June 2005

**Smith v. Town of Pittston: Municipal Home Rule's Narrow Escape from the Morass of Implicit Preemption**

Shane Wright  
*University of Maine School of Law*

Follow this and additional works at: [https://digitalcommons.mainelaw.maine.edu/mlr](https://digitalcommons.mainelaw.maine.edu/mlr)  
Part of the Conflict of Laws Commons, Environmental Law Commons, and the State and Local Government Law Commons

**Recommended Citation**  
Available at: [https://digitalcommons.mainelaw.maine.edu/mlr/vol57/iss2/13](https://digitalcommons.mainelaw.maine.edu/mlr/vol57/iss2/13)
SMITH v. TOWN OF PITTSTON: MUNICIPAL HOME RULE’S NARROW ESCAPE FROM THE MORASS OF IMPLICIT PREEMPTION

I. INTRODUCTION

II. MUNICIPAL AUTHORITY
   A. The Traditional Relationship Between the State and Municipalities
   B. Home Rule
      1. The Constitutional Amendment and Enabling Legislation
      2. Judicial Interpretation

III. SOLID WASTE MANAGEMENT ACT

IV. SMITH v. TOWN OF PITTSTON

V. ANALYSIS
   A. Statutory Construction
   B. Significance of Home Rule
   C. The Role of the Legislature vs. the Role of the Judiciary

VI. CONCLUSION
SMITH v. TOWN OF PITTSTON: MUNICIPAL HOME RULE'S NARROW ESCAPE FROM THE MORASS OF IMPLICIT PREEMPTION

I. INTRODUCTION

In Smith v. Town of Pittston,1 the Maine Supreme Judicial Court, sitting as the Law Court, upheld a municipal ordinance adopted by the town of Pittston that prohibited the spreading of septage within Pittston.2 The majority3 held that Pittston's ordinance did not violate the Maine Hazardous Waste, Septage and Solid Waste Management Act (Solid Waste Management Act),4 which "govern[s] the disposal of garbage, sludge, septage and other waste."5 The majority interpreted the "home rule" statute6 as granting sufficient authority to Pittston, as a municipal corporation, to enact the ordinance at issue.7 The dissent, on the other hand, would have held the ordinance to be incompatible with the state's statutory scheme controlling the disposal of septage.8

An analysis of the statutory schemes controlling waste management and municipal home rule, along with rules of statutory construction, demonstrates that the majority opinion best reflects legislative intent. However, the role and fate of municipal home rule warrant a different approach to state preemption of local authority. This Note considers the background of municipal authority and the establishment of home rule in the process of ascertaining legislative intent and the overall objectives that the Legislature sought to achieve. Although in this case a statutory construction approach led the Law Court to uphold Pittston's authority, it did so on narrow grounds and by a one-vote margin. The danger of home rule being undermined by implied state preemption calls for more guidance from the Legislature and an amended approach to preemption cases.

II. MUNICIPAL AUTHORITY

In describing municipal authority, the Maine Constitution provides that "[t]he inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character. The Legislature shall prescribe the procedure by which the municipality may so act."9 This constitutional provision granting "home rule" to Maine municipalities was adopted in 1969.10 "Home rule" is a term of art

1. 2003 ME 46, 820 A.2d 1200.
2. Id. ¶¶ 10, 31, 820 A.2d at 1208-09.
3. Four justices agreed that the ordinance was legitimate while the three remaining justices joined in dissent. See id. ¶ 39, 820 A.2d at 1210.
8. Id. ¶ 43, 820 A.2d at 1212.
generally connoting municipal autonomy. In order to gain a complete understanding of Maine’s home rule scheme, and accordingly its significance for the Smith case, it is useful, if not necessary, to examine the historical relationship between the state and its municipalities and the developments that culminated in the state granting municipalities home rule in 1969.

A. The Traditional Relationship Between the State and Municipalities

By the late seventeenth century, charters granted to English municipalities conferred a corporate status, and municipalities began to be viewed as an arm of the central government rather than independent entities. The view that municipal corporations were no different than any other corporation created by the state was solidified when the King’s Bench upheld the King’s right to revoke municipal charters in 1683. The British system was imported to the American colonies and as a result, the approach to local governance embodied by the granting of municipal charters by the state became the normal and accepted approach in the United States. Despite the acceptance of the grant approach to municipal authority, a number of state courts in their interpretation of state constitutions held that there was a degree of local autonomy beyond the reach of the state legislature.

11. Id. at 313 n.1 ("As a political symbol "home rule" is generally understood to be synonymous with local autonomy, the freedom of a local unit of government to pursue self-determined goals without interference by the legislature or other agencies of state government.") (quoting Terrance Sandalow, The Limits of Municipal Power Under Home Rule: A Role for the Courts, 48 MINN. L. REV. 643, 644 (1964)).

12. See id. at 319. Bower notes the irony of this developing legal fiction in light of the "plain fact [that] the historic cities of Europe today are all older than the state that legally claims these rights, and had an independent existence before their right to exist was recognized!" Id. at 319 n.45.

13. See id. at 320 (citing The King v. Mayor and Commonalty of London, 89 Eng. Rep. 930 (K.B. 1683)).

14. Id.

15. See, for example, People ex rel. Leroy v. Hurlbut, 24 Mich. 44 (1871), where the court stated:

The state may mould local institutions according to its views of policy or expediency; but local government is a matter of absolute right; and the state cannot take it away. It would be the boldest mockery . . . to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all.

Id. at 108 (Cooley, J., concurring). The Indiana Supreme Court later came to a similar conclusion, stating:

It is, perhaps, true that the General Assembly may, at will, pass laws regulating the government of towns and cities, taking from them powers which had previously been granted, or adding to that which had previously been given, but we do not think that it can take away from the people of a town or city rights which they possessed as citizens of the State before their incorporation . . . The construction of sewers in a city, the supply of gas, water, fire protection, and many other matters that might be mentioned, are matters in which the local community alone are concerned, and in which the State has no special interest, more than it has in the health and prosperity of the people generally, and they are matters over which the people affected thereby have the exclusive control, and it cannot, in our opinion, be taken away from them by the Legislature.

State ex rel. Jameson v. Denny, 21 N.E. 252, 257 (Ind. 1889). The Iowa Supreme Court also seemed to agree with this broad proposition:
ever, the Supreme Court did not share those views, but rather, established the controlling rule that municipalities were merely creatures of the state.\textsuperscript{16} In \textit{Worcester v. Worcester Consolidated Street Railway Co.},\textsuperscript{17} the Court held that a contract between the city of Worcester and the railway company requiring the railway to keep utilized portions of the street in good repair was abrogated when the state amended the statutory scheme in a manner that removed maintenance requirements from railroads.\textsuperscript{18} Central to the Court’s reasoning was the determination that:

A municipal corporation is simply a political subdivision of the State, and exists by virtue of the exercise of the power of the State through its legislative department. The legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government of the district comprised within the limits of the former city. The city is the creature of the State.\textsuperscript{19}

The historical relationship between the State of Maine and its municipalities was in accord with the national pattern upheld by the Supreme Court.\textsuperscript{20} In 1821, the year after Maine’s separation from Massachusetts, the Legislature codified the relationship between the state and its municipalities, adopting the “grant approach” to municipalities:

But from time immemorial every municipal government, properly so called, and acting within its peculiar sphere, has acted through its common council, composed either of the burgesses or their representatives, subject in some cases to checks and vetoes, but not subject to legislation or final action in defiance of their own decisions. Their supremacy cannot be given up by themselves any more than it can be taken from them. No doubt the state can limit their powers, but it cannot transfer them. The appointment and incorporation of boards as mere agencies is competent, and may be very convenient. But making them anything but agencies is a direct invasion of representative government, and would bring into existence a class of cities unknown to our constitutions, and very different from the municipal corporations recognized by our constitution as the authorized recipients of local legislative power.

\textit{State ex. rel. Howe v. City of Des Moines, 72 N.W. 639, 643 (Iowa 1897).}

\textsuperscript{16} \textit{See Comm’rs of Laramie County v. Comm’rs of Albany County, 92 U.S. 307 (1875)}. The Court reasoned that:

Such corporations are composed of all the inhabitants of the Territory included in the political organization; and the attribute of individuality is conferred on the entire mass of such residents, and it may be modified or taken away at the mere will of the legislature, according to its own views of public convenience, and without any necessity for the consent of those composing the body politic.

\textit{Id. at 310.}

\textsuperscript{17} \textit{Id. at 542, 552-53.}

\textsuperscript{18} \textit{Id. at 548-49. See also Bower, supra note 10, at 320-23 (discussing the grant approach to municipal authority).}

\textsuperscript{19} \textit{Id. at 310.}

\textsuperscript{20} \textit{See, e.g., Inhabitants of Gorham v. Inhabitants of Springfield, 21 Me. 58, 61 (1842) (“[Public corporations] exist[] at the pleasure of the State, and not at their own pleasure.”).}
to municipal authority. 21 The grant approach views municipalities as corporations deriving all of their power and authority from statutory grants from the state. 22 Furthermore, they are empowered to act only within the confines of that grant; there exists no residual authority to act beyond the scope authorized by the state. 23 The Law Court interpreted the statutory scheme granting municipal authority in 1824 in Bussey v. Gilmore. 24 In Bussey, the court held that the town of Bangor did not have the authority to levy a tax upon its citizens in order to pay on a contract for a bridge across the Kenduskeag stream. 25 The grant of authority 26 did not explicitly issue authority for the building of bridges, therefore, the court deemed that the only possible source of authority was the general grant embodied in the words "and other necessary charges." 27 Because the general language needed to be given a "reasonable limitation," 28 the court held that it could not possibly include the building of bridges. 29 The court reasoned that "necessary charges" only

21. Bower, supra note 10, at 333. Section 6 of the statute stated:  

Be it further enacted, That the citizens of any town, qualified as aforesaid, at the annual meeting for the choice of town officers, or at any other town meeting, regularly warned, may grant and vote such sum or sums of money as they shall judge necessary for the settlement, maintenance and support of the ministry, schools, the poor, and other necessary charges, arising within the same town, to be assessed upon the polls ... and ... empowered to make and agree upon such necessary rules, orders and by-laws, for the directing, managing and ordering the prudential affairs of such town, as they shall judge most conducive to the peace, welfare and good order thereof; and to annex penalties for the observance of the same not exceeding five dollars for one offence, to ensure to such uses as they shall therein direct: Provided, They be not repugnant to the general laws of this State: And provided also, Such orders and by-laws shall have the approbation of the Court of Sessions of the same county.

