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Defining "Municipal or Internal Affairs": The Limits of Power for Indiana Cities

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DEFINING "MUNICIPAL OR INTERNAL AFFAIRS:" THE LIMITS OF POWER FOR INDIANA CITIES

The Indiana legislature, in the 1971 Powers of Cities Act, Public Law 250, delegated to cities all power over "municipal or internal affairs" which is not specifically denied or vested in another governmental unit. The statute enables cities to act without specific approval from the legislature. It is a dramatic reversal of the Dillon Rule, under which local governments could exercise only those powers specifically granted, necessarily implied or indispensable to the municipal corporation.

Sections 2 through 15 of Public Law 250 grant specific powers to cities. Section 16 grants additional, undefined power:

In addition to all powers specifically enumerated in sections 2 through 15 of this chapter, and any other power granted to a city or any agency thereof under any other law of this state, every city may, within its territorial jurisdiction, except as otherwise provided in this chapter, exercise any power or perform any function necessary in the public interest in the conduct of its municipal or internal affairs, which is not prohibited by the Constitution of this state or the Con-


3. "Cities" to which the statute is applicable are probably intended to include those incorporated under IND. CODE §§ 18-2-1-1, -1.5 (1971), IND. ANN. STAT. § 48-1201 (1963). This statute classifies cities, the smallest class requiring a population of at least one thousand. This is the only general definition in Indiana statutes.

Public Law 250 does not broaden the powers of counties, towns, townships, school corporations, or other municipal corporations. Section 21 requires agreement from a municipal corporation, however, before city extraterritorial power may extend within its boundaries. IND. CODE § 18-1-1.5-21 (1971), IND. ANN. STAT. § 48-1471 (Supp. 1973).


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stitution of the United States, and which is not by express provision denied by law or by express provision vested by any other law in a country, township or state, special taxing district or separate municipal or school corporation. 

Section 23 encourages a generous interpretation of these powers. The last sentence recites and forbids the use of the Dillon Rule, which required “any fair doubt” to be resolved against the municipality. From now on, powers granted should be construed liberally — and “all doubts” should be resolved in favor of the exercise of the power by the city. Section 23 also forbids the use of expressio unius est exclusio alterius and ejusdem generis. The specific grants in §§ 2 through 15 are not to limit

7. Construction of Powers Granted. The powers of cities as defined in this chapter shall be construed liberally in favor of such cities. A specific enumeration, or failure to enumerate, particular powers of cities in section 1 of this chapter or in any other law shall not be construed as limiting in any way the general and residual powers conferred upon cities as stated in section 16 of this chapter. It is the intention of this chapter and the policy of the state to grant to cities full power and right to exercise all governmental authority necessary for the effective operation and conduct of government with respect to their municipal and internal affairs. The rule of law that cities have only those powers expressly conferred by statute, necessarily implied or dispensable [sic] to the declared objects and purposes of the corporation, and that any fair doubt as to the existence of a power shall be resolved against the existence thereof, shall have no application to the powers granted to cities herein.

8. The erroneous use of the word “dispensable” in the last sentence, rather than “indispensable,” the precise terminology of the Dillon Rule, see note 4 supra & text accompanying, should not affect the clear intent to abrogate the rule. Letter from Sandra S. Dukes, Staff Attorney, Indiana Legislative Council, to Philip R. Cockerille, April 9, 1974, on file with the Indiana Law Journal.
9. When the Iowa legislature overruled this common law interpretative device, the very court on which Dillon sat as Chief Justice a century earlier did not hesitate to comply. See Richardson v. City of Jefferson, 257 Ia. 709, 134 N.W.2d 528 (1965).
11. Id.
13. Expressio unius est exclusio alterius employs negative implication to limit the operation of a statute to things expressed. See 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.23 (4th ed., C. Sands ed. 1973). Eiusdem generis limits the scope of general words to things similar in nature to specific words in the same statutory list. Id. § 47.17. The interpretation of a broad grant of powers is therefore not an appropriate occasion for application of these doctrines. The very purpose of broad language is to supply unexpressed powers. Expressio unius would defeat this purpose. The scope of powers granted should not be limited to inferences from expressed powers, as ejusdem generis would require. The closely related process of “necessary implication”
“in any way” the broad language of § 16.14

Sections 23 and 16 state in slightly differing language a legislative intent to grant to cities all power necessary for the effective conduct of “municipal or internal affairs.”15 The result of these sections is a new, general statement of city power which must be interpreted without the familiar restrictive rules. To the extent that Indiana cities may exercise this broad power without legislative approval, “home rule”16 will be a

was also removed from the toolbox of interpretative devices. See text accompanying note 25 infra.

14. In nine of the sections which list specific powers, where the list is not exhaustive, the introductions provide that the list “shall include, but not be limited to the power to . . . .” IND. CODE §§ 18-1-1.5-2, -6 to -12, -14 (1971), IND. ANN. STAT. §§ 48-1452, -1456 to -1462, -1464 (Supp. 1973). This is another plea to the courts to refrain from limiting constructions. See note 13 supra & text accompanying. The powers are listed in generic groups, but for purposes of convenience rather than for application of *ejusdem generis*. It hardly would make sense to apply *ejusdem generis* or *expressio unius* to these separate lists when they do not apply to the broad grant of § 16. A court busy examining interests and policies, the approach recommended in this note, has no need for these restrictive devices, in any case.

15. Section 23 states:

It is the intention of this chapter and the policy of the state to grant to cities full power and right to exercise all governmental authority necessary for the effective operation and conduct of government with respect to their municipal and internal affairs.

IND. CODE § 18-1-1.5-23 (1971), IND. ANN. STAT. § 48-1473 (Supp. 1973). This language makes clear that Public Law 250, like a charter adopted by a city in most “home rule” states, is a grant of authority and not a limitation. See, e.g., Grayson v. State, 249 Ore. 92, 436 P.2d 261 (1968).

It should also be noted that this language and the rest of the statute are the only reliable guides to legislative intent. See Richardson v. City of Jefferson, 257 Ia. 709, 134 N.W.2d 528 (1965). The total absence of committee reports and debates from state legislatures requires this method of interpretation.

16. The delegation of “home rule,” or local self-government, may take several forms. “Self-executing” constitutional provisions make direct grants of power to local governments in broad terms, with either few or many specific terms. Compare Ohio Const. art. XVIII, §§ 4-12, with Colo. Const. art. XX, § 6. The constitution may mandate legislative action. See Mich. Const. art. VII, § 21. Or it may merely permit the legislature to pass enabling legislation at its discretion. Pa. Const. art. XV, § 1 (1874, as amended 1922), see id. art. IX, § 1 (1968). In New Jersey, the constitutional provision does not specifically delegate or permit delegation but provides only for “liberal construction” of whatever powers are delegated. N.J. Const. art. IV, § 4. Delaware, however, has no constitutional provision but has enacted statutes similar to the National Municipal League model constitutional provisions. Compare Del. Code Ann. tit. 22, § 802 (Supp. 1970), with National Municipal League, Model State Constitution § 8.02 (6th rev. ed. 1968) [hereinafter cited as National Municipal League]. The language of Indiana’s § 16, “municipal or internal affairs,” is common among broad grants, either constitutional or statutory.

