snell wondered

259. *Id.* at 509–10 (citing *Sioux City Police Officers’ Ass’n v. City of Sioux City*, 495 N.W.2d 687, 694 (Iowa 1993)).

260. *Id.* at 510.

261. *Id.* at 511.

262. *Id.* at 510.

263. *Id.*

264. *Id.* at 511 (Snell, J., dissenting). Justice Snell found the statutes regulating groundwater protection ambiguous and believed that a local ordinance regulating in the same area as ambiguous statutes should not be considered to conflict with those statutes. *Id.* at 517.

265. *Id.* at 511.

266. *Id.* at 512–16 (citing *Sioux City Police Officers’ Ass’n v. City of Sioux City*, 495 N.W.2d 687, 694–95 (Iowa 1993); *City of Des Moines v. Gruen*, 457 N.W.2d 340, 342 (Iowa 1990); *City of Council Bluffs v. Cain*, 342 N.W.2d 810, 813 (Iowa 1983);

whether the majority's opinion signaled an early demise to the home rule amendments enacted just a few decades earlier:

Whether the Dillon rule has been excavated from the grave or preemption has re-emerged under the new name of inconsistency, or inconsistency has swallowed the law permitting higher and more stringent standards, the majority has drained the vitality from home rule. Little is left to local government that could withstand the avarice of an inconsistency meaning so pervasive.²⁶⁷

Justice Snell thought the best way to preserve the broad intent of the home rule amendments was to require the legislature to expressly preempt local governments from regulating in a given area.²⁶⁸ That would hardly be an onerous task for the legislature, given that it has often displayed its will and ability to unambiguously and expressly preempt local action.²⁶⁹ Requiring clearly expressed preemption would comply with the spirit of the home rule amendments. And it would have the added benefit of reducing the costs and uncertainty of litigation, for the courtroom is a forum in which law is made based on not just principle, but semantics as well. "Contentious issues of policy should not be left to travel the circuitous, linguistic paths of the courts."²⁷⁰

The *Goodell* case is now largely irrelevant vis-à-vis confinement facilities because the legislature has since expressly preempted counties from regulating confinement facilities.²⁷¹ Nevertheless, the court's analysis

Bryan v. City of Des Moines, 261 N.W.2d 685, 687 (Iowa 1978)).

267. *Id.* at 517.

268. *Id.*

269. *See* Chelsea Theater Corp. v. City of Burlington, 258 N.W.2d 372, 373 (Iowa 1977) (striking down a local ordinance regulating obscenity because of express statutory preemption); *see also* IOWA CODE § 335.2 (2007) (prohibiting county zoning of property used for agricultural purposes).

270. *Goodell*, 575 N.W.2d at 517 (Snell, J., dissenting). *See also* City of Davenport v. Seymour, 755 N.W.2d 533, 538 (Iowa 2008) (in the preemption context, "express preemption offers the highest degree of certainty with the added benefit of discouraging unseemly internecine power struggles between state and local governments").

271. *See* IOWA CODE § 331.304A (2007) ("A county shall not adopt or enforce county legislation regulating a condition or activity occurring on land used for the production, care, feeding, or housing of animals . . ."); *see also* Worth County Friends of Agric. v. Worth County, 688 N.W.2d 257, 264–65 (Iowa 2004) (finding local ordinance regulating confinement feeding operations expressly preempted by state law and holding that express preemption did not violate the County Home Rule Amendment).

of municipal home rule in *Goodell* continues to have profound implications on many other issues.

C. *Post-Goodell: 1998–2008*

The Iowa Supreme Court's ruling in *Goodell*, the most notable aspect of which was its newer and stricter permit-prohibit test, seemed to greatly restrict—if not ban altogether—a municipality's ability to adopt local regulations more stringent than state law. In the few on-point cases that have been decided in the last decade, however, the impact of *Goodell* has been mixed.

In one of the earliest post-*Goodell* cases, *BeeRite Tire Disposal/Recycling, Inc. v. City of Rhodes*, the Iowa Court of Appeals upheld additional local regulations on tire disposal facilities.²⁷² The relevant additional local regulations: (1) required a permit for a tire disposal facility processing more than 100 tires, whereas the state law required a permit only for facilities processing more than 500 tires; (2) required an additional \$100 permit fee payable to the city, whereas the state law required only an \$850 fee payable to the DNR; (3) limited the total size of the storage area at a tire disposal facility to 45,648 cubic feet, whereas the state law limited storage to 50,000 cubic feet per pile of tires; and (4) required a tire disposal facility to be enclosed by a solid metal fence, whereas the state law only required a chain-link fence.²⁷³

Citing *Goodell*, the court explained the permit-prohibit test and noted its tension with the statutory ability of cities to set standards more stringent than state law.²⁷⁴ Then the court said:

It would appear that any standard made more stringent by local law . . . would necessarily be irreconcilable with that law: inherent in the act of further restricting a given activity is the prohibition of some previously permissible action. Nevertheless, we will attempt to determine whether the stricter regulations in this case could be construed under *Goodell* as still in harmony with the statutory scheme for tire storage and disposal.²⁷⁵

In ultimately upholding Rhodes's additional regulations, the court

272. *BeeRite Tire Disposal/Recycling, Inc. v. City of Rhodes*, 646 N.W.2d 857 (Iowa Ct. App. 2002).

273. *Id.* at 858.

274. *Id.* at 859.

