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**THE "CLEAN SLATE" DOCTRINE: A LIBERAL
CONSTRUCTION OF THE SCOPE OF THE
ILLINOIS HOME RULE POWERS—
*KANELLOS v. COUNTY OF COOK***

On July 1, 1971 a new constitution went into effect in Illinois. This document affected major changes in Illinois law; not the least of which was the introduction of the concept of home rule. Home rule had no history in Illinois prior to the Constitution of 1970. Its introduction most surely will have far-reaching effects on the distribution of power between state, county and municipality; and in turn, on the lives of the citizens of the State of Illinois.

While it is obvious that home rule will affect the distribution of power between governmental units, throwing Illinois governmental law into flux; what is not obvious is the degree to which the present balance of power will be upset and the scope of powers the various units will possess when the system achieves a new equilibrium.

Insight into the factors that act as catalysts in this power equation can be gained by observation and analysis of home rule experience in other states. However, this approach will not be very helpful here, due to the unique nature of the home rule section of the new constitution.¹ The best instrument to measure the degree of the shift in power will be case analysis of Illinois decisions interpreting the home rule section of the local government article of the new constitution.² In the short period since the adoption of the new constitution only a handful of cases interpreting the complex provisions of the home rule section have been decided. This is due, in large measure, to the fact that home rule units are not yet sure of the boundaries of their new powers and have been acting cautiously. Although cases interpreting this section have been few, important decisions have been made; and, opinions have been rendered which may shed a great deal of light on the future path of home rule in Illinois. One

1. One such unique provision is section 6(m) which states, "Powers and functions of home rule units shall be construed liberally." ILL. CONST. art. VII, § 6(m). The fact that the Illinois courts are giving heed to this constitutional mandate could free Illinois from restrictive views evident in states where home rule has been long established. A continued policy of liberal construction could establish Illinois as a home rule leader.

2. ILL. CONST. art. VII, § 6.

such opinion, which may be indicative of the direction home rule will take in Illinois, was delivered in 1972 by the Illinois Supreme Court. *Kanellos v. County of Cook*, 53 Ill. 2d 161, 290 N.E.2d 240 (1972).

THE "CLEAN SLATE" DOCTRINE

The *Kanellos* case was the result of a resolution of the Cook County Board providing for the issuance of ten million dollars in general obligation bonds without prior approval of the voters of Cook County by referendum. Kiriakos Kanellos, representing himself and other citizens and taxpayers of Cook County filed suit against the County of Cook, the County Board of Commissioners, its president and the county clerk. He sought to enjoin the issuance of the bonds because a referendum had not been provided for, as section 40 of the Counties Act,³ a pre-1970 Constitution statute, required.

Kanellos argued: (1) that the 1970 Constitution provided that

[t]he rights and duties of all public bodies shall remain as if this Constitution had not been adopted with the exception of such changes as are contained in this Constitution. All laws, ordinances, regulations and rules of court not contrary to, or inconsistent with, the provisions of the Constitution shall remain in force . . .;⁴

(2) that section 6(j) of the local government article⁵ authorizes the General Assembly to impose a referendum requirement on home rule counties; (3) that the General Assembly had done so in section 40 of the Counties Act; (4) that section 9 of the transition schedule, and section 6(j) of the local government article must be read together; and (5) therefore, the pre-1970 Constitution statute which required such a referendum would remain in effect.

Thus, two issues were presented for the court to resolve. The narrow issue was whether a referendum was required as a condition precedent to a home rule county's issuance of general obligation bonds. The broad issue was whether home rule powers could be limited by statutes enacted prior to the effective date of the new constitution, July 1, 1971.⁶ Justice

3. ILL. REV. STAT. ch. 34, § 306 (1973).

4. ILL. CONST. Transition Schedule § 9.

5. ILL. CONST. art. VII, § 6(j) provides:

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

6. Although the *Kanellos* case concerned the exercise of home rule powers by a county, its interpretation of constitutional provisions has comprehensive applica-

Kluczynski, speaking for the court, held that the referendum was not required⁷ and that pre-constitutional statutes had no force to limit the actions of home rule units taken pursuant to constitutionally conferred powers.⁸ The rationale behind this decision is sound and gives effect to the provisions of the 1970 Constitution. It is in accord with the intention of the drafters as embodied in section 6(m) that "[p]owers and functions of home rule units shall be construed liberally."⁹ The court characterized the effect of the new constitution in relation to this problem in the following manner:

The concept of home rule adopted under the provisions of the 1970 constitution was designed to drastically alter the relationship which previously existed between local and State government. Formerly, the actions of local governmental units were limited to those powers which were expressly authorized, implied or essential in carrying out the legislature's grant of authority. Under the home-rule provisions of the 1970 constitution, however, the power of the General Assembly to limit the actions of home-rule units has been circumscribed and home-rule units have been constitutionally delegated greater autonomy in the determination of their government and affairs. To accomplish this independence the constitution conferred substantial powers upon home-rule units subject only to those restrictions imposed or authorized therein.¹⁰

This holding represents an important development in the progress of home rule in Illinois. The court actively undertook consideration of the constitutional issue and, by deciding as it did, established a "clean slate" doctrine for home rule units in Illinois. This doctrine, simply stated, holds that home rule units are not bound by any state statute enacted prior to the 1970 Constitution if such statute deals with a matter of local concern. To avoid the effect of any such statute, the home rule unit need only pass an ordinance with provisions contrary to those of the state statute. The validity of the ordinance can only be tested by the criteria established in the constitution itself; specifically, whether the ordinance pertains to the home rule unit's government and affairs.¹¹ Therefore, a home rule unit acting pursuant to its constitutionally established powers need not scrutinize the body of state law enacted prior to the Constitution of 1970; the home rule unit writes on a "clean slate."¹²

tion to all home rule units. At present, the only county organized as a home rule unit is Cook County.

7. 53 Ill. 2d at 166-67, 290 N.E.2d at 243-44.

8. *Id.*

9. ILL. CONST. art. VII, § 6(m).

10. 53 Ill. 2d at 166, 290 N.E.2d at 243.

11. ILL. CONST. art. VII, § 6(a).

12. The author would like to emphasize that the "clean slate" doctrine does not void all pre-existing statutes. The home rule unit must take affirmative action in-

HOME RULE—A BREAK WITH ESTABLISHED PRINCIPLES

The primary importance of the *Kanellos* case is that it nullifies all pre-constitutional state statutes which either grant or limit the powers of home rule units where the unit has taken *contrary affirmative action*. *Kanellos* thus gives life to the policy embodied in the new constitution that in matters "pertaining to its government and affairs" the home rule unit is supreme.¹³ This is a decision of unique significance in that it removes all home rule units from the operation of Dillion's Rule—which specifies that local governments have only those powers specifically granted them.¹⁴ Rather, local governments are now free to exercise any power that they can imagine subject only to the limitations which have been provided by the new constitution and, of course, the federal Constitution. By so holding, the Illinois Supreme Court has given local government enthusiasts a ray of hope that home rule may proceed toward full realization of its potential. If this potential is realized, Illinois would become the leading state in the area. Obviously, the courts cannot fashion the exact nature of home rule powers; that task is dependent upon the degree of creativity that home rule units can bring to bear in formulating powers and functions. Nonetheless, the Illinois Supreme Court, in *Kanellos*, has shown that it does not intend to circumscribe narrow boundaries on local exercise under the home rule sections, and, this author feels that the courts will not look upon creative attempts to deal with the morass of urban problems with disfavor. Local governments will be free "to exercise broad powers to undertake creative and extensive projects . . . to contribute effectively to solving the immense problems that have been created by the increasing urbanization of our society."¹⁵ After all, it was for this express purpose that home rule was brought into being in Illinois.

compatible with the state statute in order to avoid its operation. This interpretation of the holding in *Kanellos* is supported by a recent Madison county decision rendered by Judge Monroe. *Illinois News Broadcasters Ass'n v. Springfield Human Relations Comm'n*, No. 72 Z 141 (Madison County Cir. Ct. March 2, 1973). At issue was the applicability of the Public Meeting Law to home rule municipalities. The Springfield Human Relations Commission claimed that the law was inapplicable because it dealt with a matter of local concern. Judge Monroe held that the statute was valid and in force. He noted that in *Kanellos*, affirmative action was taken by Cook County's adoption of an ordinance inconsistent with state law. Cook County's action created a conflict between a pre-existing state statute and a home rule unit's exercise of a constitutionally granted power; and, when such conflict exists, the home rule unit's exercise will be upheld and take precedence over the state statute.

13. ILL. CONST. art. VII, § 6(a).

14. 1 J. DILLON, MUNICIPAL CORPORATIONS 448-50 (5th ed. 1911) [hereinafter cited as 1 J. DILLON].

15. SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, 7 RECORD OF PROCEEDINGS 1605 (1972) [hereinafter cited as 7 PROCEEDINGS].