Local powers may be exclusive, i.e., insulated from modification by the legislature. The more certain method of achieving this approach to “home rule” is through constitutional limitations on the legislature. For example, in Missouri, the legislature may not interfere with the powers, duties, or compensation of any municipal office or employment. Mo. Const. art. VI, § 22. Similarly, amendments proposed in the Indiana legislature at least two times in this century would have enabled cities to adopt charters establishing any form of government. H.J. Res. 5, ch. 243, [1941] Ind. Acts 967; S.J. Res. 2, ch. 289, [1953] Ind. Acts 1021. See Ice, Municipal Home Rule in Indiana,
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This note will suggest a method for determining the limits of this power.\textsuperscript{16}

Ind. L.J. 375, 393-97 (1942); Note, Local-State Relations in Indiana: Proposed Charter Making Powers for Municipalities, 30 Ind. L.J. 265, 266 n.7 (1954). Exclusive powers can result as well from judicial interpretation of broad grants of power. See text accompanying notes 27-47 infra.

Another approach to "home rule" does not place limitations on the legislature. By "reversing the presumption" of the Dillon Rule, see note 4 supra & text accompanying, cities may exercise all powers not denied by the legislature. The legislature may always act, of course, to deny a power. Because the legislature cannot always act promptly, however, the day-to-day supervision of the limits of power must be the role of the courts. See Sandalow, The Limits of Municipal Power Under Home Rule: A Role for the Courts, 48 Minn. L. Rev. 643, 650-52 (1963) [hereinafter cited as Sandalow]. Administrative agencies, such as the Indiana State Board of Tax Commissioners which reviews local levies, also wield great control over the exercise of local power. See Ind. Code § 6-1-1-24 (1971), Ind. Ann. Stat. § 64-1914 (1961). The problem with this system is that courts and administrative agencies may restrict unnecessarily the vague legislative grant.

Modern model constitutional provisions avoid vague grants such as "municipal affairs." One of them permits the exercise of all power which the legislature has the power to devolve upon local governments in general. American Municipal Association, Model Constitutional Provisions for Municipal Home Rule § 6 (1953) [hereinafter cited as American Municipal Association]. Some of the states which have adopted this provision are Mass. Const. amend. art. II, § 6; Del. Code Ann. tit. 22, § 802 (Supp. 1970). Another model provision grants to local governments the power to exercise "any legislative power or perform any function . . . not denied . . . ." National Municipal League, supra, § 8.02. Some of the constitutions in which this language appears are Alaska Const. art. X, § 11; N.M. Const. art. X, § 6D; S.D. Const. art. IX, § 2. These provisions, however, cannot avoid the process of judicial interpretation which determines the scope of powers granted. See Sandalow, supra, at 688. What is worse, they require the courts to focus on the power of the legislature to delegate legislative power. Id. Courts should examine the importance to the city of an exercise of power in relation to the needs of the state as a whole. See text accompanying notes 50-63 infra.

17. The only court to have interpreted § 16 made no attempt to delineate the extent of these powers. In Barrick Realty, Inc. v. City of Gary, 354 F. Supp. 126 (N.D. Ind. 1973), the court upheld a city ordinance which prohibited display of "for sale," "sold," and similar signs in an effort to curtail racial tension and panic selling of entire blocks of real estate. The court summarily dismissed the ultra vires argument against the ordinance, stating that the legislature "clearly intended" to grant all powers not unconstitutional, denied or preempted, and that the ordinance did not fall within those categories. Id. at 131. The issue of the power of the city to enact the ordinance deserved more careful consideration, especially in the light of the statutory denial of power to govern "private or civil relationships" such as the realtor-vendee relationship. See notes 64-98 & text accompanying infra.

18. The constitutional doctrine of delegation might be used in determining the scope of the statute. This approach focuses on the power of the legislature to assign its functions to other governmental units. The proper focus, however, should be on the extent to which exercise of power by cities usurps the function of the legislature. Decisions limiting the power of the legislature to delegate have dealt death blows to statutes like Public Law 250 which delegate home rule authority without a constitutional provision. See Phillips v. City of Atlanta, 210 Ga. 72, 77 S.E.2d 723 (1953); Elliott v. City of Detroit, 121 Mich. 611, 84 N.W. 820 (1899). State v. Thompson, 149 Wis. 488, 137 N.W. 20 (1912). These decisions forced cities in these states to seek constitutional amendments before they could accept "home rule" powers. The fear of delegation in those decisions was based in part on belief that the legislature was the sole safe repository of legislative power. See Phillips v. City of Atlanta, 210 Ga. 72, 77, 77 S.E.2d 723, 727...
As a preliminary matter, determination of the general scope of power granted should be distinguished from the specific exercises of that power. Section 16 authorizes unenumerated powers "necessary in the public interest . . . ."[10] Section 1 authorizes the exercise of all powers granted, to the extent "necessary or desirable in the public interest . . . ."[20] As a result, the statute requires the substantive power to be "necessary" but the exercise of that power to be merely "desirable."[21] It is the exercise, and not the power itself that, except where expressly authorized, is subject to a judicial determination of reasonableness.[22]

It is admittedly difficult to distinguish power in the abstract from the exercise of power. As a practical matter a power is useful only to the extent that it may be exercised. According to the statute, however, the concepts are separate. It provides two tests: (1) § 16 asks whether

Modern legislatures delegate enormous legislative power to local governments, not only because they cannot supervise the details of municipal government but also because they have confidence in those governments. Judicial review of delegation should be limited to a requirement of minimal standards or some other safeguards. In ganamort v. Borough of Fort Lee, 120 N.J. Super. 286, 303, 293 A.2d 720, 729 (1972); Davis, A New Approach to Delegation, 36 U. Chi. L. Rev. 713 (1969).

In Dortch v. Lugar, 255 Ind. 545, 266 N.E.2d 25 (1971), the Supreme Court of Indiana upheld the delegation to consolidated first class cities (Indianapolis-Marion County) of "only those powers which are necessary or desirable in the public interest." Id. at 587, 266 N.E.2d at 50; IND. CODE § 18-4-2-33 (1971), IND. ANN. STAT. § 48-9143 (Supp. 1973). The language of Section 16, "necessary in the public interest . . . ." IND. CODE § 18-1-1.5-16 (1971), IND. ANN. STAT. § 48-1466 (Supp. 1973), apparently delegates less power than the statute upheld in Dortch. Section 16 also adds the standard, "in the conduct of municipal or internal affairs." Id. At first, this phrase seems to offer little guidance to either courts or city officials. It or similar phrases have served for a hundred years, however, to demarcate the limits of power. See Mo. Const. art. IX, § 16 (1875); City of Kansas City v. Marsh Oil Co., 140 Mo. 458, 467, 41 S.W. 943, 945 (1897). It is no more vague than is reasonably required to permit cities to act in their areas of competence but yet restrict their power over matters of statewide importance.