275. *Id.*

noted that unlike Humboldt County's regulations at issue in *Goodell*, the tire disposal regulations did not significantly revise the statutory scheme of regulation.²⁷⁶ To the contrary, the ordinances only "further restrict the already-enforceable restrictions" in state law.²⁷⁷ The court found no frustration of the statutory purpose and no contradiction of the statutory scheme.²⁷⁸

In concluding its opinion, the court made two salient points that help define municipal home rule in the post-*Goodell* era. First, the court, addressing the statute that grants cities the power to set standards more stringent than state law, said, "were it not effective under facts such as these, Iowa Code section 364.3(3) would be meaningless."²⁷⁹ That section of the Code specifically allows cities to "set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise."²⁸⁰ There is not a more simple or visible example of a "more stringent" regulation than requiring a solid metal fence instead of a chain-link fence. Under state law, BeeRite Tire was permitted to operate with only a chain-link fence. Under local law, BeeRite Tire was prohibited from operating with only a chain-link fence. Technically, Rhodes's ordinance prohibited what state law permitted. Nonetheless, the Iowa Court of Appeals properly rejected a reading of the permit-prohibit test so strict as to border on absurdity.²⁸¹

Second, the court contrasted the relatively insignificant effect the tire disposal business has on Iowa's economy with the supreme position that the agriculture industry holds in the state.²⁸² This is noteworthy because it shows courts giving greater deference to local governments to use their home rule powers when the subject of local regulation is not particularly important.²⁸³ Or, perhaps agriculture is simply in a class of its own in Iowa,

276. *Id.* at 859–60.

277. *Id.* at 860.

278. *Id.*

279. *Id.* at 861.

280. IOWA CODE § 364.3(3) (2007).

281. *BeeRite Tire*, 646 N.W.2d at 859.

282. *Id.* at 861.

283. See also *Goodenow v. City of Maquoketa*, 574 N.W.2d 18, 26 (Iowa 1998) (upholding the city's requirement that landowners mow and clear weeds in a city-owned right-of-way located between their property and the "traveled portion" of the adjacent road, even though state law only required landowners to maintain the right-of-way up to the "curb line," a smaller portion of the right-of-way than the city law covered). The home rule amendments, of course, were intended to confer broad power on municipalities to address all issues, both significant and insignificant, unless

deserving of special protection by the legislature, the judiciary, and local governments.

Just one year after *BeeRite Tire*, the Iowa Supreme Court reiterated its relatively strict interpretation of local home rule authority. In *James Enterprises, Inc. v. City of Ames*, the court struck down a local ordinance that essentially prohibited smoking in public places, including restaurants, between 6:00 a.m. and 8:30 p.m.²⁸⁴ The relevant state law also generally prohibited smoking, but expressly allowed restaurants to create designated smoking areas.²⁸⁵ The state law also displayed a desire for uniform statewide application, specifically stating that state law “shall supersede any local law or regulation which is inconsistent with” the state law.²⁸⁶ That language seems to expressly preempt any inconsistent local ordinance. (It also seems superfluous, because the home rule amendments themselves prohibit local ordinances that are inconsistent with state law.) However, the state law specifically contemplated additional local ordinances. It allowed restaurant owners to designate smoking areas, “except in places in which smoking is prohibited by the fire marshal or by other law, ordinance, or regulation.”²⁸⁷

On the one hand, the statute specifically contemplates local ordinances banning smoking altogether in certain public places. On the other hand, the statute expresses the desire for uniform statewide application of “state and local laws” and specifically supersedes inconsistent local laws.²⁸⁸ The question was whether a local law banning smoking in restaurants during most of the day was inconsistent with the state law. The court found that it was inconsistent and struck down the Ames smoking ban.²⁸⁹

The court’s ruling emphasized that the state law expressed a desire for uniform application of smoking regulations. The court found the desire for uniformity was expressed clearly enough to overrule both the general home rule statute allowing cities to set standards more stringent than state law and the specific state law contemplating a local ordinance’s total

preempted by the legislature.

284. *James Enters., Inc. v. City of Ames*, 661 N.W.2d 150, 151 (Iowa 2003).

285. *Id.* at 152.

286. *Id.* at 153 (quoting IOWA CODE § 142B.6 (2001)).

287. *Id.* at 152 (quoting IOWA CODE § 142B.2 (2001)).

288. *Id.* at 153 (quoting IOWA CODE § 142B.6 (2001)).

289. *Id.* at 154.

prohibition of smoking in public places.²⁹⁰ The order in which the laws were enacted was crucial. Iowa Code section 142B.6, which displayed the desire for uniform application of smoking regulations, was enacted in 1990, three years after Iowa Code section 142B.2, which contemplated a local ban on smoking.²⁹¹ The court found that the most recently enacted statute foreclosed any additional local smoking regulation, because any local smoking ordinance would destroy the desired statewide uniformity.²⁹²

What the court failed to note is that the newer statute (section 142B.6) itself contemplates local ordinances. The statute seeks uniform application of “state and local laws” and only supersedes local laws that are “inconsistent” or in conflict with the state law.²⁹³ The plain wording of the statute recognizes the possibility that local governments may enact ordinances regulating smoking and implicitly directs the court to uphold those regulations unless they conflict with state law.²⁹⁴

In this situation, the court should have analyzed whether a conflict existed under the permit-prohibit test. Under a strict reading of that test, the result would likely have come out the same way. The restaurants were permitted to have designated smoking areas by state law but were prohibited from doing so by local law. Based on this construction, the law would likely have been struck down. On the other hand, the ordinance could also be construed as a more stringent local regulation on smoking. State law prohibited smoking but allowed restaurant owners to designate smoking areas. The city ordinance went one step further by prohibiting smoking altogether during designated time periods. The city ordinance also furthered the general policy of the state law, which was to limit smoking in public places.

By avoiding an analysis under the permit-prohibit test, the court missed an opportunity to clarify Iowa’s home rule jurisprudence. A ruling based on the permit-prohibit test would have solidified *Goodell* and its extremely strict version of the permit-prohibit test. The actual ruling in *James Enterprises*—which seems based on implied preemption via the state occupying the regulatory field—leaves open the possibility that the permit-prohibit test is not as strict as the *Goodell* court found.