The *Kanellos* case marks a definite break with long established principles of Illinois local government law. The general character of this area until passage of the new constitution is adequately exemplified by a statement of Dillon's Rule of legislative supremacy.¹⁶ It holds that a municipality has only those powers expressly granted by the state legislature, those necessarily implied in or incident to the powers expressly granted, and those essential (indispensable) to the accomplishment of the declared objects and purposes of the municipal corporation. Any reasonable doubt is resolved against the corporation.¹⁷ The application of Dillon's Rule is so well established for non-home rule local governments that it has seldom been questioned in recent times; however, its validity has been reaffirmed in several modern Illinois cases.¹⁸

The practical effect of Dillon's Rule was to put local governments in a position of total dependency upon the state legislature. The local authority had to find a specific grant of power, in the form of enabling legislation, before any action could be taken.

The Constitution of 1870 does not contain any general grant of powers to local governments, nor does it expressly determine the manner in which local governmental powers are to be created, limited or abolished. In the absence of express treatment of local powers in the Constitution, the subject falls within the legislative authority of the General Assembly and is subject to the legal tradition, firmly rooted in American history, that local governments are "creatures" of the state and totally subject to legislative control.¹⁹

The fact that local government was viewed as a "creature" of the state made the role of the courts a simple one in cases where the power of a community to follow any given course of action was involved. In such a case the court could usually avoid the complex issue of the rationality of an ordinance, an issue with which no court likes to struggle. The court needed only to decide whether the local exercise was within the scope of power granted by the General Assembly. If the court could find that the exercise was beyond the scope of power granted in the enabling act, then the court's problem would be resolved. This is not to say that the possibility for a broader examination did not exist. A court could find that a certain power should be fairly implied from granted powers by

16. Dillon's Rule is aimed at municipal governments. Although, in *Kanellos*, the problem involved a county and not a municipality, the principles established by *Kanellos* are obviously of much broader application.

17. 1 J. DILLON, *supra* note 14.

18. See, e.g., *Chicago School Transit, Inc. v. City of Chicago*, 35 Ill. 2d 82, 219 N.E.2d 522 (1966); *Ives v. City of Chicago*, 300 Ill. 2d 582, 198 N.E.2d 518 (1964).

19. 7 PROCEEDINGS, *supra* note 15, at 1603.

holding that its exercise would benefit the community and was essential to the community's attempt to employ other specifically granted powers aimed at providing for the welfare of its citizens. While this has occasionally happened in limited circumstances, such implication of power is the rare exception to the general rule of narrow construction under Dillon's Rule.²⁰

This narrow construction of powers quite often made life difficult for city officials, who have constantly found it necessary to go to the General Assembly for the authority to provide essential local improvements and services. The General Assembly has often been very slow to act in these matters, and, when a controversial political issue is involved, action may never be taken.²¹

It has become increasingly apparent that a greater measure of local autonomy was necessary if the modern city was to deal effectively with the proliferation of urban problems and continue to support positive social life. The inherent right of the community to exercise certain powers locally achieved judicial recognition in some jurisdictions over 100 years ago.²² Such a right was also supported in the works of John Stuart Mill²³ and Alexis de Tocqueville.²⁴ However, no effective action was taken to guarantee local autonomy in Illinois until the recent constitutional convention.

Home rule was one of the most important items on the agenda of the constitutional convention.²⁵ The delegates wished to maintain broad powers in the same body that would be directly accountable to the people over whom that power is exercised.²⁶ Prior to the 1970 Constitution the ultimate power over local matters was vested in the General Assembly. This meant that the decisions which might vitally affect the lives of individuals in a given area would be the responsibility of legislators from other areas—legislators who were not accountable to those individuals and

20. See *Concrete Contractors' Ass'n v. Village of LaGrange Park*, 14 Ill. 2d 65, 150 N.E.2d 783 (1958) (holding that cities have the implied power to license concrete contractors where necessary to effectuate powers expressly granted); *City of Bloomington v. Werrick*, 381 Ill. 347, 45 N.E.2d 852 (1942) (the power to install parking meters was implied in the city's power over traffic and the use of streets).

21. One recent highly publicized example is the RTA.

22. See *People ex rel. LeRoy v. Hurlbut*, 24 Mich. 44 (1871).

23. J.S. MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 111-19 (People's ed. 1926) (written in 1861).

24. 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, ch. V (esp. pp. 67-71) (Vintage Books ed. 1945) (written in 1835).

