

# Illinois Home Rule and Taxation: A New Approach to Local Government Enabling Authority

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The single most drastic change in the 1970 Illinois Constitution, and that document's most important contribution to the art of government, was the home rule provision contained in its local government article. It set forth a basis for changing the state's philosophy regarding the establishment of municipalities, and provided major impetus for moving Illinois municipal law out of the confines of 19th century ideology.

The 1870 Illinois Constitution was largely silent on municipalities; most significantly, it placed no limits on the authority of the state legislature to structure or restrict the operations of such government.<sup>1</sup> By so doing, it clearly established the tradition that municipal governments should be agencies of limited powers fully subordinated to the state legislature. This fit the patterns of the era: citizens were distrustful of all governments, but especially of municipal governments, which had been riddled by corruption. The operative principle which emerged, and was later reinforced by the judicial doctrine of Dillon's Rule,<sup>2</sup>

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1. G. BRADEN & R. COHN, *THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS* 250, 499 (1969).

2. Dillon's Rule is a legal concept, first articulated by the Iowa courts and later applied by the courts in each state. Dillon's Rule states, in effect, that municipal corporations had only those powers specifically granted them by statute and those necessarily implied from the granted power. The rule was classically applied in *Trenton v. New Jersey*, 262 U.S. 182 (1923). See D. Kennedy, *Legal Services and Regulatory Procedures*, in *MANAGING THE MODERN CITY* 403 (J. Banovetz ed. 1971); J. DILLON, *A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS*, § 237 (5th ed. 1911), See also BRADEN AND COHN, *supra* note 1, at 499.

was that municipal governments, indeed all local governments, could be entrusted only with narrow grants of authority, strictly construed.

That 19th century concept was rejected in the 1970 document for those Illinois local governments which have acquired home rule power pursuant to the provisions of Article VII.<sup>3</sup> For those governments, 106 at most recent count, an entirely new legal concept has been created, one which markedly alters the historic relationship between the state, especially the state legislature, and units of local government.<sup>4</sup> The purpose of this essay is to assess the operational consequences of this new concept as it has developed in Illinois, and the implications of the Illinois experience for municipal enabling legislation.

### I. THE HOME RULE CONCEPT

The concept of home rule itself is not new. Indeed, it dates back to 1875 when Missouri made such powers available to its cities with populations of over 100,000.<sup>5</sup> Efforts to secure home rule for the city of Chicago date back even earlier. Chicago's efforts to obtain greater freedom from state legislative control led to the provision in the 1870 Constitution which required that all laws affecting municipalities must be of "general application."<sup>6</sup> This was followed, in 1872, by the passage of the state's first general municipal corporations act, which was viewed at that time as the most effective and flexible general municipal charter law in the nation.<sup>7</sup>

"Home rule" became the term used to describe Chicago's efforts to gain greater freedom from state legislative control. Efforts to

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3. ILL. CONST. art. VII, § 6. These home rule provisions apply only to counties which elect a chief executive officer on an at-large basis; cities and villages with populations of 25,000 or more (unless subsequently discontinued by referendum); and other cities and villages in which the voters have adopted home rule powers by referendum. All other counties, cities, villages, and all other units of local government in Illinois continue to operate under the statutory provisions enacted under the 1870 Illinois constitution, and as subsequently amended. Thus, the principles of narrow interpretation of statutory principles (Dillon's Rule) continue to apply to all such governments.

4. R. Kustra, *The Formulation of Constitutional Home Rule in Illinois* (1981) (unpublished Ph.D. dissertation on file in University of Illinois Library, Urbana, Illinois).

5. S. Cole, *Illinois Home Rule in Historical Perspective*, in *HOME RULE IN ILLINOIS* 11, 14 (S. Gove and S. Cole eds. 1978).

6. ILL. CONST. of 1870 art. IV, § 22(10).

7. D. Smith Canfield, *Illinois Home Rule and American Democracy: A Study of Anticipations, Consequences, and Prospects for the Future* 101 (1979) (unpublished Ph.D. dissertation on file in Northern Illinois University Library, DeKalb).

secure legislative authorization for Chicago home rule failed in 1904, 1907 and 1922. Downstate legislators were unwilling to grant the city such freedom. In part, their reluctance was a reaction to the perceived corruption of city politics, but, even more, the issue was political. As long as Chicago's legislative representatives had to bargain with downstaters for the authority needed to govern the city, the downstaters had a powerful position from which to secure legislative benefits for their own districts.<sup>8</sup>

The trend began to change in the 1950's, following the release of the Chicago Home Rule Commission's 1954 report which described home rule in legal rather than political terms.<sup>9</sup> The Illinois Municipal League began a study in 1955 which related home rule to the needs of cities and villages throughout the state. Local officials saw home rule as a means of gaining more flexible local powers, escaping restrictive court interpretations of local powers, and as some relief from the politics of the General Assembly, which had to approve every change in local government powers or structure. Thus, the stage was set when the Sixth Illinois Constitutional Convention convened in Springfield in 1970.<sup>10</sup>

The convention delegates ignored the traditional home rule format, which called for locally adopted charters through which local voters would prescribe the organization and powers of the municipal government. They recommended, instead, what has been termed "the most liberal" utilization<sup>11</sup> of the newer, residual powers system<sup>12</sup> (or what some have called a legislative supremacy model).<sup>13</sup>

Under the Illinois approach, a home rule government is authorized to "exercise any power and perform any function pertaining to its government and affairs"<sup>14</sup> which has not been denied to it by the state constitution or by state statute. This has been interpreted by the Illinois Supreme Court to mean that "[h]ome rule units . . . have the same powers as the sovereign except where such powers are limited

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8. *Id.* at Chapter III.

9. CHICAGO HOME RULE COMMISSION, CHICAGO'S GOVERNMENT: ITS STRUCTURAL MODERNIZATION AND HOME RULE PROBLEMS (1954).

10. The changes brought to the home rule debate by the Chicago Home Rule Commission's 1954 report are best summarized in Canfield, *supra* note 7, at Chapter III.