290. *Id.* at 153–54 (citing IOWA CODE §§ 142B.2, 142B.6 (2001)).

291. *Id.* at 154.

292. *Id.*

293. *Id.* at 153 (quoting IOWA CODE § 142B.6 (2001)).

294. IOWA CODE § 142B.6 (2001).

A few of the Iowa Supreme Court's most recent home rule cases provide further insight into the impact *Goodell* may have on future home rule disputes. In April 2006, the court invalidated an administrative fee the City of Des Moines charged on applications for liquor licenses and beer and wine permits.²⁹⁵ State law already imposed varying fees for alcohol permits and allowed the city to retain a portion of the state fee.²⁹⁶ The court found the local fee conflicted with state law, and ultimately invalidated the fee based on the occupying-the-field strand of implied preemption.²⁹⁷

But the court also engaged in a rather thorough discussion of home rule authority, including an analysis of the different ways the state can preempt local government action. For instance, one aspect of the local ordinance established an administrative fee on license transfers.²⁹⁸ The court held that portion of the ordinance was expressly preempted by a state law allowing a state agency to set a uniform transfer fee to be collected by all local governments.²⁹⁹ In also striking down the fees that applied to license issuances and renewals, the court focused on the ordinance's departure from the statutory procedure. Iowa Code section 364.6 requires local governments to "substantially comply" with any statutory procedure set out in state law.³⁰⁰ The court found the additional fees, the lack of a refund mechanism at the local level for applications that are denied, and the city's failure to report to the state alcoholic beverages division the amount of local fees collected all disturbed, rather than complied with, the statutory scheme.³⁰¹

Then the Iowa Supreme Court addressed, for the first time, the rationale used by the Iowa Court of Appeals to uphold the Rhodes tire ordinance in *BeeRite Tire*. The rationale in *BeeRite Tire* was that the city's ordinance was merely comprised of more stringent requirements than state law, the ordinance enhanced rather than contradicted the policy underlying the state law, and the ordinance was thus a valid exercise of home rule.³⁰²

295. Iowa Grocery Indus. Ass'n v. City of Des Moines, 712 N.W.2d 675, 683 (Iowa 2006).

296. *Id.* at 677.

297. *Id.* at 682–83.

298. *Id.* at 680.

299. *Id.*

300. IOWA CODE § 364.6 (2007); *see also id.* § 331.301(5) (applying the same requirement to counties).

301. *Iowa Grocery*, 712 N.W.2d at 681.

302. *BeeRite Tire Disposal/Recycling, Inc. v. City of Rhodes*, 646 N.W.2d 857,

Without directly approving or disapproving that rationale, the court found that it was not applicable to the alcohol license fee at issue in *Iowa Grocery Industry Ass'n v. City of Des Moines*.³⁰³ The court characterized Des Moines' administrative fee as an "extra hurdle" that "disrupts the uniformity" of the state law and "does more than merely increase the details of [state] regulation" already imposed.³⁰⁴

But the court did not make much of an effort to distinguish *BeeRite Tire*, which itself involved (among other things) an ordinance that imposed a local fee on top of an existing state fee.³⁰⁵ *Iowa Grocery* seems to minimize *BeeRite Tire*'s importance, at least in an area that seems sufficiently important (like regulation of alcohol or agriculture) to deserve uniform statewide regulation.

It appeared as though the Iowa Supreme Court was affirming the restricted view of home rule it set out in *Goodell*. But just a few months after *Iowa Grocery* was decided, the Iowa Supreme Court upheld a city's use of home rule authority in *City of Asbury v. Iowa City Development Board*.³⁰⁶

Asbury involved an annexation dispute between the cities of Asbury and Dubuque.³⁰⁷ Asbury sued the Development Board, a state agency, after the board approved Dubuque's proposed annexation.³⁰⁸ Among other complaints, Asbury contended that Dubuque did not have the power to offer certain financial benefits—deferred or eliminated payments for certain city services, including sewer and water hookup fees and installation costs—to landowners in the area to be annexed.³⁰⁹ State law specifically allowed cities to provide a partial property tax exemption to owners in the annexed area but did not mention the other benefits Dubuque offered to entice owners to voluntarily agree to the annexation.³¹⁰ In perhaps its most concise and accurate description of how to analyze municipal home rule claims, the court said, "The question is not

860 (Iowa Ct. App. 2002).

303. *Iowa Grocery Indus. Ass'n v. City of Des Moines*, 712 N.W.2d 675, 682 (Iowa 2006).

304. *Id.* at 681–82.

305. *BeeRite Tire*, 646 N.W.2d at 858.

306. *City of Asbury v. Iowa City Dev. Bd.*, 723 N.W.2d 188, 199 (Iowa 2006).

307. *Id.* at 190.

308. *Id.*

309. *Id.* at 198.

310. *Id.* at 198–99 (citing IOWA CODE § 368.7 (2003)).

whether a statute gives a city authority. Instead, the question is whether a statute forbids it.”³¹¹ There was, of course, no such forbiddance in state law.³¹² The court upheld the city’s authority to offer innovative financial incentives as long as the incentives related to fees and not taxation, which is one of the few areas in which cities and counties have been expressly forbidden to act under their home rule powers.³¹³

The *Asbury* court’s description of municipal home rule power is as broad as it is unprecedented. A city or county can use its home rule powers unless a statute “forbids it.”³¹⁴ That is a far cry from the court’s typical home rule analysis and it includes no mention at all of inconsistency, uniformity, or conflict. Perhaps this broad view of home rule portends the new direction of the court’s home rule jurisprudence.