Act of March 19, 1821, ch. 114, § 6, 1821 Me. Laws 459, 463.

22. See Hooper v. Emery, 14 Me. 375 (1837). In Hooper, the Law Court stated that:  

"The inhabitants of every town in this State are declared to be a body politic and corporate" by the statute; but these corporations derive none of their powers from, nor are any duties imposed upon them by, the common law. They have been denominated quasi corporations, and their whole capacities, powers, and duties are derived from legislative enactments.

Id. at 377.

23. See Phillips Village Corp. v. Phillips Water Co., 71 A. 474, 475 (Me. 1908) ("Being a creature of statute, it had only such powers as were conferred by statute expressly or by necessary implication."). The Law Court has also declared that:

The [city] is but a creature of the state, engaged in exercising some of the functions of government in a limited locality, not for any private purposes, but solely for the public good. . . . A municipal corporation is nothing more than an instrumentality of the state for the purpose of local government, exercising delegated powers, which the state itself can exercise and may withdraw at pleasure.


24. 3 Me. 191 (1824).

25. Id.

26. See supra note 21 and accompanying text.

27. Bussey v. Gilmore, 3 Me. at 195-96 (citing Act of Mar. 23, 1786, ch. 75, 1784-1785 Mass. Acts 605). The Massachusetts statute had been, in the words of the court, "re-enacted in our revised statutes." Id. at 195. The court refers to the Massachusetts version of the statute because the contract with the Bangor Bridge Company had been entered into prior to the separation of Maine from the rest of Massachusetts. Id.

28. Id. at 196.

29. Id.
included expenditures that were incidental to the explicit grants of authority.\textsuperscript{30}

Although it was codified and firmly accepted and enforced by the courts, the grant approach was not without its drawbacks. The three basic problems were: (1) the requirement that municipalities get specific authorization from the state legislature for any local issue not addressed by a statutory grant; (2) local issues and problems were becoming increasingly complex and therefore required flexible solutions; and (3) local affairs and sentiment were at the mercy of state regulation.\textsuperscript{31} In \textit{Squires v. Inhabitants of Augusta},\textsuperscript{32} the split opinion of the court reflects the aforementioned problems of the grant approach. The town of Augusta enacted an ordinance permitting non-public school children to be bused to and from school on the buses paid for by the public funds.\textsuperscript{33} The impetus behind the ordinance was the safety of the children in light of increased traffic and the reciprocal increased danger to young children walking to school.\textsuperscript{34} A majority of the court held that the ordinance was beyond the scope of the authority granted to the town and was therefore invalid.\textsuperscript{35} The dissenting justices, on the other hand, opined that local officials needed more flexibility in the scope of their authority in order to address developing problems and contingencies that could not have been anticipated when the general grant had been given.\textsuperscript{36} It was those issues faced by the citizens of Augusta, as they existed in the locality at that time, which needed to be addressed.\textsuperscript{37}

\begin{itemize}
\item \textit{Id.} The court stated:
Without enumerating the objects which this term, \textit{other necessary charges}, may be understood to embrace, it may in general be considered as extending to such expenses as are clearly incident to the execution of the power granted, or which necessarily arise in the fulfillment of the duties imposed by law. It is not pretended that the contract made with the bridge-company, was necessary to the discharge of any corporate duty. Towns are not required, nor have they the power, to provide for the erection of bridges over tide or navigable waters. The powers granted to towns are specified and defined by statute; and we have discovered no one to which a charge of this sort can be considered as incident.

\textit{Id.} (emphasis in original).
\item \textit{Id.} at 81-82.
\item \textit{Id.} at 88. Although the court noted the potential constitutional issue, they did not address that issue because they were able to decide the case on other grounds. \textit{Id.}
\item \textit{Id.} at 111 (Sullivan & Dubord, JJ., dissenting). The dissenting justices stated:
"[P]ower is not something which is rigid and definitely fixed; on the contrary, in its very nature it must be considerably elastic within limits in order to meet the changing and shifting conditions which from time to time arise through the increase and shift of population and the flux and complexity of commercial and social relations."
\textit{Id.} (quoting 6 \textit{McQuillin: Municipal Corporations} § 24.03 (3rd ed.)).
\item \textit{Id.} The justices stated:
The ordinance responds to a purely modern exigency, traffic disasters in alarming arithmetic progression... Our age differs from those immediately preceding it because of our acceptance of social concepts as contrasted with the individualistic attitudes of other times. Rapid developments in social, political and economic life produce an always increasing complexity of society and broaden the social service field. School children have welfare needs not known before.
\textit{Id.}
\end{itemize}
As demonstrated by *Squires*, the grant approach did not permit local officials to address certain local needs because the grant of authority from the state had not specifically anticipated those needs. As the dissenting justices in *Squires* stated, changes in society and increasingly complex local issues warranted more flexibility in local authority. Not only expecting, but requiring the state legislature to address varying local issues created a situation that was neither ideal nor efficient for either local citizens or the state.

**B. Home Rule**

1. The Constitutional Amendment and Enabling Legislation

Ostensibly in response to the problems with the grant approach, in 1967, a commission was formed to study the matter and issue a report to the Governor and Legislature. In its 1968 report, the Maine Intergovernmental Relations Commission proposed a constitutional amendment establishing municipal home rule. In laying out the purposes of the proposed amendment, the Commission touched upon the concepts of local accountability, increased flexibility, and relieving the state of a burden. In achieving local accountability, the Commission stated that: "Home Rule accomplishes the basic philosophy of government in allowing the people most directly affected by the governing body, to rule the governing body." Increased local flexibility could be accomplished by giving municipal officials authority to make necessary charter amendments and enact ordinances designed to address local issues. Finally, the state would no longer be responsible to respond to each local contingency on an independent basis but would be able to delegate that function to local elected officials.

---

39. *Id.* at 2. Although the Commission spoke of home rule as a new system, the term itself had, at times, been used to refer to the Legislature's grant of authority to municipalities. See, e.g., *Lemaire v. Crockett*, 101 A. 302 (Me. 1917).
40. *Id.* at 1.
41. *Id.*
42. *Id.* The Commission reported: "Through charter amendments and alterations, municipalities may readily merge service functions and provide more efficient and complete services to the community. The broader functions will also permit the municipality to exercise the necessary alternatives that it may encounter as circumstances change." *Id.*
43. *Id.* ("Indirectly, Municipal Home Rule will relieve the state of a cumbersome . . . obligation of altering the local charters to meet the local need (such can only be done on a biannual basis). The state incurs considerable expense when such matters are considered during the legislative session."). During legislative debate on the home rule amendment, it became clear that concern over the necessity and expense of state action to alter municipal charters was paramount:

> It makes no sense to me that the Legislature should determine what charter changes should be made by the cities and towns of our state. . . . I believe we have at least 70 or 77 charter changes in this Legislature [thus far] which takes a lot of time, a lot of energy, and a lot of cost.

*Bower, supra* note 10, at 337 n.144 (quoting 2 *Me. Legis. Rec.* 3257 (1969) (statement of Rep. Sahagian)); Representative Lund expressed the following feelings:

> [T]here are many many issues of statewide importance . . . which we fail to deal with effectively as we would like to because we do not have the time to do so. . . . [H]ome rule is one logical and effective way of cutting down on the number of local issues that divert a good deal of the attention and time of the Legislature . . .

As ultimately enacted, the constitutional amendment provided municipalities with "power to alter and amend their charters on all matters, . . . which are local and municipal in character."\(^{44}\) The amendment also established authority in the legislature to "prescribe the procedure" by which such charter alterations or amendments may be carried out.\(^{45}\) As currently codified, the enabling legislation is found in Title 30-A of the Maine Revised Statutes.\(^{46}\) Chapter 111 of the Title declares that its purpose "is to implement the home rule powers granted to municipalities by the Constitution of Maine, Article VIII, Part Second."\(^{47}\) The Chapter provides procedures relating to municipal charters,\(^{48}\) and ultimately states that "[t]his chapter, being necessary for the welfare of the municipalities and their inhabitants, shall be liberally construed to accomplish its purposes."\(^{49}\) More directly related to \textit{Smith v. Town of Pittston}, is Chapter 141 of the Title addressing municipal ordinances.\(^{50}\) Section 3001 of the Chapter generally establishes municipal authority:

Any municipality, by the adoption, amendment or repeal of ordinances or by-laws, may exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution of Maine, general law or charter.\(^{51}\)

Moreover, subsections one through three make it very clear that the Legislature intended local authority to be very broad. The subsections provide:

1. Liberal construction. This section, being necessary for the welfare of the municipalities and their inhabitants, shall be liberally construed to effect its purposes.