11. Cassella, *A Century of Home Rule*, NATIONAL GUIDE REVIEW, October, 1975, at 441, 448.

12. PREPARATORY COMM. PA. CONSTITUTIONAL CONVENTION, LOCAL GOVERNMENT-REFERENCE MANUAL 50 (1967).

13. Cole, *supra* note 5, at 16.

14. ILL. CONST. art. VII, § 6(a).

by the General Assembly. . . . [H]ome rule units . . . have an autonomy and independence limited only by restrictions imposed by the Constitution or authorized by it."<sup>15</sup> The Constitution further directs that the "[p]owers and functions of home rule units shall be construed liberally."<sup>16</sup>

Professor David C. Baum, legal counsel to the 1970 Constitutional Convention's Local Government Committee, characterized the intent of the home rule provisions in these words: "The presumption relating to local powers is reversed with respect to home rule units: before, local governments were thought to possess no powers except those granted by statute; now they possess most governmental powers except those specifically denied to them by statute. . . ."<sup>17</sup> In his writings after the convention, Baum asserted that the framers' intent, in setting up the provisions for legislative and judicial oversight of home rule, was to establish a system which provided for concurrent exercise of power by the state and by home rule units and which would avoid implied preemption by judicial decisions. The Illinois system, in Baum's view, placed almost exclusive reliance on the legislature rather than the courts to keep home rule units in line.

The basic concept, of course, is that popular expectations of government have changed in the twentieth century. The concept of limited government was born in the colonial era—the notion that government governed best which governed least. In such a context, the notion that local government should have strictly limited powers was not surprising, and even the home rule charter approach was designed simply to transfer control over the limits of those powers from the state legislature to local voters.

The New Deal era of American politics changed public perceptions of government. Government began to be seen, not as an evil to be limited, but as a tool for improving human lives. With its change in perception came a change in demands for government action - and a change in the definitions of government power. The notion that the national government was an agency of delegated powers, for instance, was replaced by the view that the national government is able to exercise any power that state and local governments can exercise - in

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15. *City of Urbana v. Houser*, 67 Ill. 2d 268, 273, 367 N.E.2d 692, 694 (1977).

16. ILL. CONST. art. VII, § 6(m).

17. Baum, *A Tentative Survey of Illinois Home Rule (Part I): Powers and Limitations*, 1972 U. ILL. L.F. 137, 138 (1972) [hereinafter Baum, *Part I*]; Baum, *A Tentative Survey of Illinois Home Rule (Part II): Legislative Control, Transition Problems, and Intergovernmental Conflict*, 1972 U. ILL. L.F. 559, 561 (1972) [hereinafter Baum, *Part II*].

short, any power that is needed to respond to popular demands.<sup>18</sup>

Home rule, as used in Illinois, is a means for extending this new philosophy of governmental power to the local level. By providing broad enabling authority to local elected officials, Illinois home rule gives local governments the power to exercise any local power that is needed to respond to popular demands for government action.

## II. THE ILLINOIS HOME RULE EXPERIENCE

Home rule has received a very mixed reception in Illinois. Voters at the county level, where home rule has been linked to structural reform of county government, have soundly rejected the concept at every referenda opportunity.<sup>19</sup> Municipal voters have been more supportive; the aggregate number of voters at the municipal level favoring home rule has surpassed the number opposing it, although referenda to adopt home rule powers have failed more often than they have carried.<sup>20</sup> Perhaps most significantly, however, voters in communities which have had home rule have shown strong support for retention of those powers. There have been 26 referenda held to abolish home rule; home rule has been retained in 21 of these elections, and favored by voters, in the aggregate, by a 3-2 margin.<sup>21</sup>

The composite record of reaction to home rule by the state legislature and the state courts has been better. In the aggregate, both agencies have acted favorably toward home rule more often than not, but in neither instance have actions or reactions routinely favored home rule.<sup>22</sup> There are significant instances in which both the legislature and the courts have acted to impair home rule powers.<sup>23</sup> However,

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18. This concept of the rule of the national government, and the extent of the powers of that government, is now widely accepted by scholars. As applied to local governments, for example, it is summarized in P. PETERSON, *CITY LIMITS* 13 (1981).

19. See CENTER FOR GOVERNMENTAL STUDIES AT NORTHERN ILLINOIS UNIVERSITY, *COUNTY HOME RULE IN ILLINOIS*, (D. Beam, A. Pattakos, D. Tobies eds. 1977) [hereinafter D. BEAM]. See also, BANOVTZ AND KELTY, *HOME RULE IN ILLINOIS: IMAGE AND REALITY* 8-9 (1987) [hereinafter BANOVTZ AND KELTY].

20. See BANOVTZ AND KELTY, *supra* note 19, at chart on p. 8. Since the chart was developed, there have been more than a half dozen additional referenda; home rule has been rejected in nearly every recent election.

21. *Id.* (Since the chart on that page was devised, home rule has been retained in one additional city, Pekin).

22. D. BEAM, *supra* note 19, at 12 *et. seq.*

23. The principal legislative impairments were laws authorizing local government employees to engage in collective bargaining, specifying procedures for public access to municipal documents, and establishing a uniform state-wide minimum age for purchasing alcoholic beverages. The principal judicial impairment, discussed at

there is only one instance - state preemption of the power to set a minimum age for the purchase and consumption of alcoholic beverages - in which the legislature, the principal agency for protection against home rule abuse, has acted to correct problems attributable to the use of home rule powers.<sup>24</sup>

While much attention has focused on home rule issues in Illinois, relatively little has been paid to home rule accomplishments. Home rule was the source of the authority used in Oak Park, for instance, to achieve racially balanced residential neighborhoods. DeKalb used home rule powers to develop a special board to arbitrate disputes between landlords and their university student renters. Highland Park used home rule to develop low and moderate income housing; Bloomington and Normal used it to establish a joint mass transit system; Deerfield used it to innovate new methods of controlling juvenile vandalism; and Park Forest used it to develop a modern personnel system for municipal employees.