Or perhaps not. The tone of a more recent home rule opinion from the Iowa Supreme Court is decidedly less deferential to local governments—and gives less significance to the impact of the home rule amendments—than the court had expressed in *Asbury* and even earlier.³¹⁵ *Berent v. City of Iowa City* involved three proposed amendments to Iowa City’s charter, one of which required the city manager and chief of police to stand for a retention vote every four years.³¹⁶ If the citizens voted against retention, the appointed officials would lose their jobs.³¹⁷ The court found the proposed charter amendment inconsistent with state law, which required appointed officials to receive a hearing and written notice of the reasons for their termination before they were fired.³¹⁸ The retention

311. *Id.* at 199.

312. As this Note shows, statutes rarely forbid local governments from exercising home rule authority; courts, on the other hand, are another story.

313. *Asbury*, 723 N.W.2d at 199; *see also* IOWA CONST. art. III, §§ 38A, 39A (stating that cities and counties “shall not have power to levy any tax unless expressly authorized by the general assembly”).

314. *Asbury*, 723 N.W.2d at 199.

315. Compare *Berent v. City of Iowa City*, 738 N.W.2d 193, 196 (Iowa 2007) (describing the adoption of the City Home Rule Amendment in 1968 as merely “relax[ing], to some extent,” the state’s “tight legislative grip over municipal affairs”), with *Asbury*, 723 N.W.2d at 199 (“The question is not whether a statute gives a city authority. Instead, the question is whether a statute forbids it.”), and *Goodell v. Humboldt County*, 575 N.W.2d 486, 509 (Iowa 1998) (Harris, J., dissenting) (characterizing the County Home Rule Amendment as a “vast change . . . intended to revolutionize the relationship between state and local governments”).

316. *Berent v. City of Iowa City*, 793 N.W.2d 193, 197–98 (Iowa 2007).

317. *Id.* at 208.

318. *Id.*

proposal did not meet those two requirements. It essentially permitted what state law prohibited—an appointed city official could be fired without receiving notice and without an opportunity to be heard.³¹⁹ That meant the retention vote proposal conflicted with state law and was not a valid exercise of home rule power.³²⁰

In addition to concluding that the proposed charter amendment conflicted with the letter of state law, the *Berent* court strongly implied that the retention proposal was inconsistent with the spirit of state law.³²¹ State law required city managers and chiefs of police to be appointed based on their qualifications and specifically prohibited appointing bodies from considering an applicant's political affiliation.³²² The retention proposal, like all elections, would necessarily include an element of politics. Because of the political aspect of the retention proposal, the court expressed "doubt" that the proposal was "consistent with the legislative intent" of the state law.³²³

Note, however, that the retention proposal's political element did not quite violate the permit-prohibit test because state law only prohibited hiring a city employee based on political affiliation.³²⁴ There was no express prohibition on firing a city employee because of political affiliation. Even if firing an employee for political reasons was prohibited by state law, firing an employee via a political process (i.e., the retention referendum) is not the same as firing that person for political reasons. Even though the political element of the retention vote did not violate the permit-prohibit test, the court displayed a willingness to invalidate a local law based on its inconsistency with the spirit of state law. This enhanced definition of "inconsistency" seems to allow courts even greater leeway to strike down local laws enacted under home rule authority.

In its most recent home rule decision, however, the Iowa Supreme Court rejected an opportunity to use that leeway and upheld a local ordinance that differed substantially from state law. The case, *City of Davenport v. Seymour*, centered around a dispute over the city's authority to use "'automated traffic enforcement' (ATE) systems" to catch speeders

319. *Id.*

320. *Id.* at 210.

321. *Id.* at 207.

322. *Id.* (citing IOWA CODE § 372.13(4) (2001)).

323. *Id.*

324. *Id.* at 207–08.

and red-light violators.³²⁵ Seymour received a ticket based on a speeding violation captured by a speed camera, part of Davenport's ATE system.³²⁶ He challenged the ticket, claiming the ATE system had been "preempted by traffic regulations and enforcement mechanisms contained in Iowa Code chapter 321."³²⁷ (Seymour also initially claimed a violation of due process, but he had dropped that claim by the time his case reached the Iowa Supreme Court.)³²⁸

After surveying the rise of home rule in Iowa, the court described the three types of possible preemption as "express preemption," implied "conflict preemption," and implied "field preemption."³²⁹ Seymour did not argue express preemption, so the court considered whether Davenport's ATE system conflicted with the state's traffic laws and whether the state's traffic laws occupied the field of traffic regulation.³³⁰

Iowa's state laws extensively regulate motor vehicle traffic, and Davenport's ATE system differed significantly from the state law.³³¹ State law imposes criminal penalties; Davenport's ordinance imposes civil penalties. State law penalizes the driver of the vehicle; Davenport's ordinance penalizes the owner of the vehicle. Violations of the state law appear on the violator's driving record; violations of Davenport's ordinance are not a part of that record.³³² Further, Davenport's ordinance arguably creates different proof standards than those applicable under state law, and it certainly uses a different citation form and imposes different fine schedules.³³³ Seymour argued all of these differences created "an entirely new enforcement regime," and thus conflicted with state law.³³⁴ Davenport, on the other hand, claimed its ATE system ordinance was "merely supplemental to provisions of the state code."³³⁵

The court analyzed the potential conflict under the now-familiar permit-prohibit test. But importantly, it focused on the conduct prohibited

325. City of Davenport v. Seymour, 755 N.W.2d 533, 536 (Iowa 2008).
326. *Id.* at 537.
327. *Id.*
328. *Id.*
329. *Id.* at 538–39.
330. *Id.* at 539.
331. *Id.* at 541.
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.*

under state law and Davenport's ordinance, and not on the method used to prohibit that conduct.³³⁶ Emphasizing its duty to reconcile state and local regulations whenever possible, the court found that Davenport's ordinance did not permit conduct prohibited by state law or prohibit conduct permitted by state law.³³⁷ Under both city ordinance and state law, running a red light and exceeding the speed limit are illegal conduct. Davenport identifies and punishes the illegal conduct by using ATE systems and civil fines, rather than law enforcement officers and criminal fines, but that difference does not create the type of conflict sufficient to preempt home rule authority.