2. Presumption of authority. There is a rebuttable presumption that any ordinance enacted under this section is a valid exercise of a municipality's home rule authority.

3. Standard of preemption. The Legislature shall not be held to have implicitly denied any power granted to municipalities under this section unless the municipal ordinance in question would frustrate the purpose of any state law.\(^{52}\)

The combination of the language in Article VIII of the state constitution, section 3001 of Title 30-A of the Revised Code, and the report by the Intergovernmental Relations Commission\(^{53}\) warrant the conclusion that the Legislature intended to

\(^{44}\) \textit{Me. Const.} art. VIII, pt. 2, § 1. The section provides in full:

Power of municipalities to amend their charters. The inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character. The Legislature shall prescribe the procedure by which the municipality may so act.

\textit{Id.}

\(^{45}\) \textit{Id.}


\(^{47}\) \textit{Id.} § 2101.

\(^{48}\) \textit{Id.} §§ 2102-2105.

\(^{49}\) \textit{Id.} § 2109.

\(^{50}\) \textit{Id.} §§ 3001-3012.

\(^{51}\) \textit{Id.} § 3001.

\(^{52}\) \textit{Id.} §§ 3001(1)-(3).

\(^{53}\) \textit{See Maine Intergovernmental Relations Commission, Report on Home Rule 4} (1968) (stating that "Home Rule should accomplish the independence within the municipality as was required and requested by this country from England in the years 1775-1783" and that "towns and cities will be given the opportunity to operate within their domain in a sphere of independence such as was won during the Revolutionary War.").
grant municipalities a significant degree of autonomy in local matters. The statutory scheme endows municipalities with as much authority as the Legislature has the power to confer, contingent only upon the Legislature's authority to limit that power. Moreover, that authority is accompanied by a requirement of liberal construction and a presumption of validity. Municipal home rule was intended to be more than rhetoric.

2. Judicial Interpretation

Despite the apparent intent of the Legislature, the scope of municipal autonomy has not always been subject to consistent judicial construction. The problem seems to have been facilitated by, if not a direct result of, the grant approach that had controlled for approximately a century and a half, and the existence of statutory grants of authority still present in the Code despite the establishment of home rule. In Town of Waterboro v. Lessard, the Law Court was called upon to decide the validity, or lack thereof, of an ordinance enacted by Waterboro that regulated the proximity of construction to property boundary lines. The court stated the "basic issue" as being "whether § 5(a) of the municipal ordinance is authorized by 30 M.R.S.A. § 2151." The decision was entirely based upon the construction of section 2151 of the Revised Code, which, in part, regulated the design and construction of buildings and building additions, and the effect or impact of home rule was not discussed. Because a setback requirement was not within the scope of section 2151, Waterboro's ordinance was held to be invalid. A year later in Town of Windham v. LaPointe, the court, again, not only ignored the impact of home rule, but founded its opinion on the grant approach, in direct contradiction to the new home rule scheme. Rather than seek to determine if

54. Municipal autonomy, to whatever degree it was intended, did not change the underlying fact that municipalities are corporate entities established by the state and subject to its authority. See Me. Const. art. VIII, pt. 2, § 1; see also Schwanda v. Bonney, 418 A.2d 163, 165 (Me. 1980) ("Municipal corporations, as public bodies, may exercise only such powers as the Legislature has conferred upon them by law or which may have been granted to them directly by the Constitution.").
55. See tit. 30-A, § 3001; supra text accompanying note 51.
56. See tit. 30-A, §§ 3001(1)-(3) (West 1996 & Supp. 2003); supra text accompanying note 52.
57. For additional discussion of the Law Court's interpretation of home rule, see Bower, supra note 10, at 344-63.
58. See, e.g., Town of Windham v. LaPointe, 308 A.2d 286 (Me. 1973).
59. 287 A.2d 126 (Me. 1972).
60. Id. at 127.
61. Id. at 128.
62. Id. at 128-30. Furthermore, the court stated: "It is an accepted rule that when a municipal corporation is empowered by express grant to make by-laws or ordinances in certain cases and for certain purposes, its power of legislation is limited to the cases and objects specified. . . . And it is held that if a bylaw or ordinance as drawn is outside the scope of the grant and exceeds the powers to legislate conferred upon the municipality, it is invalid."
63. Id. at 129.
64. 308 A.2d 286 (Me. 1973).
65. See id. at 290.
Windham's authority to regulate house trailers had been denied, the court inquired whether or not such authority had been granted. Moreover, the town itself argued that it had authority based on a general grant of police power under section 2151 rather than home rule authority.

Although the court's acceptance and consideration of home rule came slowly, it did eventually take hold. In *Clardy v. Town of Livermore*, the court held that Livermore's ordinance prescribing minimum frontage was not applicable to the Clary's' land because they had owned it prior to enactment of the ordinance. By holding the ordinance not applicable on that ground, the court did not have to reach the issue of whether or not the ordinance constituted a taking. Therefore, in keeping with the judicial canon of avoiding constitutional questions when a statute or ordinance can be so interpreted, the court did not reach Livermore's contention that home rule permitted it to enact such an ordinance. Commenting on the town's argument, however, the court stated, "[w]e agree with defendant Town that the issues it raises in this case are important as portents of many, and major, transformations that have been wrought by the advent of municipal homerule in the legal framework which has governed, for so long, the interrelations of State and municipal authority." In *Schwanda v. Bonney*, the court not only interpreted the home rule doctrine, but employed a key component of the legislative scheme: state preemption. In *Schwanda*, the court invalidated an ordinance enacted by the town of Freeport that required an applicant for a concealed weapons license to demonstrate that he needed the license for personal protection or for use in the course of his employment. This need requirement was in addition to the state's statutory requirement that an applicant demonstrate "good moral character." The court cited constitutional home rule and the enabling legislation, but found that neither gave Freeport the authority to regulate the issuance of concealed weapons licenses in the manner it had chosen. The court based its opinion on two somewhat compet-

66. *Id.* The court stated:

A municipality in this State has no inherent police power. It may exercise only such powers as are expressly conferred upon it by the Legislature or as are necessarily implied from those expressly so conferred. . . . "A municipal corporation has no element of sovereignty. It is a mere local agency of the state, having no other powers than such as are clearly and unmistakably granted by the law-making power."

*Id.* (citations omitted) (quoting Inhabitants of Town of Frankfort v. Waldo Lumber Co., 128 Me. 1, 4, 145 A. 241, 242 (1929)).

67. *Id.* ("The plaintiff Town claims the power to regulate house trailers through a police power ordinance, as distinguished from a zoning ordinance, from the general grant of power contained in 30 M.R.S.A. s. 2151(4)(A). ").

68. 403 A.2d 779 (Me. 1979).

69. *Id.* at 782.

70. *Id.* at 781-82.

71. *Id.*

72. *Id.* at 781.

73. 418 A.2d 163 (Me. 1980).


75. 418 A.2d at 164-65.

76. *Id.* at 164.

77. *Id.* at 167.
ing rationales that reflected the ongoing problem with the application of home rule. Quoting the constitutional grant of authority, the court stated that "[t]he licensing act has statewide application; it does not involve 'matters . . . which are local and municipal in character.'" 78 Moreover, the court quoted the language of the home rule enabling statute 79 and concluded that "municipal regulation beyond the statutory requirements of legal residency and good moral character in the licensing of persons to carry concealed weapons is by clear implication denied by the enabling legislative provisions." 80 The authority was denied by clear implication because the state had "preempt[ed] the field respecting regulatory requirements in the issuance of concealed weapons." 81

The two rationales employed are contradictory, because, unlike the language of the constitution, the enabling legislation does not appear to constrain municipal authority to only those matters which are local in character. Rather, it conveys any power that the legislature has authority to convey unless such has been denied. 82 The court's interpretation of these seemingly contradictory grants of authority will be of utmost importance in defining the scope of home rule, particularly in light of the apparent view of the Legislature as stated by the Intergovernmental Relations Commission report:

If the municipality fails to adhere to the law allowing Home Rule, abuses the enacting legislation, or fails to operate under Home Rule in a manner consistent with the philosophy therein, the Courts will be called upon to act. The Courts in replacing a legislature in this role will furnish stability to decisions that are made.

The stability stems from the doctrine of 'stare decisis' whereby one decision is rule or [sic] law as to how the Court will act in a similar set of circumstances. 83

Similar to Freeport's authority in Schwanda, the court found the town of Boothbay Harbor's authority in regard to liquor licenses to be implicitly preempted in Ullis v. Inhabitants of the Town of Boothbay Harbor. 84 The town of Boothbay Harbor had enacted an ordinance that prohibited any additional restaurants that served liquor with meals from obtaining a liquor license unless it was located at

---

78. Id. (quoting Me. Const. art. VIII, pt. 2, § 1).
81. Id. at 165.
83. Maine Intergovernmental Relations Commission, Report on Home Rule 2 (1968). It is worth noting in this regard that although the court was beginning to embrace home rule, as demonstrated by Clardy and Schwanda, reliance upon the grant approach had not been entirely eradicated. See, e.g., Spain v. City of Brewer, 474 A.2d 496 (Me. 1984). In Spain, the court held that Brewer could not deny an application for an 'automobile graveyard' because it violated local zoning ordinances or for environmental concerns. Id. at 499-500. The court stated "[m]unicipal corporations . . . may exercise only such powers as have been granted to them directly by our state constitution or which the Legislature has conferred upon them by statute." Id. at 498.
84. 459 A.2d 153 (Me. 1983).
least 1200 feet from any other restaurant of that class. The court held that the state’s “liquor licensing scheme” preempted any municipal regulation. In holding such, the court stated that the ordinance “works at cross purposes to the state’s liquor licensing statutes, and therefore impermissibly conflicts with them.” Significant to the court’s determination that the state statutory scheme was intended to preempt additional municipal regulation was the fact that the state permitted municipalities to regulate in two specific ways. Municipalities were permitted, by referendum, to prohibit specified classes of liquor licenses altogether and also to establish additional requirements for establishments that provided entertainment as well as liquor.