The most common use of home rule powers, however, has been to develop and finance local economic development programs. Sauget, for example, used home rule to expedite the marketing of industrial revenue bonds; cities such as Rock Island and Watseka have used it to help finance new industries and shopping centers; and Peoria and Galesburg have used it to help renovate their downtown business districts.<sup>25</sup>

The 1970 Constitution's framers, meeting in 1987 to assess their product after 16 years of experience, summarized their reaction to the Illinois home rule experience in the following words: "How has home rule worked? It hasn't succeeded in reducing the number of taxing bodies through consolidation as intended, but it has slowed their proliferation. It has also provided flexibility for popular choice, and has facilitated intergovernmental cooperation. On the whole, its use has been restrained."<sup>26</sup>

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length in this paper, was the decision in the Chicago Services Tax case which broadened the definition of occupation taxes (*Commercial National Bank v. City of Chicago*, 89 Ill. 2d 45, 432 N.E.2d 227 (1982)). There have been other impairments, but these have been those which have been viewed as the principal threats to home rule principles.

24. D. BEAM, *supra* note 19, at 13.

25. Home rule users are summarized in BANOVETZ AND KELTY, *supra* note 19, at 4-11.

26. COMMITTEE OF 50 TO RE-EXAMINE THE ILLINOIS CONSTITUTION, THE 1970 ILLINOIS CONSTITUTION: AN ASSESSMENT BY THE DELEGATES (Draft Summary) 14 (1987).

Home rule accomplishments have largely been in the areas of economic development, local regulation, and program development. As important as these may be, they have attracted very little public attention, debate or opposition in Illinois. The home rule actions that have sparked controversy, and thus have fueled the opposition to home rule, have been actions relating to taxation.

The opposition to home rule in the constitutional convention centered largely on the fear that home rule would lead to burdensome taxes.<sup>27</sup> That same fear has played a major role in the defeat of home rule at the county level.<sup>28</sup> Indeed, taxation has been a dominant issue in all of the state's home rule referenda campaigns.<sup>29</sup>

Not only is taxation the dominant theme in referenda campaigns, but it has also been a major topic for legislative and judicial reaction to home rule. For instance, the Illinois General Assembly has not given home rule units the authority to levy taxes on income, earnings, or occupations. The Illinois courts have also been most concerned about municipal action in the field of taxation.

If there is any single issue which would lead to strong resistance to the home rule system of local enabling authority, that issue would be taxation. If there is any single area in which broad grants of authority to local governments would be unacceptable, that area would be taxation. If such grants of authority are not workable, that failure would manifest itself first in the area of taxation. Thus, it is the home rule record on taxation which will be examined in detail below.

### III. ENABLING AUTHORITY FOR TAXATION

#### A. THE TAXING POWER

There are three important elements in the determination of the home rule taxing power. The first is the grant of power itself: the power to tax was specifically enumerated in the constitution as a part of the grant of home rule authority.<sup>30</sup> Thus, subject to subsequent

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27. SIXTH ILLINOIS CONSTITUTIONAL CONVENTION OF 1970, *Record of Proceedings*, Vol. VII, 1591, 1614, 1628 (1972).

28. D. BEAM, *supra* note 19, at 103-108.

29. BANOVEZ AND KELTY, *supra* note 19, at 16. While this source lists taxation as the second most frequently cited issue in home rule referenda campaigns, the concern over taxation was also universally at the root of concern over lack of trust in local officials. In simple language, voters who did not trust their local officials feared that such officials could not be trusted with local tax powers.

30. ILL. CONST. art. VII, § 6(a).

limitations imposed by law, home rule units were given broad, unspecified powers to enact taxes.

Second, the constitution established the following limitation on that power: "A home rule unit shall have only the power that the General Assembly may provide by law . . . to license for revenue or impose taxes upon or measured by income or earnings or upon occupations."<sup>31</sup>

Third, it was the framers' intent that it would be the Illinois General Assembly, and not the Illinois courts, that would act to place additional limits, if any, on the constitutional grant of power.<sup>32</sup> This was detailed in the constitutional provisions under which the General Assembly was authorized to preempt home rule power: it could, by a simple majority vote, provide for the exclusive state exercise of a power (presumably including the power to tax), or, by a three-fifths vote in each chamber, deny home rule units the authority to exercise a specified power.<sup>33</sup> Professor Baum described the intent of these provisions when he wrote, "the thrust of the Illinois provisions . . . favor concurrent exercise of power by the state and by home rule units and attempt to avoid implied 'preemption' by judicial decisions. The Illinois approach places almost exclusive reliance on the legislature rather than the courts to keep home rule units in line."<sup>34</sup>

The enabling provisions regarding home rule units' taxing powers, then, were designed to provide a broad grant of authority, but with the power to levy taxes on income, earnings or occupations limited to the scope of powers provided by the General Assembly, and with the presumption that additional restrictions on those powers would come only from the General Assembly.

## B. THE LEGISLATIVE REACTION

The General Assembly has not reacted at all to these constitutional provisions. This has had two quite different effects. First, and most important, the General Assembly has not acted to grant home rule units any new or added authority to impose taxes on income, earnings or occupations. This can be interpreted negatively, since it means that the General Assembly has not given home rule units taxing authority presumably intended for them by the constitution's framers.

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31. ILL. CONST. art. VII, § 6(e)(2).

32. See the statement attributed earlier to Baum, *Part II, supra* note 17, at 561.

33. ILL. CONST. art VII, § 6(g), (h).

34. Baum, *Part II, supra* note 17, at 579.



Second, it has not acted to impose any added restrictions on the grant of home rule taxing power. This can be interpreted positively, since the General Assembly has made no move to limit home rule authority in this area.