As for field preemption, the court found statutory language both supporting and opposing a finding of field preemption. Iowa's state traffic laws are very extensive, and their "length, breadth, and comprehensiveness" "suggest[] that field preemption may be at work."³³⁸ Additionally, Iowa Code section 321.235 requires the state's traffic laws to "be applicable and uniform through this state."³³⁹ However, the same section expressly allows local governments to "adopt additional traffic regulations which are not in conflict with the provisions of" Iowa Code chapter 321.³⁴⁰ The court focused on the latter language, found it to "expressly vest[] power in municipalities to enact additional traffic regulations," and held that express vesting of power "eliminates any basis for field preemption."³⁴¹ In fact, the court decided this express grant of power to municipalities to enact additional traffic ordinances "not in conflict with" the state laws showed that "the legislature has expressly declined to preempt the field, so long as conflicts are not present."³⁴² The court cited favorably to a California case "finding that general legislative statements of intent to establish comprehensive regulation do not preempt [the] field where [the] statute also expressly authorizes local action."³⁴³

Another important aspect of *Seymour* is its rejection of the doctrine of *expressio unius est exclusio alterius* in the home rule context. Generally, that doctrine holds that the express mention of one thing implies the

336. *Id.* at 541–42.

337. *Id.*

338. *Id.* at 543.

339. IOWA CODE § 331.235 (2007).

340. *Id.*

341. *Seymour*, 755 N.W.2d at 543.

342. *Id.*

343. *Id.* (citing *Big Creek Lumber Co. v. County of Santa Cruz*, 136 P.3d 821, 833 (2006)).

exclusion of others. As applied to *Seymour*, it might dictate that the state's imposition of criminal penalties for speeding and red-light violations excludes cities' ability to impose civil penalties on those same violations.³⁴⁴ But the court held that to apply the doctrine in the home rule context would "resurrect[]" "the long-deceased Dillon Rule."³⁴⁵ Instead, "[i]n the context of state-local preemption, the silence of the legislature is not prohibitory but permissive."³⁴⁶

Overall, *Seymour* may signal a shift toward broader home rule authority for Iowa's municipalities. The analysis of field preemption, in particular, seems to stray from recent Iowa Supreme Court decisions (particularly *James Enterprises*), and the complete rejection of *expressio unius est exclusio alterius* in home rule cases is a welcome sign for cities and counties. However, home rule proponents ought not get too excited over this new analysis. After all, Davenport's ATE system ordinance did not restrict conduct in a way substantively different from state law; it merely imposed a different mechanism for identifying and punishing conduct already prohibited by state law.³⁴⁷ If the ultimate impact of *Seymour* is merely to allow municipalities flexibility in the method of punishing conduct that is itself already regulated under state law, and if *Seymour*'s analysis does not result in greater municipal flexibility to substantively regulate conduct by imposing restrictions that go beyond state law, then its new analytical structure may not signify the expansion of home rule authority that it seems to.

IV. THE FUTURE OF HOME RULE IN IOWA: IMPLICATIONS AND RECOMMENDATIONS

The current state of municipal home rule authority in Iowa is substantially unclear. At times local governments have been allowed to impose standards more stringent than state law.³⁴⁸ Other times the Iowa Supreme Court has invalidated local ordinances that could, at least under a

344. *Id.*

345. *Id.*

346. *Id.* (citation omitted).

347. *Id.* at 542 ("whether a municipal ordinance is in conflict [with a state law] is not determined by the penalties prescribed, but whether the ordinance permits or licenses that which the state prohibits or forbids or vice versa").

348. See, e.g., *Bryan v. City of Des Moines*, 261 N.W.2d 685, 687 (Iowa 1978) (upholding the city's promotion requirements for police officers); *BeeRite Tire Disposal/Recycling, Inc. v. City of Rhodes*, 646 N.W.2d 857, 861 (Iowa Ct. App. 2002) (upholding local tire storage regulations).

broad version of home rule, be interpreted as additional requirements that merely make the local law more stringent than state law.³⁴⁹ The Iowa Code clearly allows local governments to set standards more stringent than state law, but it also allows the state legislature to “provide[] otherwise.”³⁵⁰ The most difficult questions are determining when exactly the legislature provides otherwise and when a local ordinance is not merely a more stringent standard but an actual revision to the state’s regulatory scheme. A number of significant policy issues are being decided by municipalities today, and some of them may be subject to challenge under the court’s home rule jurisprudence. When considering and enacting these policies, local officials need to know the true extent of their home rule authority.

One issue that seems ripe for a home rule challenge is sex offender residency. Iowa law prohibits certain convicted sex offenders from living within 2,000 feet of a school or child care facility.³⁵¹ Many local governments, spurred by a desire to protect their citizens, have expanded the state ban. The City of Oelwein, for example, recently enacted an ordinance prohibiting all registered sex offenders from entering within 250 feet of a school, child care facility, public swimming pool, recreation center, library, or bike trail.³⁵² The ordinance has three significant changes from state law: (1) it prohibits sex offenders from even entering—as opposed to living in—an area within 250 feet of a school or child care facility; (2) it expands the list of restricted facilities to include public swimming pools, recreation centers, libraries and bike trails; and (3) it applies to all sex offenders, not just “child sex offenders.”³⁵³ To determine if the Oelwein ordinance is constitutional under the city’s home rule authority, one has to ask a number of questions: Does the local ordinance impose additional standards more stringent than the state law? Does the ordinance prohibit what state law permits? Does it significantly revise the statutory scheme?