The amendments to the enabling statute in 1987 and the subsequent judicial decisions based upon the new statute were much more favorable to municipalities and home rule. In Central Maine Power Co. v. Town of Lebanon, the court upheld a Lebanon ordinance prohibiting the commercial, non-agricultural spraying of herbicides without town approval. The court held that the state’s statutory scheme addressing pesticides neither explicitly nor implicitly preempted local regulation. Central to that determination was the court’s analysis of the purpose of the state statutes—the protection of public health, safety, welfare, and the state’s natural resources; the court found that the Town of Lebanon’s ordinance did not conflict with those purposes. In regard to the furtherance of the state’s purposes in regulating pesticides, the court stated: “By requiring a more stringent review process for certain types of pesticide use than that found in the two Maine pesticide acts, the Lebanon ordinance shares and advances these same purposes.”

Similarly, in School Committee of York v. Town of York, the court gave a broad interpretation to municipal home rule, including addressing the apparent

85. Id. at 155. The ordinance stated in relevant part:

An establishment which serves liquor along with its meals contributes more heavily to parking problems due to the length of time its patrons spend in said establishment. Furthermore, the close proximity of liquor serving establishments in Boothbay Harbor has caused unnecessary noise and public disturbances as patrons travel from one such establishment to the next. In addition, the residents of Boothbay Harbor are opposed to any more liquor serving establishments in downtown Boothbay Harbor, out of concern for their own safety and personal well-being as well as that of their children. Consequently, no further Class H licenses shall be granted in Boothbay Harbor beyond the ones which exist at the adoption date of this Ordinance, unless the establishment requesting said license is at least 1200 feet distant from any other Class H licensee.

86. Id. at 155 n.1 (quoting section 8.3 of Boothbay Harbor’s victualer’s ordinance).
87. Id. at 159.
88. Id. at 158.
89. Id. at 157.
91. 571 A.2d 1189 (Me. 1990).
92. Id. at 1190-91.
93. Id. at 1194.
94. Id. at 1194-95. The court looked to the purpose in response to the home rule enabling statute’s standard for preemption. Id. at 1193-94; see also Me. Rev. Stat. Ann. tit. 30-A, § 3001(3) (West 1996).
95. Cent. Maine Power Co. v. Town of Lebanon, 571 A.2d at 1195.
96. 626 A.2d 935 (Me. 1993).
contradiction between the constitutional provision and the enabling statute. The Town of York enacted its first charter in 1991, and in the process "divested budgetary authority from the School Committee"; the School Committee then challenged the validity of the charter. In the process of upholding the charter, the court examined the Legislature's intent embodied by the home rule amendments adopted in 1987. In the court's view, the amendments to the enabling legislation made it "clear that the Legislature intended to convey a plenary grant of the state's police power to municipalities, subject only to express or implied limitations." Because of the Legislature's intent to convey a plenary grant to municipalities, the court found that the original version of the enabling legislation permitted "local legislation in areas beyond those 'local and municipal in character.'" The court garnered additional support from the Committee Report, which stated:

The standard [of review set out in 30-A M.R.S.A. § 3001] reaffirms the fundamental principle of home rule, that municipalities have been given a plenary grant of power. . . . Only where the municipal ordinance prevents the efficient accomplishment of a defined state purpose should a municipality's home rule power be restricted, otherwise they are free to act to promote the well-being of their citizens.

Furthermore, the court refuted the argument that Title 20-A, regulating educational matters, created a comprehensive scheme implicitly preempting local regulation. Again, quoting the Committee Report, the opinion states: "The mere fact that there is a state law, or even a multitude of state laws on a subject is by itself irrelevant; the key is whether the Legislature intended to exclusively occupy the field and thereby deny a municipality's home rule authority to act in the same area."

Two preemption cases with an even greater significance to Smith v. Town of Pittston are Midcoast Disposal, Inc. v. Town of Union and Sawyer Environmental Recovery Facilities, Inc. v. Town of Hampden. In Midcoast Disposal, Inc.,

97. Id. at 938-39.
98. Id. at 937-38.
99. Id. at 938-42.
100. Id. at 938 (citations omitted).
101. Id.
102. Id. at 938 n.8 (alteration in original) (quoting Report of the Joint Standing Committee on Local and County Government on the Revision of Title 30, at 11 (Dec. 1986)).
103. Id. at 941. Title 20-A, section 2 provides:

The state policy on public education is as follows.

1. State responsibility for public education. In accordance with the Constitution of Maine, Article VIII, the Legislature shall enact the laws that are necessary to assure that all school administrative units make suitable provisions for the support and maintenance of the public schools. It is the intent of the Legislature that every person within the age limitations prescribed by state statutes shall be provided an opportunity to receive the benefits of a free public education.

2. Local control of public education. It is the intent of the Legislature that the control and management of the public schools shall be vested in the legislative and governing bodies of local school administrative units, as long as those units are in compliance with appropriate state statutes.

105. 537 A.2d 1149 (Me. 1988).
106. 2000 ME 179, 760 A.2d 257.
the court held that the state, through the Solid Waste Management Act, had implicitly preempted municipal authority in the area of solid waste disposal. Preemption was deemed implied due to the "comprehensive and exclusive regulatory scheme" adopted by the state Legislature. Significant to the court's reasoning was the Act's declaration of policy seeking to address the increasing amount of waste and the inefficient methods in place to deal with it, and to encourage "public or private' solid waste programs that reduce the actual volume of solid waste generated and increase the quantity of waste that is recycled and reused in a safe manner." Similarly, in Sawyer, the court held that the Solid Waste Management Act preempted the Town of Hampden's prohibition of Sawyer Environmental's expansion beyond the border of the original landfill. As part of the Department of Environmental Protection application process for expansion, Sawyer notified Hampden of its intentions. This notification was required by section 1310-S of the Solid Waste Management Act and granted Hampden intervenor status in the application process. The court deemed the granting of intervenor status to be evidence that the state Legislature intended municipalities to have only a limited role in the application process, not authority to prohibit expansion all together. Furthermore, section 1310-U of the Solid Waste Management Act prohibits municipalities from enacting stricter standards than those in the statute or the associ-

107. Midcoast Disposal, Inc. v. Town of Union, 537 A.2d at 1151. The Town of Union had enacted an ordinance that prohibited a private company from accepting for disposal any waste that "originates, or is collected, or is in any way gathered or assembled from outside the Town of Union." Id. at 1150 (internal citation omitted).

108. Id. at 1151 (quoting Tise v. Town of Ogunquit, 491 A.2d 564, 570 (Me. 1985)).

109. Id. (quoting ME. REV. STAT. ANN. tit. 38, § 1302 (West Supp. 1986)).


111. Id. ¶ 8, 760 A.2d at 259.

112. Id.; see also ME. REV. STAT. ANN. tit. 38, § 1310-S(3) (West 2001). The sections states: Automatic municipal intervenor status. The municipal officers, or their designees, from the municipality in which the facility would be located have intervenor status if they request it within 60 days of notification under subsection 1. The intervenor status granted under this subsection applies in any proceeding for a license under this article. Immediately upon the commissioner's receipt of such a request, the intervenors have all rights and responsibilities commensurate with this status.

113. Sawyer Envtl. Recovery Facilities, Inc. v. Town of Hampden, 2000 ME 179, ¶ 32, 760 A.2d at 265 ("It would make little sense for the Legislature to craft this process for expansion approval and include express provision for significant local participation, then after approval, allow the municipality to negate the proceedings and prohibit the expansion."). The court's determination was not simply based upon common sense, but the statutory standard of preemption contained in the Home Rule enabling legislation. Id. ("Such an after the fact and absolute prohibition of the expansion prevents the 'efficient accomplishment' of the 'defined state purpose' of proper management of expansion of solid waste disposal facilities."); see supra note 52 and accompanying text (providing the standard of preemption); see also infra note 119 and accompanying text (discussing the purpose of the Solid Waste Management Act).
ated rules. The court stated that the prohibition of stricter standards “necessarily bars” Hampden’s attempt to prohibit the expansion altogether.