The court in Dortch added, "should the consolidated city, at a later date, pass an ordinance without the scope of the grant, its propriety, in light of the powers delegated, is always subject to judicial review." 255 Ind. at 587, 266 N.E.2d at 50. This more traditional approach is more desirable than decisions based on delegation because it focuses on the limits of the city's power, not the legislature's. Sandalow, supra note 16, at 661-68.

21. This lesser standard of scrutiny which applies to the exercise of power may be construed as a codification of the presumption of validity attaching to local legislative judgments. See Johnson v. City of Indianapolis, 174 Ind. 691, 703, 93 N.E. 17, 22 (1910). The power itself is subject to greater scrutiny—it must be "necessary," not merely "desirable." Once it is found to belong to the city, however, its exercise is presumptively valid. Only a strong showing of "unreasonableness" can overcome this presumption. Champer v. City of Greencastle, 138 Ind. 339, 35 N.E. 14 (1893).
the substantive power is necessary; and (2) § 1 asks whether the city has exercised that power by a means which is either necessary or desirable. This note deals primarily with the former test. The latter test, however, will be important in the practical application of § 16 because it permits more than one exercise of the same power. A decision invalidating one means of the exercise of a power should have no effect on the ability of a city to exercise that power through some other means.

An interpretation of the scope of power granted to cities under § 16 requires a determination of whether the power is "necessary in the public interest in the conduct of its municipal or internal affairs." The lawyer's instinct will be to assume that the word "necessary" is a codification of the restrictive requirements of the Dillon rule that a power must be "necessarily implied" or "indispensable" in order for it to be within the city's power. Section 23, however, specifically rejects this interpretation:

The rule of law that cities have only those powers expressly conferred by statute, necessarily implied or dispensable [sic] to the declared objects and purposes of the corporation . . . shall have no application to the powers granted to cities herein.

The only other plausible interpretation of "necessary" is to emphasize the high degree of importance required for a "municipal and internal affair" to be the subject of municipal action. As a result, "municipal or internal affairs" becomes the ultimate standard for interpretation. It is

24. See text accompanying note 4 supra.
25. See text accompanying note 4 supra.

"Necessary" is often associated with the police power: "The only restriction upon such [police] power is that it must be necessary to the protection or promotion of some public interest or welfare . . . ." City of New Albany v. New Albany Street Ry. Co., 172 Ind. 487, 490, 87 N.E. 1084, 1085 (1909) (emphasis added) (allegation that girder rails necessary for safe streets held sufficient to overrule demurrer). See also Pearson v. Duncan & Son, 198 Ala. 25, 28, 73 So. 406, 408 (1916) (dictum that cities may "do all things that in their discretion may seem necessary for the good order and welfare of the municipality" limited by Dillon Rule); Stoessand v. Frank, 283 Ill. 271, 119 N.E. 300 (1918) (statute granting power "to pass and enforce all necessary police ordinances" does not authorize ordinance requiring lights in tenement halls). These cases demonstrate the highly limited "strict construction" of the police power or of general welfare clauses. See 1 C. Antieau, MUNICIPAL CORPORATION LAW § 5.07 (1973) [hereinafter cited as Antieau]. But see authorities cited note 12 supra.
submitted that in order to make sense of his vague phrase, it is essential to make a case by case factual determination of the desirability of municipal action in the light of the interests of state and city.

APPROACHES TO INTERPRETATION

Exclusive Powers

One approach to interpretation of the phrase "municipal or internal affairs" divides powers between sovereigns. Cities have no power over "state affairs" unless expressly authorized, and the legislature may not interfere with "local affairs." Under this approach, the scope of powers may become limited to "proprietary powers." One of the terms commonly used in Indiana and other states to justify the exercise of power without express grant, "proprietary" refers to the "corporate" or "business" powers of local government, as opposed to "governmental," "public," or "police" powers which are in theory vested in the state alone.

One problem with this interpretation is that it is difficult to distinguish "proprietary powers" from "implied" grants of police power or from "inherent" powers. Because of their tendency to grasp at any


28. See authorities cited note 27 supra. The Colorado Supreme Court appears to be moving toward a "shared powers" theory:

We now expressly overrule the dicta of . . . cases which suggest that in strictly local and municipal matters ordinances of home rule cities apply to the [total] exclusion of state statutes.


29. Luhrs v. City of Phoenix, 52 Ariz. 438, 83 P.2d 283 (1938); 1 Antieau, supra note 26, § 3.17.


33. Inherent powers in theory require no state authority, since they predate the state. People ex rel. Leroy v. Hurlbut, 24 Mich. 44 (1871). "Inherent" has also been used to describe powers "growing out of the fact of the creation of the corporation." City of Crawfordsville v. Braden, 130 Ind. 149, 154, 28 N.E. 849, 851 (1891). The Indiana Supreme Court has occasionally seen the interrelationship between inherent and implied powers:

Several Indiana cases seem to hold that a municipal corporation possesses common-law powers. . . . This doctrine appears to be derived from common-law
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precedent, lawyers continue to use all of these metaphysical terms as if they had distinct meanings. The right of local citizens to select local officials, the issue in the early "inherent powers" cases,"^4^ is still argued as an inherent power."^5^ Ownership of city utilities is a "proprietary" power, while the operation of them is a "public" or "police" power."^6^ Sometimes the police power is applied as if it were inherent or proprietary without reference to state authority."^7^

The "two-valued""^8^ artificial separation of powers involved in this approach is inappropriate for analysis of the limits of local power."^9^ Whether "inherent," "propriety" or otherwise, there can be no local power independent of a legislative grant."^10^ Power begins with the state constitution, which in Indiana delegates all legislative power to the legislature."^11^ All legislative power of cities derives from the legislature.

Because every exercise of power interests both state and local governments, there can be no purely "local," "municipal" or "internal" affairs."^12^ Those affairs which have been designated exclusively local...
are merely those in which the state is minimally interested. There are many interests involved in every exercise of power. The terms “state-local,” “proprietary-governmental,” and “express-implied” are conclusions about which sovereign has the greater interest. Compartmentalizing powers hides the real interest weighing that must go into every decision on the exercise of local power.

Fortunately, the phrase “municipal or internal affairs” in § 16 of Public Law 250 need not result in compartmentalization. The phrase preceding it, “in the public interest,” invites comparison of interests of city and state. Since “affairs” may be predominantly city, predominantly state, or may admit of regulation by both, this interpretation more nearly conforms to reality. The attempt to label powers as either “local” or “state” lacks a “firm rational core.” An exercise of local power may be appropriate in some cases but not in others.