25. Other important items on the agenda were fiscal reform and judicial reform.

26. 7 *PROCEEDINGS supra* note 15, at 1605-11.

who were not familiar with their unique local problems. Since it is the local officials who are directly accountable to their constituents, they should have the powers necessary to provide for solutions to those problems within their competence which are endemic to their jurisdiction. It seems reasonable that local officials would have the best vantage point from which to observe and analyze the problems of their community and that they would have the best insight as to which solutions would have the highest probability of working with regard to local practice. In drafting the local government article, the delegates sought to serve this specific purpose—"to give greater power to certain units of local government through the home rule provisions of the new Article."²⁷

In the several states, home rule has taken three principal forms. The majority of states which have adopted home rule provide for local charters. Under this form the state constitution provides a process by which a municipality (and in some states, counties) may write its own charter from which its powers will derive. Usually the charter must then be approved by a local referendum. In a few states, the powers granted to the home rule unit are purely statutory. This form tends to be the weakest; for, what the legislature gives, the legislature may take back! In Illinois, the form adopted was that of direct constitutional home rule. The powers of the home rule unit are granted in the constitution itself, and no further steps are required for home rule to take effect.²⁸

The new constitution grants large municipalities and some counties broad powers of self-government²⁹ (at the present, the only county to qualify is Cook County) and provides that home rule powers are to be construed liberally.³⁰ Certain powers are specifically granted, such as the power to tax, to incur debt, and the police power.³¹ The enumeration of these powers was not meant to limit the home rule unit's exercise of other powers, but to protect these specific powers from the narrow court

27. *Id.* at 1570.

28. Due to the fact that the constitutional form of home rule was chosen, the home rule section resembles a complicated statute.

29. ILL. CONST. art. VII, § 6(a) provides:

A County which has a chief executive officer elected by the electors of the county and any municipality which has a population of more than 25,000 are home rule units. Other municipalities may elect by referendum to become home rule units. Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax and to incur debt. (emphasis added).

30. ILL. CONST. art. VII, § 6(m).

31. ILL. CONST. art. VII, § 6(a).

interpretation that has often resulted in other states. Very few powers are denied to home rule units,³² although a complex scheme is detailed whereby almost all home rule powers may be denied or limited by the General Assembly. Thus, the potential for strong home rule units certainly exists in Illinois.³³

THE IMPACT OF *Kanellos* ON THE
SCOPE OF HOME RULE POWERS

Kanellos will have a significant impact on Illinois law, and the practice of home rule in Illinois. It is one of the first Illinois cases to give definition to the scope of home rule powers, and is indicative of the perspective of the Illinois Supreme Court. The language of the home rule section of the new constitution is in many respects ambiguous. This is due in large part to the fact that the home rule section is written in the form of a statute. It seems inevitable that any attempt to create broad new powers in statutory form would need further elaboration. The drafters realized this and provided a clear statement of their intention in order to guide the efforts of the courts in home rule interpretation. This intention is manifest in section 6(m) which instructs courts that home rule powers shall be construed liberally.³⁴ *Kanellos* signifies that the Illinois Supreme Court has taken the intention of the drafters seriously and will apply this constitutional rule of construction. The court evidenced a lib-

32. ILL. CONST. art. VII, §§ 6(d), (e). They provide that

(d) A home rule unit does not have the power (1) to incur debt payable from ad valorem property tax receipts maturing more than 40 years from the time it is incurred or (2) to define and provide for the punishment of a felony.

(e) A home rule unit shall have only the power that the General Assembly may provide by law (1) to punish by imprisonment for more than six months or (2) to license for revenue or impose taxes upon or measured by income or earnings or upon occupations.

33. *Kanellos* does not, however, signal the total demise of Dillon's Rule; it only does so for home rule units. All other units of local government are subject to the same rules and limitations on their power to act as prior to passage of the 1970 Constitution. This means that if a non-home rule municipality wants to exercise a power, it must look for enabling legislation from the state—lacking such legislation, no power exists.

It is of interest to note that after passage of the 1970 Constitution, no unit of local government need be subject to Dillon's Rule. Section 6(a) provides that municipalities which do not automatically qualify may elect, by referendum, to become home rule units. In like manner, any county may exercise home rule powers if it conforms to the requirements of the constitution. See ILL. CONST. art. VII, § 6(a). It is debatable, though, whether election to become a home rule unit would provide a small community with any significant advantage over its present organization.

34. ILL. CONST. art. VII, § 6(m).

eral construction in holding that pre-constitutional statutes could not act to limit affirmative action by home rule units. The court stated that

the constitution conferred substantial powers upon home-rule units subject only to those restrictions imposed or authorized therein.