III. SOLID WASTE MANAGEMENT ACT

The Maine Legislature enacted the Solid Waste Management Act in 1973. The enactment followed closely upon the heels of the federal government’s enactment of the Clean Water Act in 1972. As currently codified, the stated congressional purpose of the Clean Water Act is to restore and protect the nation’s water from various forms of pollution. Similarly, the Maine Solid Waste Management Act was enacted to establish a statewide program to address the problems of pollution, and in the current form focuses not only on water pollution, but also land and air pollution. In its declaration of policy, the Legislature further stated its finding that state-wide legislation was necessary to address the problems of pollution because municipalities had not, and, due to the structure of local govern-

114. Sawyer Envtl. Recovery Facilities, Inc. v. Town of Hampden, 2000 ME 179, ¶ 31, 760 A.2d at 265; see also tit. 38, § 1310-U. The section states in relevant part: Municipalities are prohibited from enacting stricter standards than those contained in this chapter and in the solid waste management rules adopted pursuant to this chapter governing the hydrogeological criteria for siting or designing solid waste disposal facilities or governing the engineering criteria related to waste handling and disposal areas of a solid waste disposal facility. Under the municipal home rule authority granted by the Constitution of Maine, Article VIII, Part Second and Title 30-A, section 3001, municipalities, except as provided in this section, may enact ordinances with respect to solid waste facilities that contain standards the municipality finds reasonable, including, without limitation, conformance with federal and state solid waste rules; fire safety; traffic safety; levels of noise heard outside the facility; distance from existing residential, commercial or institutional uses; ground water protection; surface water protection; erosion and sedimentation control; and compatibility of the solid waste facility with local zoning and land use controls, provided that the standards are not more strict than those contained in this chapter and in chapter 3, subchapter I, articles 5-A and 6 and the rules adopted under these articles. Municipal ordinances must use definitions consistent with those adopted by the board.

Id. (emphasis added).


119. Title 38, § 1302. The section provides in part: For the purposes of this chapter . . . the Legislature finds and declares it to be the policy of the State, consistent with its duty to protect the health, safety and welfare of its citizens, enhance and maintain the quality of the environment, conserve natural resources and prevent air, water and land pollution, to establish a coordinated statewide waste reduction, recycling and management program.

The Legislature finds and declares that it is the policy of the State to pursue and implement an integrated approach to hazardous and solid waste management, which shall be based on the following priorities: reduction of waste generated at the source, including both the amount and toxicity of waste; waste reuse; waste recycling; waste composting; waste processing which reduces the volume of waste needing disposal, including waste-to-energy technology; and land disposal.

Id.
ment, potentially could not have, adequately addressed the issues themselves. Finally, the Legislature found "that environmentally suitable sites for waste disposal are in limited supply and represent a critical natural resource," and the provisions of the Act should be liberally construed to "accomplish the policies in this section."

The statute directly addresses the role and authority of municipalities in the effort to reduce and recycle, as well as to protect the health of the citizens and the environment. Each municipality is required to provide for the disposal of both solid waste and septic waste generated within that municipality. In addition to requiring each municipality to provide for the disposal of septic waste, the statute states that "any person may provide a site for disposal of septage." In establishing a site for septage disposal, such a person must receive approval from the State Department of Environmental Protection and the municipality. In the process of evaluating the application, the municipality may consider the proposed location's compliance with municipal ordinances, zoning and land use controls. If there is no conflict between the proposed location of the private site and such municipal ordinances, then the municipality is required to approve the application.

Significant to analysis of the Solid Waste Management Act, as with any statutory compilation, and of particular importance in the Smith case are the statutory definitions. Section 1303-C(29) defines "solid waste" and provides a non-exhaustive list of substances included in the definition. More significant to the Smith

---

120. Id. Section 1302 provides, in part:
The Legislature further finds that needed municipal waste recycling and disposal facilities have not been developed in a timely and environmentally sound manner because of diffused responsibility for municipal waste planning, processing and disposal among numerous and overlapping units of local government. The Legislature also finds that direct state action is needed to assist municipalities in separating, collecting, recycling and disposing of solid waste, and that sound environmental policy and economics of scale dictate a preference for public solid waste management planning and implementation on a regional and state level.

121. Id.

122. See id. § 1305.

123. Id. §§ 1305(1), 1305(6). Section 1305(1) states: "Disposal services. Each municipality shall provide solid waste disposal services for domestic and commercial solid waste generated within the municipality . . . ." Id. § 1305(1). Section 1305(6) states in part: "Municipal septic sites. Each municipality shall provide for the disposal of all refuse, effluent, sludge and any other materials from all septic tanks and cesspools located within the municipality." Id. § 1305(6).

124. Id. § 1305(6). The section provides in relevant part:
In addition, any person may provide a site for disposal of septage. In addition to making application to the Department of Environmental Protection for approval of any site, that person shall have written approval for the site location from the municipality in which it is located . . . . A municipality may determine whether approval of the site must be obtained first from the department or the municipality. The municipal officials shall approve, after hearing, any such private site if they find that the site complies with municipal ordinances and with local zoning and land use controls.

Id.

125. Id.

126. Id.

127. Id.

128. Id. § 1303-C(29). Section 1303-C(29) defines "solid waste" as "useless, unwanted or discarded solid material with insufficient liquid content to be free-flowing, including, but not limited to, rubbish, garbage, refuse-derived fuel, scrap materials, junk, refuse, inert fill material and landscape refuse, but does not include hazardous waste, biomedical waste, septage or agricultural wastes." Id.
case and the incumbent preemption analysis, is the list of substances that are not incorporated by the definition, which includes "septage."129 Of related significance are sections 1310-S and 1310-U. Both sections are included in Article III of Title 38 addressing "Solid Waste Facility Siting."130 Section 1310-S discussed earlier in the context of Sawyer Environmental Recovery Facilities, Inc., addresses local participation, including municipal intervenor status.131 Section 1310-U, also discussed in the context of Sawyer Environmental Recovery Facilities, Inc., addresses the role of municipal ordinances in the establishment and siting of solid waste facilities.132 The crux of section 1310-U is that municipalities are prohibited from enacting stricter standards than the state has established through its statutory scheme.133

IV. SMITH v. TOWN OF PITTSTON

In Smith v. Town of Pittston, Jerald Smith filed a complaint against the Town claiming that its septage ordinance, which prohibited the dumping of septage absent approval by a vote of the citizens, was illegal.134 The claim was based upon the language and intent of the Solid Waste Management Act, whereby Smith argued that the state, through its statutory scheme, had preempted municipal authority to prohibit his creation of a private site.135 The Superior Court (Kennebec County, Marden, J.) held that municipal ordinances, such as Pittston's, are preempted by the state statutory scheme.136 On appeal, the Law Court vacated the judgment of the Superior Court and remanded the case for judgment in favor of the Town of Pittston.137 Three members of the court dissented from the majority, arguing that municipal authority, to the extent exercised by Pittston, was preempted by the Legislature's enactment of the Solid Waste Management Act.138

In April of 1999, Smith first sought permission before Pittston's municipal officers to spread septage on a privately owned site in the town.139 As directed by the municipal officers, Smith began the process of applying for a permit for his proposed business.140 On July 28th of that year, the citizens of Pittston approved

129. Septage is defined as: "[W]aste, refuse, effluent, sludge and any other materials from septic tanks, cesspools or any other similar facilities." Id. § 1303-C(27).
130. See id. §§ 1310-N to 1310-AA.
131. Id. § 1310-S; see also supra note 112 and accompanying text.
132. Title 38, § 1310-U; see also supra note 114 and accompanying text.
133. See id., § 1310-U.
135. Smith v. Town of Pittston, No. Civ.A. CV-99-279, 2002 WL 273634, at *2 (Me. Super.). Although Smith's complaint consisted of twelve counts, it is Count IX, addressing the legality of Pittston's ordinance that was at the center of the courts' analyses and is the focal point of this article. See id. at *1; see also Smith v. Town of Pittston, 2003 ME 46, ¶¶ 13-16, 22, 820 A.2d at 1203, 1205. "At the center of this dispute lies section 1305(6) [of the Solid Waste Management Act], detailing municipal powers and duties in regulating and providing for the disposal of septage." Id. ¶ 22, 820 A.2d at 1205.
136. Smith v. Town of Pittston, 2002 WL 273634, at *3 ("Clearly, the Town of Pittston has 'frustrated the purpose' of state regulation in this area by prohibiting all forms of septage spreading within its confines. . . . Accordingly, this court finds that the Town of Pittston has exceeded its home rule authority by passing an ordinance prohibiting the spreading . . . of septage.").
138. Id. ¶ 39, 820 A.2d at 1210.
139. Id. ¶ 2, 820 A.2d at 1201.
140. Id. ¶ 2, 820 A.2d at 1201-02.
a 180-day moratorium on the spreading of septage within the municipal borders.\textsuperscript{141} Due to the existence of the moratorium, the municipal officers declined to submit Smith’s application for review by the State Department of Environmental Protection (DEP) on August 4.\textsuperscript{142} At a town meeting on December 22, 1999, the citizens of Pittston approved an ordinance that “prohibited the ‘spreading, storing, or dumping of septage in the Town of Pittston’ unless approved by the voters of the Town of Pittston.”\textsuperscript{143} The same day, Smith’s spreading application was forwarded to the DEP for review.\textsuperscript{144} The application was not fully reviewed by the DEP because it was deemed incomplete, but was forwarded again on February 2, 2000.\textsuperscript{145} On October 19, 2000, Pittston’s voters approved a third version of the septage spreading ordinance that made the effective date retroactive to July 23, 1999.\textsuperscript{146} On May 15, 2001, the DEP approved Smith’s application and granted a license to spread septage on his Pittston property.\textsuperscript{147} When the Town refused to approve the site and grant Smith a permit, this legal action ensued.\textsuperscript{148}