The exclusive powers approach inevitably forbids cities from exercising power over many matters of vital concern to them. Compartmentalizing certain affairs in the exclusive province of either state or local government results in a list of powers available to each. At first, this list simplifies the process of determining “municipal” and “state” affairs. The list must continually change, however, as the need for state and local control continually changes. Because under this approach the exercise of power by a city precludes the same exercise by the legislature, city powers must be sharply limited. As cities are denied power over more and more “areas” of state concern, they must recommend their requests for authority from the legislature, defeating the purpose of “home rule.” Fortunately, a preferable alternative exists.

it is municipal. The word ‘municipal’ connotes public interest or character.” Department of Treasury v. City of Linton, 223 Ind. 363, 369, 60 N.E.2d 948, 950 (1945).

43. MANDEIKER, supra note 38, at 68.
44. Sandalow, supra note 16, at 662-63 & nn.82-85.
45. Cf. id. at 663 & n.85.
46. AMERICAN MUNICIPAL ASSOCIATION, supra note 16, at 6. In the words of § 23, Indiana courts are supposed to permit the exercise of all “governmental” authority with respect to “municipal and internal affairs.” IND. CODE § 18-1-1.5-23 (1971), IND. ANN. STAT. § 48-1473 (Supp. 1973). The courts must translate state or “governmental” power into city or “municipal” power. The irrationality of this process suggests the wisdom as well as the greater relevance of balancing the interests of city and state.
49. 1 ANTEAU, supra note 26, § 3.17. The analogy to the police power is here most clear. The police power expands and contracts as state and local needs demand. See Spitler v. Town of Munster, 214 Ind. 75, 14 N.E.2d 579 (1938) (sanitation and housing regulation). Similarly, municipal or internal affairs must be elastic. See People v. Graham, 107 Colo. 202, 110 P.2d 256 (1941) (traffic control).
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Shared Powers

Some courts use an approach which does not classify powers into inflexible compartments. These courts have employed a "paramount interest" test with some success.60 Cities have achieved substantial power from court determinations that their local interests outweighed state interests. In California, local governments may preempt state law in certain municipal affairs.51 Local legislation is not limited to these affairs, however, but may extend to a wide variety of state affairs in which local governments are interested.52

This "shared powers" approach appears to have been endorsed by the Indiana legislature. A 1973 amendment removed the "preemption" provisions of Pubic Law 250.53 Preemption would have permitted courts to invalidate ordinances because they conflicted with a state statute in the same field.54 Absent preemption, the legislature must pass, and the

50. For example, municipal employment contracts are predominantly of local interest unless they interfere with state wage laws. Bishop v. City of San Jose, 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969); City of Joplin v. Industrial Comm., 329 S.W.2d 687 (Sup. Ct. Mo. 1959).

51. See Bishop v. City of San Jose, 1 Cal. 3d 56, 62, 460 P.2d 137, 141, 81 Cal. Rptr. 465, 468 (1969). The California experience leading up to Bishop has been confusing. A recent article suggests more definite standards. Sato, "Municipal Affairs" in California, 60 CALIF. L. REV. 1055 (1972). The dissent in Bishop indicates future difficulty. The majority opinion, however, presents a workable interpretation of the phrase, "municipal affairs."

52. Local governments . . . do not lack the power . . . to legislate upon matters which are not of a local nature, nor is the Legislature forbidden to legislate with respect to the local municipal affairs of a home rule municipality. Bishop v. City of San Jose, 1 Cal. 3d 56, 62, 460 P.2d 137, 140, 81 Cal. Rptr. 465, 468 (1969).

It is impossible to eliminate use of "two-valued" language. Every case must decide whether a city may exercise a power. If it may, the power is a "municipal affair." If a power may be shared by both sovereigns, it will still be labeled a "municipal affair" and a "state affair."


Section 24, repealed by this amendment, authorized a finding of preemption where (1) a statute expressly provided, or (2) when the provisions of a statute were "mandatory and obligatory upon a city," or (3) (a) for statutes passed after 1971, when there was "direct and positive conflict" between statute and ordinance, or (b) for statutes passed before 1971, when the statute was "so comprehensive as to completely occupy the field . . . ." See Pub. L. No. 250, § 24, [1971] Ind. Acts 968. The grant of power to "consolidated first class cities" (Indianapolis-Marion County) retains this limitation. See IND. CODE § 18-4-2-35 (1971), IND. ANN. STAT. § 48-9146 (Supp. 1973).

54. Preemption invalidates inferior laws because the superior legislature has spoken on the same subject. Preemption is useful in a variety of conflicts. See Note, Preemption as a Preferential Ground: A New Canon of Construction, 12 STAN. L. REV. 208 (1959).

For preemption purposes, the states are to the federal government with respect to commerce as cities are to their states with respect to all powers. See United States v. Rock Royal Co-op., 307 U.S. 533, 569-70 (1939). See also Cooley v. Board of Wardens, 53 U.S. (12 How.) 298 (1851); Dowling, Interstate Commerce and State Power—Re-
courts demand, specific denial or specific vesting of a power in another governmental unit before an ordinance justifiable under § 16 will fail. Otherwise, cities and state both may regulate the same field. By passing this amendment, the legislature was willing to give up the protection that preemption usually affords to state interests. The amendment reinforces the message of Public Law 250: The courts should be less willing to deny power and more "liberal" in construing § 16.55

55. It is apparently a coincidence that this amendment preceded by only three months an Indiana Court of Appeals decision that, under the preemption rules of § 24 (which resolved statute-ordinance conflicts), another statute "preempted" § 2(d) of Public Law 250 as to fifth class cities. Meinschein v. J. R. Short Milling Co., --- Ind. App. ---, 298 N.E.2d 495 (1973). The so-called "preempting" statute, IND. CODE § 18-5-29-1 (1971), IND. ANN. STAT. § 48-6938 (Supp. 1973), provides that fifth class cities "may" lease unused real estate to nonprofit corporations or organizations. Section 2(d) provides that cities shall have the power to "use . . . interests in real or personal property owned by the city." IND. CODE § 18-1-1.5-2(d) (1971), IND. ANN. STAT. § 48-1452(d) (Supp. 1973). The City of Mount Vernon attempted to lease to a profit-making company. The court listed five "reasons" for finding "a legislative intent to occupy the field:")

(1) The Powers of Cities Act, passed in 1971, did not specifically repeal § 48-6938, duly enacted into law just two years earlier in 1969;
(2) The Powers of Cities Act speaks generally of "use" of land, while § 48-6938 deals specifically with the leasing of land;
(3) The Powers of Cities Act applies generally to all classes of cities, while § 48-6938 specifically refers to cities of the fifth class and is the only such class limitation . . . ;
(4) The word "may" as used in § 48-6938 is not permissive as contended by appellant, but, rather, directive in nature, as the word "shall" would be totally inappropriate . . . ;
(5) The words "to any private not for profit corporation or organization located in any such city" are words of limitation expressing a legislative intent that such corporations or organizations are the only allowable lessees, as the city could lease to any qualified person or entity had these words of limitation been deleted . . . .