We therefore hold that this statute is inapplicable as applied to a home-rule county. It was enacted prior to and not in anticipation of the constitution of 1970 which introduced the concepts of home-rule and the related limitation of sections 6(g) and 6(h). Such considerations were totally foreign in the contemplation of legislation adopted prior to the 1970 constitution.³⁵

Such a holding is encouraging and shows that the Illinois courts are attempting to avoid the mistake often made in other states of trying to make the powers of home rule units subject to prior limitations on local government. A contrary holding in the *Kanellos* case would have emasculated home rule before it had a chance to establish itself.

The court, by holding as it did, has assured that home rule powers will not be narrowly circumscribed. This means that the court will not thwart the drafters' intentions. The legislature may limit home rule powers, but in doing so, it will be constrained to follow the strict scheme that the constitution sets forth. Sections 6(g), 6(h) and 6(i)³⁶ preserve the state's ultimate authority to regulate and control all local government activity.³⁷ Where the state has not taken action in the field, a three-fifths majority of both houses of the General Assembly is necessary to deny or limit the exercise of a home rule power.³⁸ If the state is active in a field, the General Assembly may provide for exclusive exercise by the state of powers other than the taxing power by the vote of a simple ma-

35. 53 Ill. 2d at 166-67, 290 N.E.2d at 243-44.

36. ILL. CONST. art. VII, §§ (g), (h), (i). They provide:

(g) The General Assembly by a law approved by the vote of three-fifths of the members elected to each house may deny or limit the power to tax and any other power or function of a home rule unit *not exercised or performed by the State* other than a power or function specified in subsection (1) of this section. (emphasis added).

(h) The General Assembly may provide *specifically by law* for the *exclusive exercise by the State* of any power or function of a home rule unit *other than a taxing power* or a power or function specified in subsection (1) of this Section. (emphasis added).

(i) Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive.

37. Baum, *A Tentative Survey of Illinois Home Rule, (Part II): Legislative Control, Transition Problems, Intergovernmental Conflict*, 1972 U. ILL. L.F. 559, 561-64.

38. See ILL. CONST. art. VII, § 6(g).

jority of both houses.³⁹ However, unless the legislation is drafted so as to show specifically that the state's power is exclusive, the home rule unit will be presumed to have concurrent power.⁴⁰ Thus, legislative pre-emption may not be implied by the courts. The drafters felt that this was important to the preservation of the integrity of home rule.⁴¹ Some powers are completely protected from legislative interference. Such are the power to make local improvements by special assessment, and the power to create special service districts.⁴²

The language of legislative restriction in the constitution and the rule in *Kanellos* provide the parameters within which home rule units and the General Assembly will operate. While one can note the percentage required for legislative limitation of a given power, the "real world" impact that this system will have is not readily apparent. This author feels that in situations where a local community attempts to exercise a power not exercised by the state, it will be able to do so unimpeded by the state legislature. The actual effect of the three-fifths majority requirement will be that very few bills will be passed. This is due to the balance of political power in Illinois. One may expect few attempts by the legislature to limit new home rule powers, prior to their exercise, in fields in which the state has not acted. Legislative action in this circumstance would only be taken after the local community had acted. In that instance pre-emptive legislation would not pass unless the community's action was extremely outrageous. The probable consequence should be that home rule units will exercise some internal restraint so as to avoid the establishment of a precedent for legislative pre-emption. The same policy should hold true with reference to the taxing power of home rule units; as, the taxing power is subject to the same limitations as home rule actions in an unoccupied field.⁴³

In fields where the state is active, the General Assembly may take

39. A minority of the Committee on Local Government wanted the three-fifths requirement extended to all matters, not only those where the state was not in the field. 7 PROCEEDINGS, *supra* note 15, at 1881-91.

40. See ILL. CONST. art. VII, §§ 6(h), (i).

41. The Committee on Local Government relied in large part on the philosophy and work of Dean Fordham, who feels that it is necessary to limit the role of the courts in the home rule context in order to avoid narrow construction. See 7 PROCEEDINGS, *supra* note 15, at 1620-21, 1637-41. See also Fordham, *Home Rule—AMA Model*, 44 NAT'L MUNIC. REV. 137, 138-39 (1955); AMERICAN MUNICIPAL ASS'N, MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE (1953).

42. *But see* Oak Park Fed. Sav. and Loan Ass'n v. Village of Oak Park, 54 Ill. 2d 200, 296 N.E.2d 344 (1973).