The answer to the first two questions is clearly yes. The ordinance expands the areas sex offenders are prohibited from living in and also

349. See, e.g., *James Enters., Inc. v. City of Ames*, 661 N.W.2d 150, 154 (Iowa 2003) (striking down local smoking regulations); *Goodell v. Humboldt County*, 575 N.W.2d 486, 508 (Iowa 1998) (striking down local regulation of confinement facilities); *City of Des Moines v. Master Builders of Iowa*, 498 N.W.2d 702, 704 (Iowa 1993) (striking down a local prevailing wage ordinance).

350. IOWA CODE § 364.3(3) (2007).

351. *Id.* § 692A.2A.

352. Oelwein, Iowa, Ordinance 1057 (Apr. 24, 2006).

353. *Id.*

prohibits their mere presence in those areas.³⁵⁴ Certainly those regulations are more stringent than state law, but they appear to further the purpose of the state law—protecting Iowa’s children. Because the local ordinance furthers, rather than frustrates, the statute’s purpose, it should be upheld.

On the other hand, the ordinance quite obviously prohibits what the statute permits. For example, suppose a registered sex offender moves to Oelwein after the ordinance’s adoption. State law would permit the sex offender to live right next door to a public swimming pool. Oelwein’s ordinance would prohibit that. Does that mean the ordinance is inconsistent with state law? Not under the Iowa Supreme Court’s original home rule jurisprudence, because state law does not *expressly* permit a sex offender to live next door to a public swimming pool. Instead, state law *implicitly* permits that to happen because the Iowa Code does not forbid it. Under the court’s original home rule analysis, a local ordinance only violated the permit-prohibit test if it prohibited an activity that a state law expressly permitted.³⁵⁵ Under the court’s modern home rule jurisprudence, however, implied statutory permission might well be sufficient to invalidate a local law under the permit-prohibit test.³⁵⁶

The answer to the third question posed above—whether the Oelwein ordinance significantly revises the statutory scheme for restricting the residency of sex offenders—is unclear. But it is the most important of the three questions because it appears to be the focus of the Iowa Supreme Court’s home rule analysis. The statutory power of municipalities to impose local regulations more stringent than state law is routinely downplayed, if not altogether ignored, in the judicial arena. And the permit-prohibit test has always been an overly simplistic tool for analyzing serious division-of-power issues. So courts are left to consider whether a local ordinance significantly revises a statutory scheme. This is necessarily a fact-dependent test, which is another way of saying it does not provide much guidance to local officials, citizens, or district courts.

In the sex offender residency context, some local ordinances are likely

354. *Id.* The Oelwein ordinance includes certain exceptions. For example, it does not apply to sex offenders who lived in a restricted area before the ordinance was enacted, and it allows parents who are sex offenders to transport their children to “an event within the restricted area” and to observe the event. *Id.*

355. *See* City of Council Bluffs v. Cain, 342 N.W.2d 810, 812 (Iowa 1983).

356. *See* Iowa Grocery Indus. Ass’n v. City of Des Moines, 712 N.W.2d 675, 681–82 (Iowa 2006); Goodell v. Humboldt County, 575 N.W.2d 486, 501 (Iowa 1998). *But see* City of Davenport v. Seymour, 755 N.W.2d 533 (Iowa 2008); BeeRite Tire Disposal/Recycling, Inc. v. City of Rhodes, 646 N.W.2d 857, 861 (Iowa Ct. App. 2002).

to be upheld. That is because Iowa Code chapter 692A, which provides for the sex offender registry and imposes residency restrictions, does not display a desire for statewide uniformity or reserve exclusive regulation of sex offenders to the state.³⁵⁷ There is no express preemption and no implied preemption via the “occupying the field” strand. Implied preemption would only exist if a local ordinance was inconsistent with state law. Oelwein’s ordinance, for example, seems especially susceptible to challenge as inconsistent with state law. The fact that the ordinance restricts where sex offenders can enter, in addition to where they can reside, seems to revise the statutory scheme. Additionally, the Oelwein presence restriction applies to all registered sex offenders, while the state residency restriction only applies to sex offenders who have committed crimes involving a minor.³⁵⁸ Those two changes may be significant enough to be considered revisions to the statutory scheme, in which case the ordinance would likely be invalidated. A recently enacted Mason City ordinance may also be susceptible to challenge. That ordinance restricts sex offenders from being present in certain “exclusionary zones” within the city, including playgrounds, skate parks, and tennis courts.³⁵⁹ In that context, it is very similar to the Oelwein ordinance. But the Mason City ordinance stands a better chance of being upheld because, like the state law, it only applies to “child sex offenders,” not all sex offenders.³⁶⁰

For a local sex offender ordinance to stand the best chance of being upheld, it should work within the context of the state law and add to the details already set out by the statute. A local sex offender ordinance would likely be upheld if it is limited to: (1) adding to the list of places within a certain distance of which a child sex offender may not reside and (2) expanding the restricted area. An ordinance that restricted child sex offenders from living within 3,000 feet of schools, day care facilities, and libraries, for example, would likely be upheld as a local regulation more stringent than state law and not a revision to the statutory scheme. Expanding the scope of people covered by the residency restriction to include all sex offenders or changing the type of restriction from residency to presence would be more drastic departures from state law and would likely lead to a local ordinance being struck down as inconsistent with state law.