In their opinion upholding the ordinance, the majority of the court began their analysis with the policy and purpose of the Solid Waste Management Act.\textsuperscript{149} The court noted the need for statewide coordination of disposal and recycling efforts, and reiterated the Legislature’s determination that the Act should be “‘construed liberally to address the findings and accomplish the policies [of section 1302].’”\textsuperscript{150} Completing its discussion of the statutory background, the court provided the relevant statutory definitions and noted the DEP authority in the approval process.\textsuperscript{151} The court began its discussion of preemption by examining section 1305(6) of the Solid Waste Management Act.\textsuperscript{152} As was discussed previously in this article, section 1305(6) requires municipalities to provide for the disposal of septage, and further that any individual may provide a site.\textsuperscript{153} The section also addresses the method for approval of a proposed private site.\textsuperscript{154} Before moving on to discuss home rule authority and the standards for preemption, the court noted the existence of section 1310-U prohibiting municipalities from enacting stricter standards than has the state in regulating solid waste disposal.\textsuperscript{155}

\textsuperscript{141} Id. \textsuperscript{4}, 820 A.2d at 1202.
\textsuperscript{142} Id.
\textsuperscript{143} Id. \textsuperscript{5}, 7, 820 A.2d at 1202.
\textsuperscript{144} Id. \textsuperscript{7}, 820 A.2d at 1202.
\textsuperscript{145} Id. \textsuperscript{8}, 820 A.2d at 1202.
\textsuperscript{146} Id. \textsuperscript{10}, 820 A.2d at 1203. The second ordinance had been adopted on March 18, 2000 and along with the first version was removed and replaced by the third and final version adopted on October 19. Id. \textsuperscript{9-10}, 820 A.2d at 1202-03.
\textsuperscript{147} Id. \textsuperscript{11}, 820 A.2d at 1203.
\textsuperscript{148} Id. \textsuperscript{12-13}, 820 A.2d at 1203.
\textsuperscript{149} Id. \textsuperscript{20}, 820 A.2d at 1204.
\textsuperscript{150} Id. (quoting ME. REV. STAT. ANN. tit. 38, § 1302 (West 2001)). See also supra note 119 and the accompanying text relating to the discussion of section 1302.
\textsuperscript{151} Smith v. Town of Pittston, 2003 ME 46, § 21, 820 A.2d at 1204-05. See supra notes 128-29 and accompanying text for the language of the relevant definitions and the related discussion.
\textsuperscript{152} Smith v. Town of Pittston, 2003 ME 46, § 22, 820 A.2d at 1205-06.
\textsuperscript{153} ME. REV. STAT. ANN. tit. 38, § 1305(6) (West 2001); see also supra notes 123-24 and accompanying text.
\textsuperscript{154} Title 38, § 1305(6).
\textsuperscript{155} Id. § 1310-U; see also supra note 114 and accompanying text.
Having laid out the relevant portions of the Solid Waste Management Act, the court turned to home rule and the standards for preemption.\footnote{156} The court recognized that a municipality may exercise any authority not explicitly or implicitly denied by the state, noted the presumption in favor of municipal authority, and stated that "[t]he determinative factor is, therefore, whether the ordinance "would frustrate the purpose of any state law.""\footnote{157} Accordingly, the appropriate standard was stated in the terms of "[w]e will view municipal action as preempted only when the application of the 'municipal ordinance prevents the efficient accomplishment of a defined state purpose.'"\footnote{158}

While recognizing that it had previously held in both Midcoast Disposal and Sawyer Environmental Recovery Facilities, Inc. that the Solid Waste Management Act preempted municipal ordinances banning solid waste disposal, the court distinguished these cases on the ground that septage is treated differently than solid waste.\footnote{159} Specifically, the court held that section 1305(6) "clearly contemplates" municipal involvement in the licensing process, which makes its approach different than that for solid waste provided in section 1310-U.\footnote{160} The existence and structure of section 1310-U was seen as unambiguous evidence that the Legislature was competent to preempt municipal authority when it chose to, and the inclusion of only solid waste within section 1310-U confirmed an intentionally different approach to septage.\footnote{161} Furthermore, Pittston had met the state’s general requirement that it provide for the safe and effective disposal of septage by contracting with Interstate Septic Systems in a manner approved by the DEP.\footnote{162} Finally, the majority stated that Smith’s argument was weakened because the ordinance did not in fact prohibit private septage disposal, but only spreading or land application.\footnote{163} The court noted that other methods of disposal permissible under the DEP regulations were still available to Smith and any other potential private applicant, and therefore the state’s purposes were not frustrated.\footnote{164}

While the dissenting justices undertook the same analysis, they reached the opposite conclusion—that Pittston’s ordinance was preempted by the Solid Waste Management Act.\footnote{165} The majority’s conclusion that not all methods of disposal available to private applicants were foreclosed by Pittston’s ordinance drew an incredulous response from the dissent.\footnote{166} In the dissent’s view, the alternate methods suggested by the majority, while in some technical sense may have been available, were utterly unrealistic in application.\footnote{167} The dissent concluded that Pittston’s

\footnote{156} Smith v. Town of Pittston, 2003 ME 46, ¶ 24, 820 A.2d at 1206.


\footnote{158} Smith v. Town of Pittston, 2003 ME 46, ¶ 24, 820 A.2d at 1206 (quoting Sch. Comm. of York v. Town of York, 626 A.2d 935, 938 n.8 (Me. 1993)).

\footnote{159} Id. ¶ 29-30, 820 A.2d at 1207-08.

\footnote{160} Id. ¶ 29, 820 A.2d at 1207.

\footnote{161} Id. ¶ 29, 820 A.2d at 1208.

\footnote{162} Id. ¶ 29, 820 A.2d at 1207-08.

\footnote{163} Id. ¶ 31, 820 A.2d at 1208.

\footnote{164} Id.

\footnote{165} Id. ¶ 39, 820 A.2d at 1210 (Dana, J., dissenting).

\footnote{166} Id. ¶ 41, 820 A.2d at 1211 (Dana, J., dissenting) ("To be charitable, the Court’s suggestion that Smith could build a private wastewater treatment facility is, at least, impractical.").

\footnote{167} Id. ¶¶ 41-42, 820 A.2d at 1211-12 (Dana, J., dissenting).
 ordinance frustrated the Legislature's purpose in enacting statewide regulation, and therefore, it was invalid.\textsuperscript{168}

V. ANALYSIS

The complexity of the issue presented is demonstrated by the fact that the majority and dissenting justices undertook the same analysis and yet reached opposite conclusions. Compelling and opposing legislative policies accompanied by limited legislative guidance has left the courts to do the heavy lifting in the domain of implied preemption. Both the majority and the dissent took a practical and legitimate approach to the issue, and based on the law and precedent, both achieved a reasonable conclusion.\textsuperscript{169} However, based upon the statutory structure of both the Solid Waste Management Act and the home rule enabling legislation, and accepted models of statutory construction, the majority had the better of the argument. Moreover, prudential considerations surrounding the significance and importance of municipal home rule counsel against preemption. The court's analysis of the issues and hesitancy to recognize implied preemption is grander than the issue of whether Mr. Smith could spread septage on his property in Pittston. In cases of implied preemption the entire scheme of municipal home rule is at risk of being undermined. Home rule is of extreme importance, not only to municipalities, but also to the local citizenship and the state government. The importance of home rule calls for a legislative determination of preemption rather than a judicial one; requiring a legislative determination keeps the courts and the democratic process operating within the realms to which they were designed and are best-suited.

A. Statutory Construction

General rules of statutory construction are instructive in the implied preemption analysis. To begin with, the point of interpreting a statute is to fulfil the intent of the Legislature; that is always the objective.\textsuperscript{170} Furthermore, a significant part of the intent is effectuating the policy supporting that intended objective.\textsuperscript{171} The

\textsuperscript{168} Id. ¶ 43, 820 A.2d at 1212 (Dana, J., dissenting). Justice Dana stated that: The Legislature spoke clearly when it declared the policy behind the waste management statute. Recognizing that "environmentally suitable sites for waste disposal are in limited supply and represent a critical natural resource" and that "municipal waste recycling and disposal facilities have not been developed in a timely and environmentally sound manner because of diffused responsibility for municipal waste planning, processing and disposal among numerous and overlapping units of local government," the Legislature provided that "any person may provide a site for disposal of septage.

\ldots Pittston has thwarted the Legislature's intent to foster the creation of adequate, affordable, environmentally suitable, private septage disposal sites. Its ordinance is, therefore, ultra vires.

\textit{Id.} (internal citations omitted).

\textsuperscript{169} The same can be said for Justice Marden of the Superior Court.

\textsuperscript{170} See Schwanda v. Bonney, 418 A.2d 163, 165-66 (Me. 1980) ("Legislative intendment always controls; this is a fundamental precept of statutory construction."); see also Chase v. Town of Litchfield, 134 Me. 122, 128, 182 A. 921, 924 (1936) ("The intention of the lawmaker is the law.") (citation omitted).

\textsuperscript{171} Schwanda v. Bonney, 418 A.2d at 166 ("Courts should implement not only the intent but also the policy of the Legislature behind the legislation.").
Law Court has stated that legislative history and legislative activity are useful instruments to be considered in the process of ascertaining legislative intent. A corollary to achieving the legislative intent is the plain meaning rule, or in other words, applying the plain or common meaning to the language in order to best represent the legislative intent. Additionally, and of particular importance in such an extensive statutory scheme as the Solid Waste Management Act, is the rule that every portion of the legislation be afforded meaning. What this rule of construction means is that no one section will be construed in such a manner that it negates another section or makes another section obsolete.