Initially, the General Assembly's failure to act on income, earnings and occupations taxes was not surprising. The state had just enacted a state-wide tax on income and shared a portion of the receipts with local governments. Federal revenue sharing was enacted at about the same time, providing yet another new source of income for local units.<sup>35</sup> Local governments also had access to their traditional power to levy property taxes, and they had gained the authority to levy a sales tax in addition to their existing power to add a local levy to the state's retail occupation (sales) tax.

Yet, over time, and with the termination of federal revenue sharing,<sup>36</sup> the absence of power to tax incomes, earnings or occupations became increasingly restrictive, particularly for the City of Chicago. While home rule governments made increasing use of their new tax powers, none had the potential revenue-raising power of taxes which might be levied on income, earnings or occupations. The result led some observers to question the value of home rule:

The difficulties which continue to plague Illinois cities and counties are problems that probably cannot be solved under home rule as it currently exists. . . . The principal problem . . . may be the lack of revenue sources rather than the lack of regulatory authority. This problem probably cannot be solved under the current home rule provisions . . . . Progressive taxes that are truly proportionate to the taxpayer's ability to pay are not available under home rule. . . .<sup>37</sup>

Truly meaningful (i.e., productive) sources of new revenue have not yet been made available to home rule governments in Illinois.

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35. Federal revenue sharing was a program, enacted during the first term of President Richard M. Nixon, under which a designated sum of money was distributed annually to state, county, municipal, and township governments. Distributions were based on a formula which took into account, for each such unit, the socio-economic status of its residents, the wealth of local tax bases, and local tax effort. Poorer communities received substantial revenues from this source; wealthy communities, particularly in suburban areas, received relatively little.

36. Revenue sharing for states was terminated during the first term of President Reagan; revenue sharing for local governments was terminated during Reagan's second term.

37. R. Michael & J. Norton, *Home Rule in Illinois: A Functional Analysis*, 1978 U. ILL. L.F. 559, 602.

### C. THE MUNICIPAL RESPONSE

Home rule opponents predicted, and some have even claimed, that home rule governments would use their broad taxing powers to levy new, burdensome taxes on their residents. In their view, such broad taxing powers would provide a temptation that local officials would be unable to resist, and local taxpayers would be forced to pay the price of too much government power.

This prediction has not been borne out in practice, however. While it is true that many new taxes have been levied with home rule authority, it is also true that 40% of all home rule governments have not used their home rule taxing powers at all.<sup>38</sup> Fewer than 20% of home rule governments have increased their property taxes above the statutory limits imposed on non-home rule governments.<sup>39</sup>

Instead, what has happened is that local communities have used their home rule powers to institute an array of new taxes designed to shift the tax burden from local property taxes to taxes that are paid by non-residents as well as residents of the community. Home rule powers have been used to impose local taxes on the rental of hotel and motel rooms, on the sale of alcoholic beverages and cigarettes, on tickets to spectator events, on the sale of gasoline, on retail sales, on the sale of food and beverages in restaurants, on the sale of new motor vehicles, on the transfer of title to real estate and on mobile homes.

In general, such taxes have been levied when the burden of their incidence would fall primarily on non-residents of the community. Cities with large regional shopping centers, for example, are most likely to levy a retail sales tax;<sup>40</sup> cities with many transient visitors are most likely to tax the sale of gasoline and restaurant food and beverages.<sup>41</sup> Home rule communities with large hotel/motel complexes

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38. The material on taxation in this section is reported in more detail in BANOVTZ AND KELTY, *supra* note 19, at 6, 10, 18 *et. seq.*

39. *Id.* at 21.

40. Voters in Mt. Vernon, for example, adopted home rule when local officials promised that they would use home rule powers to adopt a local sales tax. Mt. Vernon is a regional shopping center; its stores attract residents of many adjacent rural counties. By adopting home rule, voters demonstrated their preference that needed new taxes come from sales taxes, paid partially by shoppers from out of town, rather than new utility taxes which would be imposed solely on local residents. Local sales taxes are also popular in communities which have large state universities, such as Carbondale and DeKalb, for it gives the community the ability to place a tax on the purchases of the university students.

41. Taxes on the sale of restaurant food and beverages are popular in large, down-state cities such as Rockford, Peoria, and Rock Island for they enable the city to tax persons from out of town who come to the city on business.

first introduced the municipal tax on the rental of such rooms in Illinois<sup>42</sup> and communities with high volume, regional automobile dealerships pioneered the local tax on the sale of new automobiles.<sup>43</sup>

It was this same tendency to tailor local sales taxes so that they would transfer as much tax burden as possible to non-residents, and simultaneously avoid placing local businesses at a competitive disadvantage, that has led to wide variations between communities in the base upon which sales taxes are levied. The state sales tax is, in reality, a retail occupation tax. It is a broad-based tax on the occupation of retail sales in the state. When it was passed, the state authorized cities and counties to levy an additional retail occupation tax on the same tax base. Virtually all cities and counties have done so. Later, the state exempted retail sales of food and drugs from the state tax, but not from the local portion of the tax. Despite this difference in tax base, the state collects both state and local portions of the tax, remitting the local portion to the appropriate local government.

Because of the prohibition against levying occupation taxes without legislative authorization, home rule governments do not have the power to increase the rate of the retail occupation (sales) tax which they levy in conjunction with the state tax. However, such governments do have the power to levy a tax on sales of commodities, and an increasing number (currently 17) of home rule governments are doing so. In designing their sales taxes, however, these governments are each developing their own idiosyncratic definitions of the kinds of sales which are subject to tax. Variations exist in the coverage of food and beverages, agricultural equipment, industrial equipment, restaurant food and beverages, and the amount of the sale that is taxed.<sup>44</sup> Some communities, for example, tax only the first \$500 of the value of any sale; other communities exempt sales above a stated amount, such as \$5,000, from the tax.<sup>45</sup>

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42. Such taxes were first introduced by Rosemont which is located next to O'Hare Airport and has several thousand persons staying each night in local hotel rooms. The hotel/motel tax is the most frequently used home rule tax. After seeing its popularity, the General Assembly authorized non-home rule governments to levy a hotel/motel tax, but such cities may spend the proceeds of such taxes only to promote local tourism.