357. See IOWA CODE ch. 692A (2007).

358. Compare Oelwein, Iowa, Ordinance 1057, with IOWA CODE § 692A.2A (2007).

359. MASON CITY, IOWA, CODE ch. 8 (2007).

360. *Id.*

Campaign finance restrictions are another area in which local regulations enacted under home rule authority may be subject to challenge. Iowa has no statutory limit on the amount of money individuals can contribute to candidates for state or local offices.³⁶¹ State law prohibits contributions from corporations and certain other business entities,³⁶² prohibits contributions from lobbyists during certain times,³⁶³ and requires disclosure of all contributions above a certain level.³⁶⁴ But there is no restriction on the dollar amount that an individual can contribute to a candidate for state or local office.

Iowa City, however, has enacted a local campaign finance ordinance that limits contributions to candidates (or their committees) for municipal office to \$100 per person, per election.³⁶⁵ The ordinance clearly prohibits what state law permits. Under state law, and in most cities across Iowa, any person can contribute any amount to any candidate for local office and the candidate can accept that contribution. In Iowa City, a person cannot contribute more than \$100 per election to a given candidate, and the candidate cannot accept a contribution in excess of \$100. The Iowa City ordinance fails the permit-prohibit test.

This is a unique situation because state law is entirely silent on the issue of limiting personal campaign contributions. There are no state regulations relating to the size of personal campaign contributions, so Iowa City's ordinance can hardly be called an additional, more stringent local regulation. In the same sense, Iowa City's ordinance does not revise the statutory scheme for limiting personal campaign contributions because there is no statutory scheme capable of revision. On the other hand, state law does provide a broad campaign finance regulatory scheme, and it specifically requires disclosure of contributions and prohibits certain contributions altogether.³⁶⁶ While there is no express preemption, an argument could be made that the state intended to occupy the regulatory field of campaign finance regulation. The legislature requires disclosure of all individual contributions over \$25 to candidates for municipal office, so it clearly contemplated personal campaign contributions when it drafted the

361. See IOWA CODE ch. 68A (campaign finance restrictions).

362. *Id.* § 68A.503.

363. *Id.* § 68A.504.

364. *Id.* § 68A.402A.

365. IOWA CITY, IOWA, CODE § 1-9-2 (2008), available at http://sterling.webine.ss.com/codebook/index.php?book_id=320 (last visited Oct. 22, 2008).

366. See IOWA CODE ch. 68A.

law.³⁶⁷ The absence of any state restriction on personal contributions—particularly when coupled with the prohibition on corporate contributions and the restriction on lobbyist contributions during and near the legislative session—likely displays the legislature’s preferred policy that personal contributions not be limited. Even if that is true, the existence of home rule authority should allow a municipality’s preferred policy to be implemented notwithstanding any implicit state policy to the contrary. After all, “[i]n the context of state-local preemption, the silence of the legislature is not prohibitory but permissive.”³⁶⁸

This issue provides a good forum for urging the Iowa Supreme Court to change its home rule analysis. Iowa’s state law arguably demonstrates a policy preference that personal contributions to candidates for state or local office not be limited. Iowa City’s local law clearly demonstrates the opposite policy preference—personal contributions should be limited and quite strictly at that.³⁶⁹ So which law should prevail? The local ordinance should prevail because the legislature had the opportunity to unequivocally implement its policy preference statewide, and it did not do so.

The Iowa legislature has demonstrated time and again that it knows how to expressly preempt local governments when it wants to.³⁷⁰ Municipal ordinances enacted in the face of such express preemption must surely fail. Similarly, the Iowa Code is full of express prohibitions of certain conduct. When a local ordinance seeks to permit conduct that is unambiguously prohibited by state law, the local ordinance must fail. Thus, it seems clear that Iowa courts should continue to invalidate local ordinances when the state has expressly preempted local regulation and when a local ordinance permits what state law expressly prohibits.³⁷¹

367. *Id.* § 68A.402A(1)(b).

368. *City of Davenport v. Seymour*, 755 N.W.2d 533, 544 (Iowa 2008) (citation omitted).

369. *See* IOWA CITY, IOWA, CODE § 1-9-2 (2008) (limiting personal contributions to \$100).

370. *See* *Chelsea Theater Corp. v. City of Burlington*, 258 N.W.2d 372, 373 (Iowa 1977) (striking down a city ordinance restricting the availability of obscene materials to adults as expressly preempted by state law); *see also* IOWA CODE § 335.2 (prohibiting county zoning of property used for agricultural purposes); *id.* § 331.304A (prohibiting county regulation of confinement facilities).

371. *See, e.g.*, IOWA CODE § 692A.2A(2) (a child sex offender “shall not reside within two thousand feet of” a school or child care facility). A local ordinance permitting an offender to live within 2,000 feet of a school should be struck down as violating the permit-prohibit test. *See also id.* § 331.301(6) (“A county shall not set standards . . . less stringent than those imposed by state law . . .”).

However, resolving a conflict between a state law expressly permitting certain conduct and a local law prohibiting that conduct is not so easy. What makes the resolution more difficult is the presence of Iowa Code sections 331.301(6) and 364.3(3), which expressly allow counties and cities to enact standards more stringent than state law.³⁷² As the *BeeRite Tire* case shows, any more stringent local standard—even one as innocuous as requiring a solid metal fence instead of a chain-link fence—necessarily prohibits what the state law permits.³⁷³ But, because of the statutory grant of power enabling municipalities to set standards more stringent than state law, that should be allowed; the permit-prohibit test should not apply. The local ordinance ought to be upheld because doing so would effectuate the broad grant of power that the home rule amendments and their statutory supplements were intended to confer. Absent express preemption or field preemption shown by a clear statement expressing the desire for uniform statewide application of state regulations, the permit-prohibit test should not apply to situations in which a local ordinance seeks to prohibit what state law permits.³⁷⁴ That is true even when the state law expressly permits an activity, as in *James Enterprises*.³⁷⁵

372. *Id.* §§ 331.301(6), 364.3.