--- Ind. App. at ---, 298 N.E.2d at 497.

These reasons are inadequate and reflect a misunderstanding of the purpose of Public Law 250. Consider these refutations of them:

(1) Upon passing a new statute, the legislature cannot be expected to repeal or revise every existing statute, no matter how recently passed. Courts can interpret statutes in order to achieve coexistence and harmony rather than preemption.
(2) The difference in terms (i.e., "use" and "lease") is no reason for finding "occupation of the field." It is true that specific statutes sometimes express an intent to exclude a more general grant. See Sayles v. Bennett Ave. Dev. Corp., 158 Ia. 659, 138 N.W.2d 895 (1965). Section 23 of Public Law 250 provides, however, that "A specific enumeration, or failure to enumerate, particular powers of cities in section 1 of this chapter or in any other law shall not be construed as limiting in any way the general and residual powers" of § 16.

IND. CODE § 18-1-1.5-23 (1971), IND. ANN. STAT. § 48-1473 (Supp. 1973) (emphasis added). The court stated with respect to another part of § 23, "The powers of cities are to be construed liberally with all doubts resolved in favor of the city." --- Ind. App. at ---, 298 N.E.2d at 496. It failed to decide in that spirit.
(3) The class of city (fifth) specifically mentioned in § 48-6938 is just another...
While the amendment eliminates "preemption," it cannot prevent the conflicts which normally invoke preemption. Conflict alone is simply not conclusive evidence of the invalidity of the ordinance. The more complete the regulation of a subject by statute, the less likely it is appropriate for municipal regulation under § 16. For example, in the instance of direct conflict, a court must choose which law to apply, and normally the statute will prevail. In the absence of direct conflict, however, both statute and ordinance may coexist. Where an ordinance duplicates state law, it should stand if the interest in encouraging local enforcement outweighs the confusion resulting from amendment of the statute without corresponding amendment of the ordinance and from conflicting interpretations by city and state courts. Although more stringent local laws may infringe undesirably on state-wide uniformity, they may be justified if they amplify a state program through fine-tuning. It is essential to remember that a statute requires invalidation of an ordinance in the same field only where this result is justified by strong state interests.

specific detail. It should not operate to exclude the broad grant of § 16 of Public Law 250.

(4) The court contrasted "directive" with "permissive." These kind of statutes are in fact identical. Both would allow the city to lease to unenumerated parties since expressio unius est exclusio alterius would not apply. See 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 57.10 (4th ed., C. Sands ed., 1973); notes 13 & 14 supra. The court apparently meant to say that § 48-6938 was mandatory, and that under the "mandatory and obligatory" clause of § 24, see note 53, supra, that it "preempted" any attempt to lease to profit-making organizations. The court, however, gives no reason why § 48-6938 should be mandatory. It is true that because the statute grants power to lease only when the city wishes to, "shall" would have been inappropriate. However, there is no reason to assume that by saying "may" the legislature intended to allow cities to rent to nonprofit organizations exclusively. Only the application of expressio unius est exclusio alterius would compel that result. That may have been appropriate in 1969, when the legislature passed § 48-6938, since at that time cities had only those powers expressly granted, necessarily implied or indispensable. See note 4 supra. But under § 23, enacted in 1971, use of expressio unius is no longer valid. Consequently, the power in issue should no longer be limited unless some statute specifically denies the power or vests it elsewhere. See notes 13 & 14 supra & text accompanying.

(5) This reason seems to be saying that express mention of private not for profit organizations implies the exclusion of all other lessees. It is faulty, like the other reasons, because it fails to take into account § 16.


In addition to examining whether an ordinance conflicts with, duplicates, or is more stringent than a statute, courts should consider the extent of state regulation and the potential for injury to a statewide program or plan.\(^5\) Apart from statutes, other factors\(^6\) are the benefit to the state of encouraging local initiative,\(^7\) the liquid financial resources available

59. Nearly all ordinances have some effect on suburbanites or transients. These "extraterritorial effects" may interfere with a need for uniformity or coordination throughout the state or region.

In Graham Farms, Inc. v. Indianapolis Power & Light Co., 249 Ind. 498, 233 N.E.2d 656 (1968), the utility attempted to exercise its power of eminent domain in order to clear a right of way for a power line. The City of Washington, which had jurisdiction over the land in the path of the proposed power line, intervened. It argued that the statutes organizing its Plan Commission and Board of Zoning Appeals required the utility to seek approval from those local bodies. Two expert witnesses testified for the utility that the site to be condemned was the best available. The court held in favor of the utility "in view of the chaos that would result" otherwise. 249 Ind. at 517, 233 N.E.2d at 667. It noted that the state Public Service Commission would normally review complaints against utilities. \(^{id}\). This decision emphasizes the widespread effects of local land use control. It is insufficient, even irrelevant, that cities traditionally have had broad authority in this field. In this context, one court has denied a local governing body the traditional presumption of validity, see note 21 supra, of local legislative judgment. Fasano v. Board of County Comm'rs, --- Ore. ---, 507 P.2d 23, 26 (1973). Yet neither should cities be denied participation in land use decisions. The preferable solution is cooperation. In a case similar to Graham Farms, another court has held that local governments may not exclude power lines but may require underground placement. In re Long Island Lighting Co., 49 Misc. 2d 717, 268 N.Y.S.2d 366 (Sup. Ct. Spec. T. 1964). Supervision by a state agency such as the Public Service Commission is another alternative. See Mandelker, supra note 38, at 204-21. Premption, like centralization, increases local resentment and decreases local initiative. "New Federalism" is returning a measure of power from federal agencies to the states; the states would be wise to turn to local officials for an even more cooperative effort. The proposed Land Use Planning Act, H.R. 10294, 93d Cong., 1st Sess. (1973), which will attempt to synthesize highway, pollution control, and other land use planning, gives the states the perfect opportunity to establish effective intergovernmental relations in matters of intergovernmental concern. Slater & Clark, The Year in Washington: How the Cities Fared, 12 Nation's Cities, Jan. 1974, at 7.

60. The risk with this analysis of various factors is that cities are at the mercy of the legislature unless protected by the courts. One commentator has noted that courts seem more willing to protect cities where there is a broad general grant of powers subject to legislative control than in the Colorado system where the legislature is highly restricted. Schmandt, Municipal Home Rule in Missouri, 1953 Wash. U.L.Q. 385, 408-12. Rhode Island courts have shown little of this sympathy but have consistently permitted legislative intervention in such matters of local interest as cable television, Nugent v. City of East Providence, 103 R.I. 518, 238 A.2d 758 (1968), and housing regulation, Early Estates, Inc. v. Housing Bd. of Rev., 93 R.I. 227, 174 A.2d 117 (1961). Nevertheless, this risk is justifiable. Its possibilities for local initiative are greater, and it can encourage state-local cooperation rather than bifurcation.