43. See ILL. CONST. art. VII, § 6(g).

action by simple majority vote. It would be mere speculation to predict the course of legislative action in state occupied fields. The author would like to stress that in areas where the state is active, home rule units should make an effort to consult with the appropriate state instrumentalities prior to taking any action; and where a conflict becomes evident, a positive, conciliatory attitude should be adopted. Of course, the opinions of state officials would only be advisory; and, the good will that consultation would be likely to create might dissipate tension in the state-local relationship. Many important areas in which home rule units will want to exercise powers will be found to be effected by state legislation. It should be quite obvious that through overly aggressive competition with the state, home rule units could suffer greatly. Local officials should keep in mind the fact that the future of home rule in Illinois will be fixed by the early precedents and patterns that are established!

Since it is probable that the legislature will take a "wait and see" approach to home rule, much of the legal development in the area is likely to come from the courts. As a result of the *Kanellos* case, the number of paths which the Illinois courts may follow in the future is substantially reduced, and some prediction is possible. Justice Kluczynski writes that "[w]hile a referendum may be imposed . . . such restriction must be specifically enacted by the General Assembly with the requisite legislative majority."⁴⁴ The Justice's language is a definite rejection of the theory that an intent to pre-empt local government from a field may be implied from the general nature of legislation that the state legislature has passed. This is one major respect in which the Illinois home rule provisions differ from those of most states. Under the theory of implied legislative pre-emption, the courts of the state are free to decide on the basis of the statutes enacted in the field, whether the legislature wanted to exercise exclusive control. The fact that the Illinois courts will not be able to use this theory to close a field to home rule units considerably narrows the role of the court in establishing the scope of home rule powers. Implied pre-emption, which has been implemented in many states,⁴⁵ should

44. 53 Ill. 2d at 167, 290 N.E.2d at 244 (emphasis added).

45. See, e.g., *New York: Wholesale Laundry Bd. of Trade v. City of New York*, 17 App. Div. 2d 327, 234 N.Y.S.2d 862 (Sup. Ct. 1962), *aff'd*, 12 N.Y.2d 998, 189 N.E.2d 623, 239 N.Y.S.2d 128 (1963); *California: Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 384 P.2d 158, 32 Cal. Rptr. 830 (1963); *In re Lane*, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962); *Minnesota: State ex rel. Town of Lowell v. City of Crookston*, 252 Minn. 526, 91 N.W.2d 81 (1958); *Wisconsin: City of Fond du Lac v. Town of Empire*,

never have a chance to take hold in Illinois. Justice Kluczynski employed the correct construction of the constitutional provision: "The General Assembly may provide *specifically by law* for the exclusive exercise by the State"⁴⁶ However, this rejection of the implied pre-emption theory makes it impossible for Illinois courts to use the same criteria to determine whether a concern is local or statewide which has often been used in other states. In states where implied pre-emption theory is available,⁴⁷ the court can examine the nature of enacted legislation in a given area to determine if a concern is statewide *vel non*.⁴⁸ In Illinois, legislation will only be useful to this determination if it specifically pre-empts local regulation. The Illinois courts may not mechanically hold that state legislation in a given field is pervasive, therefore the matter is statewide. If implied pre-emption may not be used, what approach is proper to determine the heretofore decisive question of which matters are statewide and which are local?

"PERTAINING TO ITS GOVERNMENT AND AFFAIRS"

The Illinois courts will develop either a mechanical approach of a balancing of interests test to give meaning to the provisions of section 6(a), "pertaining to its government and affairs."⁴⁹ Traditionally, a mechanical approach has been employed in home rule cases to resolve whether a matter is of local or statewide concern. The mechanical approach is based on an "all or nothing" classification system. The courts would try to label a matter to make it fit into a scheme of opposition. For example, the

273 Wisc. 333, 77 N.W.2d 699 (1956). *Contra*, Colorado: *Retallack v. Police Court*, 142 Colo. 214, 351 P.2d 884 (1960) (N.B. Doyle, J., concurring).

46. ILL. CONST. art. VII, § 6(h) (emphasis added).

47. See cases cited in note 45, *supra*.

48. Implied pre-emption theory is not always employed at the mere whim of the court. In California, the following guides have been established:

chartered counties and cities have full power to legislate in regard to municipal affairs unless: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to clearly indicate that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.

In re Hubbard, 62 Cal. 2d 119, 128, 396 P.2d 808, 814-15, 41 Cal. Rptr. 393, 398-99 (1964).