43. Arlington Heights, which is home to several large, high volume auto dealerships, was one of the first to introduce this tax.

44. See appendices E and F in *Revenue Review Committee Proposals to Reform the Illinois Tax System*, A Report Submitted to Governor James R. Thompson, April 1987.

45. *Id.* at Appendix C.

Two problems have emerged from this proliferation of local sales taxes in the state. First, although the Illinois Department of Revenue is authorized to collect these taxes and remit the proceeds to the levying community, it has refused to do so because of the local variations in tax base. Thus each local government must establish its own system for the administration and collection of these taxes. Second, such local sales taxes, when added to the state and local retail occupation taxes, produce variations in applicable sales tax rates throughout the state. The Governor's Revenue Review Committee has recently labeled this system "unnecessarily burdensome" and argued that it "causes retailers with multiple locations throughout the state to have particular difficulties."<sup>46</sup> As a result, the Committee has recommended that home rule authority to levy sales taxes be replaced by state authorization which would allow home rule governments the authority to increase the percentage which they could levy as part of the local government portion of the state's retail occupation tax.<sup>47</sup>

Home rule communities, however, are resisting this proposal. On its surface, the proposal offers financial benefits: the state, under this system, would handle all tax administration and collection. Home rule units, however, see themselves losing in two ways: (1) they would lose the option to tailor their sales tax base to local economic circumstances; and (2) more seriously, from their point of view, they would lose home rule tax autonomy in return for taxing authority which would be controlled by the state. They see the proposal as an attempt to erode their home rule powers.

The proposal offers an example of the classic confrontation posed by home rule: the interest of the state, which is concerned with the state-wide business climate, is set against the interest of local communities, which want the autonomy to tailor their taxing systems to their local economic needs. The state sees the confrontation in terms of state-wide interest; local communities see the confrontation in terms of both local interest and the preservation of the integrity of the home rule system.

From an analytic perspective, a further issue is posed by the proposal: to what extent should broad-based local government enabling authority empower local governments to advance their local interests at the expense of the broader state-wide interests? Placed in a different perspective, it poses the issue of whether the state as a whole is better served by stronger local communities, even at some

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46. *Id.* at Recommendation #2.

47. *Id.*

cost in terms of state-wide uniformity, or is better served by state-wide uniformity when such uniformity must be achieved at the expense of weakened local governments.

It is important to note, in this regard, that neither state nor business interests have publicly contended that home rule units, in exercising their sales tax authority, have acted in a fiscally irresponsible fashion or misused their authority. At issue is simply a question of state-wide interest as opposed to local interest in the construction of the taxing system. Ultimately at issue is whether a legislative response, asserting the state's interest, is justified as a means of responding to legitimate, individual home rule community uses of home rule taxing powers.

#### D. THE JUDICIAL RESPONSE

Contrary to the framers' expectations, the courts have played a more active role than the legislature in reviewing, defining and limiting home rule powers, including home rule taxing powers. The judicial response to home rule has varied: lower courts have generally fallen back on traditional, narrow construction of municipal powers when dealing with home rule issues,<sup>48</sup> but the Illinois Supreme Court has been generally responsive to the philosophy and intent of home rule. It has even, on occasion, cited the constitutional directive that home rule powers be liberally construed.<sup>49</sup>

Thus, it is the courts which have been most involved in developing the record of state reaction to the home rule concept regarding local government enabling acts and, in particular, to the taxing powers which have been a part of those enabling acts. Therefore, the courts' reactions to those taxing powers deserve particular scrutiny.

#### IV. THE COURT AND HOME RULE POWERS

Perhaps the most important signal of the Illinois Supreme Court's reaction to home rule came in two early rulings which, more than any others, gave legal acknowledgement to the intent of the Constitution's framers. These were cases in which the court declined the opportunity to impose what would have been broad and unspecified statutory limitations on the exercise of home rule powers.

The first case dealt with the question of whether statutory restrictions on the exercise of municipal or county powers, enacted prior

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48. BANOVEZ AND KELTY, *supra* note 19, at 14.

49. *See, e.g.*, Paper Supply Co. v. City of Chicago, 57 Ill. 2d 553, 317 N.E.2d 3 (1974).

to the 1971 effective date of the 1970 Constitution, should be interpreted as state preemptions of home rule powers. In *Kanellos v. Cook County*,<sup>50</sup> the supreme court considered whether a statute passed prior to 1970, requiring counties to hold a referendum before the issuance of general obligation bonds, was applicable to Cook County. The court held that while the General Assembly had the power to impose a referendum requirement on home rule counties, its action prior to the adoption of the constitution had not complied with the constitution's three-fifths majority vote required to do so.<sup>51</sup> In a similar case, *Sommer v. Village of Glenview*,<sup>52</sup> the court also held that legislation in effect prior to the 1970 Constitution did not limit home rule powers, for it violated the new constitution's home rule provisions by imposing a legislative check on home rule powers without complying with constitutional requirements.

A year after *Kanellos*, the court amplified the principle of that case when it asserted that statutes restricting the exercise of local government powers did not apply to home rule units unless the statute explicitly indicated such a legislative intent.<sup>53</sup>

Through these cases, the Illinois Supreme Court effectively ruled that the general body of statutory law restricting the powers of local government did not automatically apply to home rule units; rather, both a specific statement of legislative intent to achieve that purpose and the applicable provisions of Article VII relating to legislative preemption had to be met before home rule powers were circumscribed by statute.

#### A. THE POWER TO TAX

The courts have generally upheld the legitimacy of the uses which have been made of home rule taxing powers. The Illinois Supreme Court upheld home rule taxes on the retail sale of liquor despite the state's extensive taxation and regulation of the liquor industry (which demonstrated that even though the matter was of statewide interest, it was nevertheless related to local government and affairs within the meaning of the constitution's home rule powers grant).<sup>54</sup>

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50. 53 Ill. 2d 161, 290 N.E.2d 240 (1972).