61. One of the most important state interests is in effective local government. The argument for broad local power has been made often and well. See, e.g., Baum, The Scope of Home Rule: The Views of the Con-Con Local Government Committee, 59 Ill. B.J. 814, 817 (1971). Under the Dillon Rule, it has been long ignored. Local leaders should not be forced to spend their talents in the lobby of the legislature. Legislators should not vote on bills in which they are not interested and which tend to give them unfair bargaining power over city officials. See Sandalow, supra note 16, at 655-56 n.51. Rather than ask, "Where is your authority?" courts and administrative agencies
to the city to pay any costs to be incurred, and the degree to which effects will be imposed extraterritorially upon those unrepresented in the political processes of city government. City regulation conflicts with

should ask, "How will the exercise of this power by a city further the interests of the city as compared to the state as a whole?"

62. "Home rule" grants rarely diminish state control of taxation, finance, and contracts. See 1 ANTEAU, supra note 26, §§ 3.26, 3.27; 2 id. § 19A.06. Indiana will be no exception to this rule. Cities may charge fees reasonably related to licensing and assess charges reasonably related to services. IND. CODE § 18-1-1.5-20(a) (1971), IND. ANN. STAT. § 48-1470(a) (Supp. 1973). They may also "[f]ix or levy a charge or assessment against property" equivalent to costs of services, IND. CODE § 18-1-1.5-4(a) (1971), IND. ANN. STAT. § 48-1454(a) (Supp. 1973), subject, of course, to heavy regulation by state agencies. The statute grants no power to tax or to issue bonds. The authority to enter into contracts to receive state, federal, and other funds, IND. CODE § 18-1-1.5-9 (1971), IND. ANN. STAT. § 48-1452(o) (Supp. 1973), does not include any new authority to expend those funds.

The state's interest here is in protecting the taxpayer from unnecessary levies and appropriations. The traditional demand by state agencies for authority is an effective means toward this end. It should not be an end in itself. The purpose of the broad grant of power in § 16 is to enable cities to act without specific authority. Some additional funds may be necessary to carry out small programs. In reviewing requests for these funds, state agencies should adopt the spirit of §§ 16 and 23. If the agencies do not, then a court called upon to review their action should.

Appropriation of federal funds requires even more deference to local judgment. The only state interest here is in assuring appropriation in accordance with accounting procedures prescribed by statute. See Heller, A Sympathetic Reappraisal of Revenue Sharing, in REVENUE SHARING AND THE CITY 1, 7-8 (H. Perloff & R. Nathan eds. 1968). New programs are frequently the purpose of these grants, particularly revenue sharing. See id. at 37. Contracting for services in relation to these programs is consistent with this purpose. The argument in favor of delegation by the legislature—increased efficiency, decreased burden on policymakers—applies equally to common councils. See generally 1 ANTEAU, supra note 26, §§ 5.25-32. While the effects of a decision holding a delegation improper are less far-reaching, the disadvantages to the people of the city and even of the state may be significant. Compare Booth v. City of Owensboro, 274 Ky. 325, 118 S.W.2d 684 (1938) (delegation to nonprofit corporation, to be formed by representatives of city, county, and owner of land, to run hospital held unlawful) with Lien v. City of Ketchikan, 383 P.2d 721 (Alas. 1963) (delegation to nonprofit religious group to run hospital held lawful).

63. Section 20(e) of Public Law 250 requires specific delegation for the exercise by a city of the power to regulate "private activity" outside its territorial jurisdiction. IND. CODE § 18-1-1.5-20(e) (1971), IND. ANN. STAT. § 48-1470(e) (Supp. 1973). By negative implication, a city is able to regulate "public" activity, or at least activity which is not private, without specific delegation. All of the specific grants in §§ 2 through 15 for which extraterritorial application is expressly authorized seem to have potential effects on "private activity." Yet this cannot be the reason that they are expressly authorized. It is hard to imagine any exercise of power, extraterritorial or not, which would not regulate private activity in some manner. The regulation of water and watercourses, for which some regulation is authorized up to ten miles extraterritorially, permits restraints on the introduction of substances into the water or the taking of water. See IND. CODE § 18-1-1.5-9 (1971), IND. ANN. STAT. § 48-1459 (Supp. 1973). The businesses or persons guilty of these actions are carrying on private activity. If the activity becomes other than private, it is when it becomes a violation of an ordinance and an offense against the city.

The probable meaning of the "private activity" phrase is to leave open the possibility of city action in an emergency. A city without extraterritorial police power is helpless to act against extraterritorial dangers. The phrase is in effect a limited authorization of this police power. "Private" emphasizes the undesirability of imposing this power.
the state interest in private or civil relationships (a discussion which follows) only to the extent that these factors are present.

PRIVATE OR CIVIL RELATIONSHIPS

Under § 19(a), ordinances governing "private or civil relationships are beyond the power of cities." There is a long-accepted "common understanding" that domestic relations, wills and administration, mortgages, trusts, contracts, real and personal property, insurance, banking, corporations, and many other subjects are "private law" unsuitable for less than state-wide administration. If the term "civil relationships" adds anything, it might emphasize that the law in question is that which takes effect in civil suits.

One justification for this rule is protection against interference by city regulation with well-established state control. The state has legislated heavily in these "private" fields, with case law continually filling interstices. Therefore, the resolution of suits arising from these upon individuals unrepresented in the decisionmaking processes of the city. See generally Sandalow, supra note 16, at 692-700. In order to be regulated, the activity must be serious enough to fall within the city's police power and be subject to public regulation. The generous specific grants of extraterritorial power should make resort to this provision rare in any event.

64. A more general question is conflict of city ordinances with the common law. Without more substantive reasons, this is not a justification for invalidation of an ordinance. Indiana has "received" the common law. See IND. CODE § 1-1-2-1 (1971), IND. ANN. STAT. § 1-101 (1967). See generally Hall, The Common Law: An Account of Its Reception in the United States, 4 Vand. L. Rev. 791 (1951). This reception statute, the argument might run, would make "the common law" a "state affair" expressly denied to city legislation. See Ruud, Legislative Jurisdiction of Texas Home Rule Cities, 37 Texas L. Rev. 682, 691 (1959) [hereinafter cited as Ruud].

The few cases which have invalidated ordinances because in conflict with common law have been devastatingly criticized for invoking this new rationale when the familiar one—"local-state concerns"—would have done as well. See Ruud, supra, at 691-93; Sandalow, supra note 16, at 671-72; Schwartz, The Logic of Home Rule and the Private Law Exception, 20 U.C.L.A. Rev. 671, 732, 734 (1973) [hereinafter cited as Schwartz].