373. *See BeeRite Tire Disposal/Recycling, Inc. v. City of Rhodes*, 646 N.W.2d 857, 858 (Iowa Ct. App. 2002).

374. The most egregious conflicts between prohibitory local laws and permissive state laws could still be invalidated based on conflict preemption, but the test should require direct and irreconcilable conflict. For example, in *City of Clinton*, a city ordinance prohibited the building of railroad tracks across city streets, while a state law specifically authorized railroad tracks to be built to a designated location in the city. The city ordinance directly conflicted with the state law, and there was no possibility of reconciling the two. Further, the city ordinance could not reasonably be called a more stringent local standard, and the statute clearly did not contemplate additional local regulation. *See supra* notes 15–17 and accompanying text. In a case where the state law authorizes specific conduct and the local ordinance prohibits the same conduct, where there is no reasonable claim that the local ordinance is a more stringent standard, and where the state law does not allow for additional local regulation, the local ordinance should be invalidated.

375. *James Enters., Inc. v. City of Ames*, 661 N.W.2d 150, 152 (Iowa 2003) (quoting Iowa Code section 142B.2, which provides that “[s]moking areas may be designated by persons having custody or control of public places”); *see also Baker v. City of Iowa City*, 750 N.W.2d 93, 99–102 (Iowa 2008) (striking down a local ordinance prohibiting small employers from discriminating in the workplace because the state employment discrimination laws exempted small employers). The employment discrimination statute at issue in *Baker* did not expressly permit discrimination by small employers (that would be an odd thing for a state law to do). Nonetheless, the specific exemption of small employers from the application of antidiscrimination laws is

When a state law only implicitly permits certain conduct—as it implicitly permits unlimited campaign contributions, for example—the permit-prohibit test should likewise not apply. Assume Iowa City’s local campaign finance ordinance was challenged and invalidated on home rule grounds. To prevent Iowa City from imposing local limits on campaign contributions based on a violation of the permit-prohibit test would completely nullify municipalities’ ability to impose standards more stringent than state law. It would allow a judicially created test to overrule clear statutory authority.³⁷⁶ In short, it would absolutely eviscerate home rule. Any local ordinance that prohibits certain conduct fits into one of two categories: either it prohibits an activity that is expressly or implicitly permitted by state law or it prohibits an activity that state law already prohibits. Surely the home rule amendments were not enacted to foster redundancy. Rather, the amendments were enacted to give substantial power to local governments by citizens who sought to liberate themselves and their local leaders from the bounds of Dillon’s Rule.³⁷⁷

The Iowa Supreme Court should only invalidate local laws enacted

tantamount to granting permission to discriminate. But the state law at issue in *Baker* did not expressly preempt local regulation, and it did not express a desire for uniform statewide application. Indeed, it did the opposite. The statute specifically said it should not “be construed as indicating an intent on the part of the general assembly to occupy the field in which this chapter operates to the exclusion of local laws not inconsistent with this chapter,” and that it should not “be construed as limiting a city or local government from enacting any ordinance or other law which prohibits broader or different categories of unfair or discriminatory practices.” IOWA CODE § 216.19. That language, combined with the home rule amendments and statutes, seemed to clearly authorize Iowa City’s ordinance. But the court found the ordinance’s application to small employers to “thwart [the] legislative intent,” and thus struck it down. *Baker*, 750 N.W.2d at 101. It is at least possible that the legislative intent could have been to exempt small employers from state antidiscrimination laws, while leaving open the possibility that those same employers would be subject to local antidiscrimination laws. This interpretation of legislative intent seems particularly reasonable given the statute’s express contemplation of local regulation of employment discrimination, but the court did not address this possibility. And frankly, it should not have to. A major benefit of requiring the legislature to expressly preempt local regulation in order to overrule home rule power is that it would eliminate guessing games as to legislative intent.

376. See IOWA CODE § 331.301(6) (local regulations may be more stringent than state law); see also *Towns v. Sioux City*, 241 N.W. 658, 662 (Iowa 1932) (the Iowa origin of the permit-prohibit test).

377. See *Goodell v. Humboldt County*, 575 N.W.2d 486, 509 (Iowa 1998) (Harris, J., dissenting) (describing the home rule amendments as a “vast change . . . intended to revolutionize the relationship between state and local governments”).

under home rule authority when a statute expressly preempts local regulation, when a local law permits conduct that is expressly prohibited by state law, or when a local law prohibits specific conduct that has been expressly permitted by a state law and there is no reasonable claim that the local law is simply a more stringent standard.³⁷⁸ This expansive interpretation of home rule authority would have a number of benefits. It would: (1) reflect the original intent of the home rule amendments; (2) avoid ambiguous judicial tests, like whether the local law revises the statutory scheme;³⁷⁹ (3) allow local governments to react quickly to the needs and desires of their local communities; and (4) still permit the state legislature to clearly overrule or preempt local action whenever it wanted to do so.

In 1968, and again in 1978, Iowa's legislature and Iowa's citizens adopted the home rule amendments into Iowa's constitution. These two acts "revolutionize[d] the relationship between state and local governments."³⁸⁰ It is time for the Iowa Supreme Court to return to its original home rule jurisprudence and honor the impact of that revolutionary change.

Jay P. Syverson*

378. *See supra* note 374.

379. *See id.* at 502 (majority opinion) (finding the county ordinances "revise[d] the state regulatory scheme").

380. *Id.* at 509 (Harris, J., dissenting).

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