51. *Id.* at 165, 290 N.E.2d at 243.

52. 79 Ill. 2d 383, 403 N.E.2d 258 (1980).

53. *Rozner v. Korshak*, 55 Ill. 2d 430, 303 N.E.2d 389 (1973) (the issue at bar concerned restrictions on municipal wheel taxes which passed both houses of the General Assembly by more than a three-fifths vote after the effective date of the 1970 Constitution).

54. *Mulligan v. Dunne*, 61 Ill. 2d 544, 338 N.E.2d 6 (1975), *cert. denied*, 425 U.S. 916 (1976).

The courts have also ruled that home rule governments may impose taxes on amusements<sup>55</sup> and the sale of cigarettes,<sup>56</sup> on the grounds that the incidence of such sales taxes is imposed upon the purchaser and not upon the occupation of the sales agent. They have held that home rule ordinances levying wheelage taxes on bases other than those set forth in state law did not represent a licensing for revenue and did constitute a valid classification leading to a reasonable system of taxation.<sup>57</sup> The courts have also held that taxes on the rental of hotel or motel rooms were taxes upon the use of tangible personal property<sup>58</sup> and a privilege tax,<sup>59</sup> rather than a tax upon occupations. They also approved the simultaneous levy of a tax by a home rule county and a home rule city upon the same sales transaction.<sup>60</sup>

Not all court actions, however, have favored home rule; the courts have made it clear there are limits beyond which they will not go. For instance, the action of a home rule county imposing a higher court filing fee to support the county law library was not approved.<sup>61</sup> The court held that the constitution did not authorize home rule units to legislate for the judicial system or impose a fee upon access to the courts.<sup>62</sup> In another instance, the Illinois Supreme Court refused to permit a home rule municipality to levy a tax on a special service district, even though such action was authorized by the constitution, until the legislature had acted to provide the procedures to be followed in exercising such powers.<sup>63</sup>

In the recent case of *People ex rel. Bernardi v. City of Highland Park*<sup>64</sup> the court, in holding that the home rule powers of Illinois municipalities do not extend to the area of prevailing wages for local construction projects, stated in part that the "limited grant of power to home rule units in Section 6(a) legitimizes only those assertions of authority that address problems faced by the regulating home rule

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55. Board of Ed. of School Dist. No. 150 v. City of Peoria, 76 Ill. 2d 469, 394 N.E.2d 399 (1979).

56. S. Bloom, Inc. v. Korshak, 52 Ill. 2d 56, 284 N.E.2d 257 (1972).

57. Rozner v. Korshak, 55 Ill. 2d 430, 303 N.E.2d 389 (1973).

58. Springfield Hotel-Motel Assoc. v. City of Springfield, 119 Ill. App. 3d 753, 457 N.E.2d 1017 (1983).

59. Marcus Corp. v. Village of South Holland, 120 Ill. App. 3d 300, 458 N.E.2d 112 (1983).

60. City of Evanston v. County of Cook, 53 Ill. 2d 312, 291 N.E.2d 823 (1972).

61. Ampersand, Inc. v. Finley, 61 Ill. 2d 537, 338 N.E.2d 15 (1975).

62. *Id.* at 542-542, 338 N.E.2d at 18-19.

63. Oak Park Federal Savings and Loan v. Village of Oak Park, 54 Ill. 2d 200, 296 N.E.2d 344 (1973).

64. 121 Ill. 2d 1 (1988).

unit, not those faced by the State or Federal governments.”<sup>65</sup> Thus, the court imposed further restrictions on the scope of home rule power, and in so doing, reached its conclusions without relying upon the liberal interpretation mandate of the constitution<sup>66</sup> and without attempting to distinguish *Kanellos*.

#### B. TAXES ON INCOME, EARNINGS AND OCCUPATIONS

It is taxes on income, earnings, and occupations which have generated the most controversy. This was evident within the Sixth Constitutional Convention itself. Some delegates argued that home rule governments needed such tax authority to gain access to the revenues that would be needed to accomplish home rule powers.<sup>67</sup> Other delegates, including some home rule supporters, countered with three arguments: (1) local variations in the use of such taxes “could impair the efficient operations [of business] within the state”;<sup>68</sup> (2) limits on such powers were necessary in order to gain public support for the new constitution;<sup>69</sup> and (3) occupation taxes had been used in another state (Colorado) as a device to circumvent state limits on local use of income taxes.<sup>70</sup>

A majority of the convention’s delegates adopted the restriction against “taxes upon or measured by income or earnings or upon occupations” because they feared that home rule practice in this area without legislative control might well lead to a profusion of local income taxes and a burden on business. They were also convinced that the home rule powers provided sufficient taxing powers to achieve home rule goals without the use of these taxes, and they feared that, without such limitations, voters would refuse to ratify the new constitution.

#### C. THE OCCUPATION TAX

From the first year of ratification of the new constitution, the most controversial home rule issue in the Illinois courts has been the nature of the taxes falling within the definition of an “occupation

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65. *Id.* at 12.

66. ILL. CONST. art. VII, § 6(m).

67. SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, RECORD OF PROCEEDINGS, Vol. IV, 3366 (1972).

68. *Id.* at 3151.

69. *Id.* at 3162.