The common law, in its seamless, weblike manner, pervades every aspect of life in a flexible framework. It is difficult enough to state what the common law is. It is impossible to know how it will develop. An ordinance on any subject, if analyzed for conflict with the common law, would touch off a difficult, sensitive series of questions. Besides the difficulties for judges, ordinance drafters would have too many conflicts to watch for and too few fields to regulate to make home rule meaningful. See Ruud, supra, at 691-93. In any case, "private or civil relationships" are the stronghold of the common law, despite growing statutory regulation.


67. Private law consists of the substantive law which establishes legal rights and duties between and among private entities, law that takes effect in lawsuits brought by one private entity against another.

Schwartz, supra note 64, at 688 (footnotes omitted).

68. Id. at 690-93.

69. Indeed, "the distinction between common law and legislation may become blurry," "almost symbiotic" or "integrated." Id. at 745-46.
relationships is usually well covered by the state. In addition, city regulation may interfere with a state interest in uniformity. Finally, to the extent that it imposes extraterritorial effects, city regulation of these areas may interfere with state policies, or may impose economic costs on parties unrepresented in city decisionmaking processes.

Virtually all ordinances infringe upon private or civil relationships to some extent. The drafters of the "private or civil relationships" provision attempted to separate serious from harmless infringement by permitting regulation "as an incident to the exercise of an independent municipal power." The word "incident" in this phrase creates two false impressions. First, it encourages a "bootstrap" argument by city officials who desire to circumvent the prohibition against regulation of private or civil relationships. If the city has power to create a public offense, this argument asserts, then any resultant effect on "private or civil relationships" is "incident to the exercise of" that independent municipal power. In other words, ordinances creating public offenses are valid, regardless of their effect on private or civil relationships. This argument encourages the creation of public offenses when the real evil to be regulated is private.

In Marshal House, Inc. v. Rent Review Grievance Board, the Supreme Judicial Court of Massachusetts, interpreting language similar to that in § 19(a) of the Indiana statute, dismissed this argument. A rent control ordinance, which created a public, criminal remedy as well as a civil review procedure, was challenged as a regulation of "private or civil

70. Id. at 739-40, 747-76.
71. Id. at 738. This kind of local regulation imposes burdens on local minorities in contravention of a state policy. It is analogous to local ordinances which infringe upon recognized civil rights or "basic values." See Sandalow, supra note 16 at 708-721.
72. See Schwartz, supra note 64, at 753-54.
73. See id. at 747-58. For example, the time and effort expended in seeking information about local law. Id. at 749.
74. IND. CODE § 18-1-1.5-19(a) (1971), IND. ANN. STAT. § 48-1469(a) (Supp. 1973) (emphasis added). The phrase is at least as old as State ex rel. Garner v. Missouri & Kan. Tel. Co., 189 Mo. 83, 88 S.W. 41 (1905), where the majority opinion stated that the power to fix rates for a public utility is not a power appertaining to the government of the city, and does not follow as an incident to a grant of power to frame a charter for city government. Id. at 100, 88 S.W. at 43 (emphasis added). A concurring opinion suggested a prohibition of delegation to municipalities to confer civil rights, to create civil liabilities, to provide civil remedies, to punish by civil action any acts of commission or omission of duty, or to create any civil right of action between citizens inter se.
75. See Schwartz, supra note 64, at 718-20.
relationships." The court looked behind the public, criminal remedy of the ordinance and found that "the methods of carrying out the public objective" were "predominantly civil." In other words, public penalties alone do not justify any "incidental" regulation of private or civil relationships. If other courts are willing to determine the "predominant" nature of an ordinance, then cities will not, as they should not, be able to disguise regulation of private or civil relationships with criminal remedies.

In addition to this problem, the word "incidental" creates the false impressions that any city regulation of private or civil relationship must be less than the main focus of an ordinance. After finding that the rent control ordinance governed the "civil" landlord-tenant relationship, the court in Marshal House attempted and failed to find an exercise of any "independent municipal power" to which it was "incident." The court assumed that the police power permits city regulation of landlords "to protect tenants against injury from fire, badly lighted common passageways, and similar hazards." It then attempted to distinguish regulation of these matters from rent control through the word "incidental:"

Such by-laws, although affecting the circumstances of a tenancy, would do so (more clearly than in the case of the present by-law) as an incident to the exercise of a particular aspect of the police power . . . . Rent control, however, is . . . an objective in itself . . . .

The court read "incidental" as "clearly" incident. Thus, an ordinance that is "incident to the exercise of an independent municipal power" may not have as its major objective the regulation of "private or civil relationships." Focusing on the objective of the ordinance, however, overlooks the purposes of the "private or civil relationships" exception. The state has no reason to prohibit regulation of private or civil relationships per se; it should step in only when an ordinance has undesirable extraterritorial consequence or interferes with state uniform regulation. The Massachusetts court, however, adopted a mechanical test. It attempted to determine what powers authorized by a broad legislative grant are "independent municipal powers" to which the regulation of private or civil relationships may be incident. It held that

77. Id. at 717, 260 N.E.2d at 206.
78. Id.
79. Id.
80. Id.
81. Id.
82. Id.
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a municipal civil law regulating a civil relationship is permissible (without prior legislative authorization) only as an incident to the exercise of some independent, individual component of the municipal police power.\(^83\)

Because it found rent control to rely on the "whole range" of the police power, rather than on its individual components of health, safety, morals, or general welfare, the court held the ordinance invalid.\(^84\) It offered no reason why rent control was not necessary to protect the public health or to protect the public safety. Yet each of these is an individual component of the police power and each is endangered if the public cannot afford decent housing.

The court could have held the police power not to be an "independent municipal power" to which the regulation of private or civil relationships may be "incident," and it could have held the exercise of the police power valid only to the extent that it does not interfere with "private" relationships. Regulation of landlords to protect tenants from fire or badly lighted passageways, the court might have said, is not regulation of the landlord-tenant relationship. It is regulation of the building only, regardless of who owns it or lives in it. Building regulations under this construction do not invade the province of traditional private law. In contrast, rent control regulates the contract between landlord and tenant.

The court apparently was not willing to go this far. It recognized the police power as an independent municipal power to which law governing private or civil relationships may be incident.\(^85\) However, there must be a limit to this power. This limit should be the point at which state interests in exclusive regulation of private or civil relationships override the city's justification for interference with those relationships. This is the same analytical process used in any other context.\(^86\) The Marshall House court's discussion of the extraterritorial effects of rent control, although in a footnote, shows some recognition of the relevance of this analysis.\(^87\)

83. Id. at 718, 260 N.E.2d at 206-07 (emphasis added).
84. Id. at 718, 260 N.E.2d 207.
85. Id.
87. Regulation of rents in one community may have impact elsewhere on land use, new housing construction, the mortgage market, conveyancing practices, the adequacy and use of recording systems, and other similar matters.