49. See ILL. CONST. art. VII, § 6(a), and pp. 1304-05, *supra*.

court could characterize a function as either "governmental" or "proprietary"—if the court then found the home rule unit's exercise to be "proprietary" the function would be approved, if "governmental," it would be defeated.⁵⁰ Other dichotomies which have been used to affect a mechanical classification are: whether the local ordinance affects "private" or "public" law,⁵¹ whether an ordinance attempts to create "general" or "local" law,⁵² or simply whether or not a matter has traditionally been handled by the state.⁵³ Attempts to resolve the issue in an all or none fashion, using the above criteria or similar dichotomies, suffer from a serious flaw in that conclusionary reasoning must be used in the process of classification. The mechanical approach merely begs the question!

When the courts first began using the mechanical approach to home rule problems, it had some validity because the categories were clear and home rule problems could be handled on a manageable basis. It gave the court a simple issue to resolve; the extent of analysis required was usually limited to whether a subject was local or not. The courts were attracted by this simplicity. As time passes, this approach becomes less and less useful as a tool of decision making due to the pervasive changes in our society. The massive urbanization that has taken place over the last several decades has created an environment in which any action taken at either the state or local level will have an effect on the other. Most actions could be classified as a genuine concern of several levels of government! This means that almost any matter could be viewed as being either of state or local concern—the result becomes dependent solely on the vantage point the court adopts. Such a state of affairs is hardly conducive to the development of a consistent rule structure where accurate prediction of results is possible. Rather than contributing to the manageable resolution of home rule problems, the application of a mechanical approach to home rule in the modern context makes the courts' task more difficult. Judges are called upon to make broader decisions than are necessary, including or excluding large fields from the operation of home rule. Judges do not like to be put in such a position. While courts can find ways to differentiate cases that appear to exclude whole fields from home rule exercise, such decision-making tends to confuse the law and is very cumbersome. Application of a mechanical approach must

50. *See, e.g.*, *City of Tucson v. Tucson Sunshine Climate Club*, 64 Ariz. 1, 7-8, 164 P.2d 598, 602 (1945).

51. *See, e.g.*, *Genusa v. City of Houston*, 10 S.W.2d 772 (Tex. Civ. App. 1928).

52. *E.g.*, *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 384 P.2d 158, 32 Cal. Rptr. 830 (1963).

53. *E.g.*, *Newport Amusement Co. v. Maher*, 92 R.I. 51, 56, 166 A.2d 216, 218 (1960).

necessarily lead to conflicting precedents and can only generate confusion as to the scope of home rule powers.

The alternative to the application of a mechanical approach is a reasonable one and is more aptly suited to modern circumstances: a balancing of interests approach. A balancing approach would be in line with the philosophy underlying the decision in *Kanellos*. The Illinois Supreme Court recognizes the intended nature of home rule and is supportive of its implementation. The court states that "[t]he concept of home rule . . . was designed to drastically alter the relationship which previously existed between local and State government."⁵⁴ Thus, to determine the scope of home rule, the proper inquiry should be directed at determining which level of government would best be able to cope with a given problem—not at whether a matter has traditionally been held to be of state-wide concern.

Professor Vincent Vitullo recommends that in each case where there is a possible overlap, the court should decide whether the subject matter is suitable for local control, would be better handled by the state, or can be treated by both bodies without harm.⁵⁵ Professor Vitullo posits that the following variables are relevant to the courts' considerations: Any possible effect on persons or property outside the home rule unit; whether local regulation might interfere with state regulation; whether local regulation might be detrimental to basic human rights.⁵⁶ This writer agrees that the essential task which the courts face is determining which governmental body is most competent to deal with a given matter, and that this can best be accomplished by a weighing of interests. The courts must weigh local values, conditions and interests against the values and interests of the larger community. The following is a sampling of factors the court should consider when resolving the issue of whether a local governmental body is competent to deal with a given matter: (1) the risk that local exercise will cause an externalization of costs;⁵⁷ (2) whether enabling legislation exists which would give such a power to non-home

54. 53 Ill. 2d at 166, 290 N.E.2d at 243.

55. Professor Vincent Vitullo of De Paul University has been a leader in recommending that a balancing test be used to determine the scope of home rule powers.