70. *Id.* at 3157. The Colorado case in which the matter was litigated was *City and County of Denver v. Duffy Storage and Moving Co.*, 168 Colo. 91, 450 P.2d 339 (1969).



tax” and thus subject to the limitations of legislative authorization. Initially, the courts employed a narrow definition of occupation tax. They approved, for instance, taxes on the sale of cigarettes and amusement tickets.<sup>71</sup>

The landmark ruling came in 1974 in a test of the City of Chicago’s Employer’s Expense Tax, a tax imposed on employers at the rate of three dollars per employee per month. In *Paper Supply Co. v. City of Chicago*,<sup>72</sup> the Illinois Supreme Court upheld the tax, rejecting the argument that the tax was an occupation tax. In its decision, the court reasoned that if it broadened the definition of an occupation tax beyond that used under the 1870 constitution,<sup>73</sup> home rule sources of revenue would be narrowed, and such narrowing would be in direct conflict with the delegates’ intent that home rule units should have broad powers.<sup>74</sup> The court concluded that, in the event some harm arises from its interpretation, the legislature was authorized to correct the situation by a three-fifths vote of both houses.<sup>75</sup> The court, in essence, ruled that courts must consider three conditions when ruling on whether an ordinance created an unconstitutional occupation tax: (1) the courts must construe home rule powers liberally; (2) the tax must be upon a specific occupation to be an occupation tax; and (3) the ordinance in question must place the legal incidence for the tax on the consumer rather than the seller in order to avoid being categorized as an occupation tax.<sup>76</sup>

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71. See *supra* notes 55 and 56 for case references.

72. 57 Ill. 2d 553, 317 N.E.2d 3 (1974).

73. See *id.*

[A]n occupation tax has one of two missions: either to regulate and control a given business or occupation, or to impose a tax for the privilege of exercising, undertaking or operating a given occupation, trade or profession. Its effect is to license a person engaged in a given calling or occupation. A license in form may not be issued to a taxpayer but the payment of the tax is the license under the authority of the State to engage in such occupation. Regulation is not a necessary adjunct of an occupation tax. It may or it may not be. The payment of the tax itself is a condition precedent to the privilege of carrying on a business or occupation. The payment of the tax is made mandatory by the act creating it upon the right of thy individual to follow the given occupation. An occupation tax may be levied under the general police powers of the State, where its purpose is to regulate or control a given occupation, or it may be levied under the general sovereign powers of the State, where its sole purpose is to raise revenue.

*Id.* at 566 quoting *Reif v. Barrett*, 355 Ill. 104, 108, 188 N.E. 889, 892 (1933).

74. *Paper Supply*, 57 Ill. 2d at 570, 317 N.E.2d at 12.

75. *Id.* at 571, 317 N.E.2d at 12.

76. *Paper Supply Co.*, 57 Ill. 2d 553, 317 N.E.2d 3 (1974).

This reasoning was changed and the definition of an occupation tax was broadened appreciably in 1982 when a subsequent Chicago ordinance levying a tax upon the sale of services was challenged. In *Commercial Nat'l Bank of Chicago v. City of Chicago*,<sup>77</sup> the court broadened the definition of an occupation tax, stating that "[t]he word 'occupation' in this case must be considered in the broader context . . . and the tax must be judged by the standard of whether it is one imposed upon the privilege of engaging in the business of selling services, that is, in service occupations."<sup>78</sup> The court also held that, if an ordinance imposes a service or occupation tax and is thus unconstitutional, it is not necessary to consider where the legal incidence of the tax is placed.<sup>79</sup>

The immediate consequence of the *Commercial Nat'l Bank* case for home rule units was severe. Not only did the ruling invalidate the Chicago services tax, it also reversed the *Paper Supply* finding on the Chicago Employer's Expense Tax.<sup>80</sup> More severe for home rule, the court immediately used the rationale of that ruling in another case, *Waukegan Community School Dist. No. 60 v. City of Waukegan*,<sup>81</sup> in which it held that municipal taxes imposed on consumers' use of telephone, electricity and gas were unconstitutional taxes on the sale of services.<sup>82</sup> Noting that these municipal taxes were levied on consumers, the court found that they were substantially similar to the municipal utility occupation tax ordinances authorized by the Illinois Municipal Code.<sup>83</sup> Thus, the court concluded that these were invalid and impermissible occupations taxes.<sup>84</sup> In so ruling, the court foreclosed one of the more productive taxes that had been developed through home rule powers.

Thus, while the courts had started a pattern of interpretations of the scope of the term "occupations tax" which had been narrow, and thus favorable to home rule, it reversed direction in the *Commercial Nat' Bank* case and moved to a much broader, and thus more restrictive, definition of the term, leaving in its wake a more narrow range of potential taxing authority for home rule governments.

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77. 89 Ill. 2d 45, 432 N.E.2d 227 (1982).

78. *Id.* at 62, 432 N.E.2d at 235.

79. *Id.* at 79, 432 N.E.2d at 243.

80. *Id.* at 59-62, 432 N.E.2d at 233-35.

81. 95 Ill. 2d 244, 447 N.E.2d 345 (1983).

82. *Id.* at 255, 447 N.E.2d at 350.

83. ILL. REV. STAT. ch. 24, para. 8-11-2 (1981).

84. 95 Ill. 2d 244, 255, 447 N.E.2d 345, 350 (1983).

## V. IMPLICATIONS FOR HOME RULE ENABLING AUTHORITY

From two different perspectives, home rule in Illinois has been a success.<sup>85</sup> First, it has been successful because it has produced a flow of creative new ideas for making local government more effective. The introduction of the hotel/motel tax is one such idea; the development of the real estate transfer tax, now being used by an increasing number of suburban communities in the Chicago area, is another innovative source for local revenues developed through the application of home rule powers. Outside of taxation, the innovations attributable to home rule are even more numerous. Home rule has been used, for example, to develop innovative approaches to resolving problems involving neighborhood racial integration (Oak Park), maintenance of residential properties (Park Ridge), elimination of neighborhood blight (Berwyn), improvement of landlord-tenant relations (DeKalb), promotion of more extensive intergovernmental cooperation in regional economic development (Normal), control of juvenile vandalism (Deerfield), facilitate the demolition of unsafe buildings (East St. Louis), and expedite the sale of industrial revenue bonds (Sauget).

Second, home rule has been successful in the sense that it has not produced failures. Instances of possible abuse of home rule powers are few, and the courts, the General Assembly, and the referenda process have proven effective in placing boundaries around the use of home rule powers. Seventeen years after its adoption, home rule governments continue to function, evaluations of home rule have been positive,<sup>86</sup> and voters in municipalities which have used home rule have voted by an overall 3-2 margin to retain home rule. In general, as an enabling act for the development of local government powers, the approach taken in the home rule provisions of the 1970 Illinois Constitution would appear to be successful.