Section 1302 of the Solid Waste Management Act declares the need for statewide coordination to address the environmental issues and the scarcity of suitable waste disposal sites. The ultimate goal expressed by the Legislature is "to protect the health, safety and welfare of [Maine’s] citizens, enhance and maintain the quality of the environment, conserve natural resources and prevent air, water and land pollution." In order to achieve that objective, the Legislature declares that the provisions of the Act should be liberally construed. In implementing the state’s policy, the statute requires municipalities to provide for the disposal of solid waste and septage produced within the municipal boundaries. That requirement must be read in light of the overall purpose of the statute—protecting the health of the citizenry and the environment. Similarly, the provision’s allowance for private septage disposal sites can be linked to the finding that “environmentally suitable sites for waste disposal are in limited supply and represent a critical natural resource.”

As with the Solid Waste Management Act, the Legislature has provided that the home rule enabling legislation should be liberally construed to give effect to its purposes. The purpose to be given effect is the enhancement of “the welfare of the municipalities and their inhabitants.” The breadth of municipal authority is demonstrated by its limitations, which are found only in express denial of author-

172. Id. (“The legislative history of a particular statute, as well as legislative activity concerning such or related legislation, is a helpful guide in ascertaining the intent of the Legislature.”). The court has demonstrated a willingness to take its own advice and use legislative history in construing the intent of a statute. See, e.g., Sch. Comm. of York v. Town of York, 626 A.2d 935, 938 n.8 (Me. 1993) (after stating the Legislature’s intent, the court supported its conclusion by quoting a portion of the relevant Committee Report relating to the amending of the home rule scheme).


175. Id. (“[W]henever possible, courts will construe a legislative scheme so as to render no portion of it useless or unnecessary.”) (alteration in original) (quoting Ullis v. Town of Boothbay Harbor, 459 A.2d 153, 159 (Me. 1983)).


177. Id.

178. Id.

179. Id. §§ 1305(1), 1305(6).

180. Id. § 1302.


182. Id.
ity or denial by clear implication. In order for implicit denial of authority to be established, the municipal ordinance must “frustrate the purpose of any state law.” Implied preemption has been found to exist when a municipality attempted to add an additional requirement to that required by the state for the issuance of a concealed weapons permit. Similarly, the Town of Brewer was preempted from regulating an automobile junkyard in a manner beyond the scope of the state statutory scheme. Likewise, the court has invalidated, on preemption grounds, a municipal ordinance that sought to impose additional requirements in order to receive a liquor license. In the words of the court, such ordinances work at “cross purposes” to the state’s enacted scheme. However, a local ordinance that requires a more stringent review or analysis in a manner that furthers the purpose of the state scheme is not implicitly preempted.

The statutory requirement that municipal home rule be liberally construed reflects the Legislature’s intent that towns be given broad authority to control local issues. Furthermore, that authority is accompanied by a presumption of validity. The stated purpose of promoting the welfare of municipalities and their inhabitants is buttressed by the words of the Intergovernmental Relations Commission’s report, which states: “The establishment of Municipal Home Rule creates a local government that must be responsible to the people it governs. If it is not responsible to the local community, then the local government will no longer be in office.” As long as the municipal ordinance does not frustrate the purpose of a state law it will be upheld. It is against this backdrop that the Solid Waste Management Act, and Pittston’s authority must be analyzed.

As has been discussed, section 1305(6) of the Solid Waste Management Act requires each municipality to provide for disposal of septage produced within its borders. The same section provides that in addition to the municipality’s obligation, any individual “may provide a site for disposal of septage.” Based upon the language, it is clear that there is no obligation upon such an individual as there is for the municipality. Before a private site can be utilized, the individual must

183. Id. § 3001.
184. Id. § 3001(3).
186. See Spain v. City of Brewer, 474 A.2d 496, 500 (Me. 1984) (noting that “[a]n analysis of this entire statutory scheme reveals a clear legislative intent to limit the inquiry in automobile graveyard and junkyard permitting proceedings to evidence concerning the location of the facility with reference to a highway and compliance with screening regulations.”)
188. Id. at 159.
189. See Cent. Maine Power Co. v. Town of Lebanon, 571 A.2d 1189 (Me. 1990). “By requiring a more stringent review process for certain types of pesticide use than that found in the two Maine pesticide acts, the Lebanon ordinance shares and advances these same purposes.” Id. at 1195.
190. See supra note 52 and accompanying text.
191. MAINE INTERGOVERNMENTAL RELATIONS COMMISSION, REPORT ON HOME RULE 1 (1968).
192. See supra note 52 and accompanying text.
194. Although the term “may” utilized in a statutory context is generally considered to be permissive, it has been interpreted as mandatory when imposing a public duty. Schwanda v. Bonney, 418 A.2d 163, 167 (Me. 1980). However, interpreting section 1305(6) to place a duty upon private persons to provide for septage disposal is untenable. See tit. 38, § 1305(6).
get approval from the DEP and the municipality. 195 In the case of private septage disposal, the legislative intent, and accordingly the scope of the municipality's role, can be distinguished from the municipality's role in the solid waste context. Section 1305(6) provides that "the municipal officers shall approve, after hearing, any such private site if they find the site complies with municipal ordinances and with local zoning and land use controls." 196 A plain reading of the statute necessitates the conclusion that a municipality does have authority to accept or reject an application, but only upon the bases provided in the statute. Should the site comply with local ordinances, zoning, and land use controls, then the municipality must approve the application. The plain meaning is confirmed by an examination of other relevant factors.

As was discussed in the context of Sawyer Environmental Recovery Facilities, Inc., section 1310-S grants a municipality intervener status when an application for a solid waste disposal facility license is filed with the DEP. 197 As the court in Sawyer noted, intervener status is not commensurate with an authority to prohibit a solid waste disposal facility entirely. However, it is noteworthy that section 1305(6) does not grant intervener status, but makes municipal approval a prerequisite for a private site. 198 The granting of intervener status on the one hand, and the requirement of written approval on the other, reflects a different policy relating to the scope of municipal involvement. Furthermore, section 1310-U, also relied upon by the court in Sawyer, prohibits municipalities from enacting stricter siting standards, but does so only in the context of "solid waste." 199 It could be argued that the policy behind section 1310-U applied to septage as well as to solid waste, but the structure of the statutory scheme and recent legislative activity belie that argument. Both sections 1310-S and 1310-U fall under the heading of "Solid Waste Facility Siting." 200 Furthermore, the specific exclusion of "septage" from the statutory definition of "solid waste" 201 was pursuant to an amendment passed in 2001. 202 As the court has stated, such legislative activity is informative of legislative intent; the Legislature's removal of septage from the definition, absent any accompanying amendment to section 1310-U, creates an inference that the section's application was intended to be confined to solid waste.

Moreover, section 1305(6) grants the municipality authority to "determine whether approval of the [private] site must be obtained first from the department or the municipality." 203 Applying the rules of statutory construction it follows that such a discretionary grant to the municipality must not be empty words. If the scope of municipal authority in approving an application for a private septage dis-

195. Title 38, § 1305(6) ("In addition to making application to the Department of Environmental Protection for approval of any site, that person shall have written approval for the site location from the municipality in which it is located . . . ").

196. Id. (emphasis added).

197. Id. § 1310-S(3).

198. For a discussion of the scope of authority commensurate with intervener status, see Butler v. D/Wave Seafood, 2002 ME 41, ¶ 13, 791 A.2d 928, 931 (quoting Local Number 93 v. City of Cleveland, 478 U.S. 501, 528-29 (1986)).

199. Title 38, § 1310-U.

200. See tit. 38, §§ 1310-N-1310-AA.

201. See supra note 128 and accompanying text.


203. Title 38, § 1305(6).
positional site is as narrow as the Smith dissent argues, then the ability to determine whether approval may come first from the municipality or the department is nonexistent. No benefit could possibly be derived from such discretion if the underlying authority was essentially nonexistent.

Finally, the purpose of the Solid Waste Management Act is not frustrated by permitting municipalities to prohibit private septage disposal sites. To protect the health and welfare of its citizens and the environment, the Legislature sought to establish a coordinated and integrated approach to waste disposal through the Solid Waste Management Act.\textsuperscript{204} One of the means employed to accomplish this purpose, was requiring each municipality to properly dispose of the septage produced within its boundaries. The record in the Smith case demonstrates that Pittston has satisfied that requirement.\textsuperscript{205} An additional purpose of the state was to act in a manner that recognized that “environmentally suitable sites for waste disposal are in limited supply and represent a critical natural resource.”\textsuperscript{206} Although the context of this legislative finding leads to the conclusion that it is related to the encouragement of recycling and reuse,\textsuperscript{207} interpreting it more broadly, as the dissent in Smith appears to have done, does not convert Pittston’s ordinance into a frustration of the state’s purpose. There is nothing in the record that indicates that Pittston has not met its obligations to protect its citizens and the environment. Permitting Mr. Smith to spread septage on his property may very well have contributed to the Solid Waste Management Act’s purpose, but prohibiting the same does not frustrate it; rather, it requires Pittston to satisfy its obligations through other means, which it has done. Furthermore, the ordinance would have been valid even if it had prohibited all methods of disposal rather than just spreading.\textsuperscript{208}