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83 Id. at 718, 260 N.E.2d at 206-07 (emphasis added).
84 Id. at 718, 260 N.E.2d 207.
85 Id.
87 Id. at 637. See also notes 56-63 supra & text accompanying.
357 Mass. at 718-19 n.6, 260 N.E.2d at 207 n.6.
The court offered no better reason than these extraterritorial effects for reaching its conclusion that local rent must be expressly authorized by the legislature, thus forcing the local government to seek special legislation. However, this procedure defeats the policies underlying "home rule" and a broad grant of power. A court ought to require substantial justification before undercutting these policies. In this case, the court should have required more detailed evidence of the undesirable extraterritorial effects.

There is considerable difference of opinion over the desirability of local rent control ordinances. Less extreme regulation of the landlord-tenant relationship is more compatible with state interests and therefore more widely accepted. For example, an ordinance requiring landlords to register their units with the city is no more offensive to state interests than licensing any other local business. A requirement that the landlord maintain public areas seems less objectionable than a requirement that he or she provide hot running water in all bathrooms, but both are commonly the subject of local housing codes. In Indiana, the Administrative Building Council prescribes state-wide minimum standards. Its rules may be supplemented by more stringent city rules. The extraterritorial effects of these local regulations are costly. The local interest in safe, healthy housing conditions, however, justifies their continuation.

If these local regulations can force the landlord to make improvements, then the costs will be reflected in the rental price, which is part of the contract between landlord and tenant. If city regulation of another part of the contract, for example payment of rent or damage deposits, is necessary to protect either landlord or tenant, there is no greater entrench-

88. Id. at 717, 260 N.E.2d at 204.
89. Special rent control enabling legislation was upheld in Marshal House, Inc. v. Rent Control Bd., 358 Mass. 876, 266 N.E.2d 876 (1971).
91. Compare City of Miami Beach v. Fleetwood Hotel, Inc. 261 So. 2d 801 (Fla. 1972), with Inganamort v. Borough of Fort Lee, 120 N.J. Super. 286, 293 A.2d 298 (1973). The former case, which invalidated a rent control ordinance, interpreted a constitutional "home rule" provision while the latter, which upheld rent control, found support in a constitutional provision requiring only "liberal construction." The obvious difference is state policy. See also Comment, supra note 86, at 636-37; 1 FLA. ST. L. REV. 360 (1973); 4 SETON HALL L. REV. 360 (1972).
92. MANDELKER, supra note 38, at 112.
95. Individualized local building codes make it impractical for builders to develop general statewide or nationwide management of their operations. UNITED STATES ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, BUILDING CODES: A PROGRAM FOR INTERGOVERNMENTAL REFORM 1 passim (1966).
96. See MANDELKER, supra note 38, at 126.
ment upon the landlord-tenant relationship. If invalid, it would be because city power is more dangerous than the evils remedied or sought to be remedied by the regulation.\textsuperscript{97} If valid, it would fill a special local need inadequately protected by statute or common law.\textsuperscript{98} Regulation of the contract or of the private or civil relationship, in other words, is forbidden only to the extent that it interferes with legitimate state interests.

CONCLUSION

Restrictive interpretation of city powers under Public Law 250 will result in overworked courts, a legislature overloaded with requests for special legislation from local governments, and discouragement of potentially advantageous innovation and experimentation. "Liberal construction" will avoid these consequences and will enable cities to exercise broad powers even in the absence of pure "home rule" autonomy. A case by case analysis of competing interests is the proper method for determining whether the power is "municipal or internal" or should be reserved ex-

\textsuperscript{97} See Comment, supra note 86, at 636.

\textsuperscript{98} Id. at 639. See also Schwartz, supra note 64, at 716-18, suggesting that the more the common law meets the needs of modern society, the less the need for city "private law."

A Bloomington, Indiana, ordinance provides an example of a city's attempt to alter what it believed to be unresponsive common law treatment of the landlord-tenant relationship. One section expressed the landlord's responsibility to keep the premises in reasonable repair . . . , except when the disrepair has been caused by the willful or irresponsible conduct by the tenant, his guest, or a person under his direction and control. BLOOMINGTON, IND., CODE § 17.20.120(b)(4)(D) (1973). Perhaps more novel were the requirements that landlords' rules be for the purpose of promoting the welfare of the property, be reasonably related to that purpose, apply fairly to all tenants, and give fair notice. Id. § 17.20.190.

A recent circuit court decision invalidating the ordinance on a motion for summary judgment illustrates the misunderstanding of the power of cities to govern private or civil relationships. Chuckney v. City of Bloomington, Cause No. C72-C-475 (Monroe Co. Cir. Ct. Ind., decided Feb. 22, 1974). Although the court wrote no opinion, the decision may have been based on plaintiffs' allegation that the ordinance governed "private or civil relationships." Brief for Plaintiffs at 1, id. The brief erroneously cited Marshal House, see text accompanying note 85 supra, as holding that the police power is not an independent municipal power. Brief for Plaintiffs at 2, id. For this same proposition, plaintiffs relied on the opinion of one of the drafters of Public Law 250 taken in a deposition. Brief for Plaintiffs at 5, id. This opinion is an unreliable source of interpretation because it ignores the only guide to meaning, the words of the statute. See Deposition of F. Reed Dickerson, id. A brief for defendants argued that the circumstances should be considered, including the inclusion of apartment owners in the political processes of the city and the city's interest in providing a safe environment for apartment dwellers. Brief for Defendants at 22-23, id. Assuming that the landlord-tenant relationship is "private or civil" within the meaning of Ind. Code § 18-1-1.5-19(a) (1971), Ind. Ann. Stat. § 48-1469(a) (Supp. 1973), only an analysis of these and other circumstances can provide the information necessary to a determination of whether the ordinance governed private or civil relationships or whether it was a valid exercise of an "independent municipal power" to which regulation of the landlord-tenant relationship was "incident." That the county court decided the issue without a trial is incomprehensible.
clusively to the legislature or another governmental body. In case of doubt, courts should refrain from invalidating an exercise of city power. If the matter is truly of statewide interest, then the legislature can always act to deny it.

As arbiters of individual disputes, courts are unequal. As administrators of the constant working of local government, they are inferior to administrative agencies. A state agency which would encourage intergovernmental cooperation could achieve the most effective local government. In the absence of an agency, the courts are the best supervisors. The courts, while deciding one case at a time, must also keep in mind this goal of cooperation. Where city action interferes with and impedes the programs of the state or of the surrounding local governments, it should not stand. Where it does not, courts should encourage cooperation through a liberal construction of city powers. The proper scope of city initiative extends to those services which it can provide and those regulations which it can enforce more efficiently than any other organ of state government.

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