In the area of taxation, however, it is harder to reach that conclusion. It is in the area of taxation that the principal constitutional restraint on home rule powers was specified — the limitation on the power to tax income, earnings or occupations. It is also in this area that voters are most reluctant to trust the judgment of their local officials, as evidenced by the results of home rule referenda throughout the state. In addition, it is in this area that the courts have interjected themselves to place the most severe constraints on the use of home rule power.

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85. See BANOVTZ AND KELTY, *supra* note 19.

86. See THE 1980 ILLINOIS CONSTITUTION: AN ASSESSMENT BY THE DELEGATES, *supra* note 26; BANOVTZ AND KELTY, *supra* note 19, at 24-31.

To be sure, the judicial record to date is largely supportive of home rule, even in the area of taxation. The court ruling in *Paper Supply* set forth clear guidelines for deciding the difficult "occupations tax" issue, and set forth guidelines which gave full recognition to the constitutional framers' mandate to construe home rule grants of authority liberally. If the record had been left at *Paper Supply*, home rule would indeed have been well served. But the record was not left there; *Paper Supply* was reversed by *Commercial Nat'l Bank* and the new trend was further aggravated by *Waukegan Community School Dist.* As a result, the residual pool of home rule taxing power was severely curtailed.

Interestingly, the limitation on occupation taxes was imposed partially to prevent the use of the income tax and partially to avoid irregular patterns of taxation in different communities across the state, which would impose a hardship on business.<sup>87</sup> Ironically, neither of the taxes rejected in the *Commercial Nat'l Bank* and the *Waukegan Community School Dist.* cases involved those difficulties.

What prompted the court's action, rather, was the Chicago Services Tax, which imposed a sales tax on the sale of services by such business and professional persons as lawyers, doctors, accountants, barbers, and repair services. The Home Rule Attorneys group of the Illinois Municipal League had opposed the enactment of the tax, fearing that the tax, linked closely as it was to occupations, would pose an excessive risk of adverse court action and offset the favorable pattern of rulings that had developed in the wake of *Paper Supply*. Regardless of this concern, the City of Chicago imposed the tax, and the Home Rule Attorney's worst fears were realized with the ruling in *Commercial Nat'l Bank*.

Equally ironically, the constitution's authors did not oppose home rule authority to levy sales taxes on the grounds that variations among communities in that tax would impose a hardship for business. Yet, that is precisely the basis behind the suggestion of the Governor's Revenue Review Committee's proposal that home rule sales tax authority be curtailed in favor of broader legislative authorization to levy a local retail occupation tax. Given the consequences of the court action narrowing home rule tax authority, it is not surprising that municipal officials have reacted negatively to a proposal that would involve legislative action which would have the same effect.

Thus, the grant of authority given to home rule units to levy taxes is under siege. Threats to home rule tax powers are more than

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87. SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, RECORD OF PROCEEDINGS, Vol. IV, 3151 (1972).

just threats to that authority; they are threats to the very essence of home rule itself. As participants to the Sixth Constitutional Convention correctly noted, home rule powers to address community issues are hollow without corollary powers to raise the revenues needed to implement such powers.<sup>88</sup>

Even the constitutional convention delegates who voted to impose the limitations on the power to tax income, earnings and occupations understood this linkage between tax power and the other home rule powers. The founders, however, believed that they had given home rule units adequate taxing power, particularly in light of their liberal construction mandate. That mandate was integral to the court's action in *Paper Supply*, but it was ignored in *Commercial Nat'l Bank* and again, more recently, in *Bernardi*.

The ultimate irony is that these narrowings of home rule authority stem less from abuses of home rule powers, which legislative and judicial review were designed to prevent, and more from concern over taxpayer convenience. To be sure, the Chicago Services Tax might have constituted an inappropriate use of home rule taxing power, but the remedy in that case did not require reversal of the findings in *Paper Supply*, nor did it subsequently merit the court's findings in *Waukegan Community School Dist.*

The court could have found against the Chicago Services Tax without necessarily overlooking the constitutional mandate that home rule powers be liberally construed. It need not have overruled *Paper Supply*, in holding that the Chicago Services Tax fell within the definition of an occupation tax, by defining the occupation tax as broadly as it did. By broadening that definition, however, it severely limited the range of home rule taxing authority and, in so doing, undermined the utility, if not the functional capability, of the broad based enabling principle inherent in the Illinois home rule experiment.

## VI. SUMMARY

What the courts have accomplished is a demonstration of the weakness of the principle that local governments can function effectively with broadly defined powers. That weakness is not, as so many have feared, the inability of local governments to use such powers responsibly.

Illinois' home rule cities and villages have demonstrated that narrow, limited grants of power are not needed to enforce responsible local government behavior. The behavior of home rule cities and

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88. *Id.* at 3366.

villages has been responsible, not because of a lack of power, but because local policy-makers are restrained by the ultimate check in a democracy: the will of the people as reflected through the political process. Even with their broad grants of powers, Illinois cities and villages have used their authority in a "restrained" manner.<sup>89</sup> The reaction of the voters to home rule in those communities which have exercised home rule powers is perhaps the best evidence that home rule has, indeed, worked satisfactorily.

Yet, home rule—the use of broad grants of local enabling authority—cannot work unless it is given the latitude which the framers of the 1970 Illinois Constitution underscored in their liberal construction mandate. The courts and the legislature must be as careful in protecting the well-being of the home rule system, and must be as faithful to the liberal construction mandate of the 1970 Constitution, as they are to the needs and conveniences of those who are ultimately served by the qualities which home rule can bring to the local governing process.

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89. THE 1970 ILLINOIS CONSTITUTION: AN ASSESSMENT BY THE DELEGATES, *supra* note 26, at 14.