56. See Baum, *A Tentative Survey of Illinois Home Rule, (Part I): Powers and Limitations*, 1972 U. ILL. L.F. 137, 155.

57. These "costs" are not necessarily monetary, they include all burdens beyond local boundaries. The purpose of this element is to protect the larger community from self-serving, parochial ordinances and to avoid "balkanization." See *Vickers v. Township Comm.*, 37 N.J. 232, 253, 181 A.2d 129, 149 (1962) (Hall, J., dissenting); *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970); cf. *Memphis Steam Cleaner v. Stone*, 342 U.S. 389 (1952).

rule communities;⁵⁸ (3) the degree to which local administration would interfere with a state or federal regulatory scheme;⁵⁹ (4) the state interest in uniformity as against the need for systems tailored to varied local conditions; (5) the protection of private interests against the arbitrary exercise of local power;⁶⁰ (6) the relative importance of a local policy which is in conflict with a state or federal policy; (7) the degree to which a matter is limited to internal governmental policy of the home rule unit;⁶¹ (8) the effect that treatment of a matter as local or statewide would have on the administration of justice.⁶²

The basic objection to the use of the balancing of interests approach discussed above is that it makes it necessary for the court to set the policy of the state and that the legislature is the proper body to make policy determinations. This makes good sense in the abstract, but the extremely general nature of the outline of home rule powers provided in the new constitution, and the many ambiguities created by the wording of the grant of home rule power make it impossible for the court to deal with case and controversy without making state policy.⁶³ It should also be noted that the legislature retains the ultimate policy making authority. If the legislature found a court ruling to be objectionable, such a ruling could be avoided by statute. Nor does the mechanical approach obviate policy considerations; they remain as the inarticulated underlying basis of decision. If the court must propound state policy, it is safer to make explicit the considerations which shape that policy. This would be the

58. Obviously, if non-home rule communities have a power under an enabling statute, such a power can not be denied to a home rule unit.

59. In this area, the courts might be able to draw on the commerce clause opinions by analogy. Cf. *Dean Milk v. City of Madison*, 340 U.S. 349 (1951); *Arlington v. Lillard*, 116 Tex. 446, 294 S.W. 829 (1927). At a future date, if metropolitan regional authorities were to develop into bodies with more than advisory powers, then regional interests would have to be formally taken into account at this point in the analysis.

60. It has been suggested that the potential for abuse of individual rights is greater on the local level than on the state or federal level. See *THE FEDERALIST* No. 10 (Madison).

61. The home rule unit should have freedom in matters that are strictly limited to internal governmental policy. Of course, this freedom must be subject to constitutional limitations. For example, if a town passed an ordinance which provided that all business shall be conducted in secret session, although it concerned the internal governmental affairs, it probably would not pass constitutional muster.

62. For a good example of why this factor must be considered see Comment, *Defending an Illinois Proceeding for Violation of a Municipal Ordinance: The Worst of All Possible Worlds*, 1 *LOYOLA U. CHI. L.J.* 86 (1970).

63. See generally Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 *MINN. L. REV.* 643 (1964).

case with the balancing approach. Its usage, would signal an end to inarticulate policy-making guised by the "catch-phrase" analysis of the mechanical approach. The author emphasizes that this is desirable if an integrated home rule legal structure is to develop.

CONCLUSION

This note has attempted to demonstrate that the ramifications of *Kanellos* are far more important than the narrow issue it resolved: A referendum is not a condition precedent to the issuance of bonds by a home rule county. The *Kanellos* case creates a framework for the whole future of the development of home rule law. It demonstrates that the Illinois Supreme Court is ready to make a total break with traditional Illinois government law as characterized by Dillon's Rule. The strong language of the opinion granting home rule units a fresh start in the exercise of their constitutional powers insures that home rule is not to be fettered by prior conflicting legislation. The limitations that will fix the boundaries of home rule exercise will arise from the definition of those constitutional powers. If the philosophy which engendered the *Kanellos* case is employed, one could expect the pattern of Illinois decisions to reflect a liberal construction. This author feels that home rule communities can look forward to the exercise of broad powers. The greatest limitation on home rule powers is not the definitional problem which the courts must resolve; rather, the major limitation will be the degree of creativity which officials and planners of home rule communities can bring to the problem of formulating new home rule powers. The court in *Kanellos* has given home rule units a green light, but it is up to the individual communities to structure home rule to their individual needs and to implement their new powers. Home rule has much greater potential than simply increasing tax revenue to the community.⁶⁴ Home rule powers can provide the freedom of action needed by municipal leaders to institute comprehensive programs to improve the quality of life in the urban community. *Kanellos* encourages creativity by providing home rule units a "clean slate" upon which to write the answers to the many problems which must be solved if our cities are to survive and grow. Let wise men write on that slate.

Gordon V. Levine

64. See, e.g., *Jacobs v. City of Chicago*, 53 Ill. 2d 421, 292 N.E.2d 371 (1972); *S. Bloom, Inc. v. Korshak*, 52 Ill. 2d 56, 284 N.E.2d 257 (1972).