\textbf{B. Significance of Home Rule}

In contrast with the Solid Waste Management Act, the Legislature’s purpose in granting municipal home rule would have been frustrated by a judicial finding that Pittston’s authority had been implicitly preempted. As was discussed in Part II(B)(1) above, the Legislature intended municipal home rule to establish a substantial degree of municipal independence and accountability to the local citizenry.\textsuperscript{209} To facilitate the accomplishment of that purpose, the requirement that home rule be broadly construed was included in the statute.\textsuperscript{210} Reflecting the legislative intent is the sweeping language of the Intergovernmental Relations Commission’s report:

\begin{itemize}
\item \textsuperscript{204} See id. § 1302; see also supra note 119 and accompanying text.
\item \textsuperscript{205} Smith v. Town of Pittston, 2003 ME 46, ¶ 29, 820 A.2d 1200, 1208 (“The record reflects that the Town of Pittston has provided for the disposal of septage by virtue of its contract with Interstate Septic Systems and that DEP has certified that the Town’s contract satisfies the requirements of section 1305(6).”).
\item \textsuperscript{206} Title 38, § 1305(6).
\item \textsuperscript{207} See id.
\item \textsuperscript{208} The majority in Smith stated that “[i]f the Town’s ordinance prohibited all methods of septage disposal, Smith would have a stronger argument that the purposes of section 1305(6) are frustrated.” Smith v. Town of Pittson, 2003 ME 46, ¶ 31, 820 A.2d at 1208. However, the statutory interpretation, as previously discussed, and more importantly the policy behind the home rule legislation, warrant a broader reading of municipal authority.
\item \textsuperscript{209} See supra notes 38-56 and accompanying text.
\item \textsuperscript{210} See supra text accompanying note 52.
\end{itemize}
Home Rule accomplishes the basic philosophy of government in allowing the people most directly affected by the governing body, to rule the governing body. Whether it be municipal, state or federal, the United States has been a country whereby "no taxation without representation" has been the motto. The establishment of Municipal Home Rule creates a local government that must be responsible to the people it governs.211

Had the court preempted municipal authority, the ramifications would have been far-reaching. For example, an individual could decide he wanted to establish a private site for the disposal of septage, and as long as the DEP approved, there would be nothing that the municipality could do to prevent the disposal. This would be true regardless of the location of the site212 or what percentage of the town’s citizenship was opposed to the location. Borrowing the words of another commentator, "[a]dherence to [that] interpretation will result in the end of meaningful home rule in Maine."213 Moreover, from an environmental standpoint, other commentators have stated that "[i]ncreased participation by local government in the environmental arena can enhance environmental protection by tailoring federal and state programs to fit local needs and concerns. . . . [M]unicipalities have a legitimate role in evaluating federal and state policies in the light of the environmental and social conditions in their area."214

C. The Role of the Legislature vs. the Role of the Judiciary

Although the court in Smith v. Town of Pittston got the answer right, whether or not the state has preempted municipal home rule authority should not be left to judicial determination, but rather to the Legislature. By explicitly preempting certain fields of authority215 the Legislature has demonstrated that it is capable of making such determinations. Rather than create an amorphous sphere of implied preemption, the Legislature should explicitly preempt any field it desires to pre-empt.216 The court’s approach in implied preemption cases, as demonstrated in

211. MAINE INTERGOVERNMENTAL RELATIONS COMMISSION, REPORT ON HOME RULE 1 (1968).
212. One could imagine any number of scenarios, particularly in rural communities, such as spreading septage on property adjacent to a school, which would illicit genuine and warranted concern from local officials. If municipal home rule were preempted, the hands of local officials would be effectively tied and they would have no means to address the concerns of their constituents.
215. See, e.g., ME. REV. STAT. ANN. tit. 25, § 2011(1) (West Supp. 2003). Section 2011(1) provides that "[t]he State intends to occupy and preempt the entire field of legislation concerning the regulation of firearms, components, ammunition and supplies. Except as provided in subsection 3, any existing or future order, ordinance, rule or regulation in this field of any political subdivision of the State is void." Id.
216. See Christy Noel, Preemption Hogwash: North Carolina’s Judicial Repeal of Local Authority to Regulate Hog Farms in Craig v. County of Chatham, 80 N.C. L. REV. 2121 (2002). Noel notes that:

The North Carolina Supreme Court’s preemption ruling in Craig v. County of Chatham contributes to already clouded precedent defining state and local authority. The General Assembly should act decisively in its next session to clarify the law regarding the scope of local government authority concerning North Carolina’s economic and environmental animal waste crises. Hereinafter, state courts should apply preemption
Smith, supports this argument. When a court interprets a statutory scheme in order to determine whether or not the Legislature has implicitly preempted municipal home rule, it looks first and foremost to the legislative intent of the statute.\textsuperscript{217} Consequently, the court either finds that there is, or is not, implicit preemption based on its perception of the intent of the Legislature.\textsuperscript{218} Once a court makes such a determination, there is a lasting impact due to judicial precedence and stare decisis.\textsuperscript{219} However, it is the Legislature that is in the best position to know its own intent. Rather than force a court to struggle through statutory interpretation of competing statutory schemes, the Legislature should simply state its intent, and if it desires to preempt municipal authority do so explicitly. Furthermore, requiring explicit preemption will escape the potential pitfall of the courts creating authoritative precedence based on a misinterpretation of legislative intent. The state has made it clear that municipal home rule is important; accordingly, preemption of local authority is best left to the democratic process.

Moreover, the significance of the environmental concerns addressed by the Solid Waste Management Act warrant a legislative determination. The Act was enacted during an era of increasing environmental awareness. While much has been accomplished in the effort to protect the environment over the last thirty

principles carefully and consistently, toward the goals of avoiding confusion and promoting sound public policy.


The most serious difficulty courts face [in cases of implied preemption] is that the search for legislative intent is nebulous at best. More often than not, a legislature in enacting a law has no intent at all with respect to superseding municipal regulations. Rather, legislatures usually act to solve affirmatively a particular problem and not to change municipal law. Thus, although rarely admitted by the courts, determining preemption is often an exercise of judicial judgment in the absence of a legislative one. With legislative correction of any judicial misstep likely to be slow and cumbersome, the ultimate effect of a preemption decision is to assert judicial control—in effect, expanded judicial home rule. Unfortunately, a search for legislative intent impedes clarity as well. It produces unpredictable results because of the difficulty courts face in applying a clear set of guidelines for determining supposed legislative intent.

In light of these circumstances, it is not surprising that observers have singled out implied preemption for vehement criticism. They have... described it as a threat to home rule.\ldots  Critics further contend either that implied preemption is an unworkable rule that courts should abandon or that it should be applied cautiously. They should act only if the basis for finding preemption is clear, i.e., they should resolve doubts as to legislative intent in favor of municipal power.

\textit{Id.} at 684-86 (internal citations omitted).

\textsuperscript{217} \textit{See supra} notes 170-75 and accompanying text.

\textsuperscript{218} \textit{See}, e.g., Smith v. Town of Pittston, 2003 ME 46, 820 A.2d 1200.

\textsuperscript{219} Stare decisis is defined as the doctrine of: “\textit{abid\textsuperscript{[i]}g} by, or \textit{adher\textsuperscript{[i]}g} to, decided cases.” \textit{Black’s Law Dictionary} 1406 (6th ed. 1990). It is true that the Intergovernmental Relations Commission anticipated, and in fact encouraged, judicial involvement, but that seems to have been in the context of municipal charter amendments. \textit{See} \textit{Maine Intergovernmental Relations Commission, Report on Home Rule} 2 (1968). Unlike judicial interpretation of appropriate home rule procedure relating to charter amendments, the judicial interpretation of implied preemption will not work to create stability because the court is required to make its best guess relating to the Legislature's intent and will be unable to establish bright line rules that will serve as effective notice to local governing authorities and citizens. \textit{See id.} The sharply divided court in Smith demonstrates the potential problems.
years, environmental concerns are still substantial and varied. Accordingly, the question of preemption should be answered by the Legislature. It is clear from Smith that municipal authority and environmental protection can be competing interests. The state has sought to address both interests through comprehensive statutory schemes that require an expansive interpretation to effect the underlying purposes. Thus, which interest is more compelling is a determination that should be addressed by the same governmental entity that enacted those statutory schemes: the Legislature. The ramifications of a judicial determination like the one in Smith v. Town of Pittston are far-reaching and impact the accomplishment of two important state objectives. It is not in the best interest of the citizens of Maine to have the fate of municipal home rule on the one hand and environmental protection on the other turn on a judicial analysis of statutory construction with such limited legislative guidance.

VI. CONCLUSION

In Smith v. Town of Pittston, the Law Court was called upon to interpret the interplay of two somewhat competing statutory schemes. Employing a traditional statutory construction approach, the court, by a one vote margin, answered the question appropriately. Although the court’s decision was obviously significant to both parties to the case, it had a more significant impact by preserving municipal home rule. The intent of the state Legislature, as evidenced by Article VIII of the Maine Constitution and the accompanying statutory enabling legislation, is that municipalities have extensive authority over local issues in order to promote an efficient government responsible to its citizenry. Implied preemption to home rule, such as argued by Mr. Smith and supported by the dissenters of the court, carves away at municipal authority and defeats the purpose and intent of the Legislature. Although the statutory scheme permits the courts to find preemption in cases where authority is denied “clear implication,” the purpose of home rule and the well-being of Maine’s citizens would be best served if the Legislature explicitly preempted authority when it intended to do so. It may be unrealistic to expect the Legislature to anticipate every claim of preemption, but judicial determination should be reserved only for those rare instances when it could not have been predicted and addressed by the Legislature. In those cases, the current standard of implied preemption, that of frustrating the purpose of state law, should be narrowly interpreted as it was by the majority of the court in Smith. Preserving home rule advances the intent of the Legislature and provides local citizens the accountability and responsiveness that is the hallmark of American democracy.

Shane Wright

220. See, e.g., supra notes 118-19 and accompanying text.
221. See supra text accompanying notes 52 and 121.